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Vol. I

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 798

THE DENVER UNION STOCK YARD COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND SECRE-
TARY OF AGRICULTURE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO

FILED FEBRUARY 14, 1938.

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VOL. I

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A.

[fol. a]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO, SITTING AT DENVER**

Be it remembered, that heretofore, and on, to wit, the ninth day of March, A. D. 1937, came The Denver Union Stock Yard Company, by Robert G. Bosworth, Esquire, its solicitor, and filed in said court its petition; and sued out of and under the seal of said court a writ of subpoena against United States of America and Secretary of Agriculture.

And the said petition, with Exhibits A, B and C attached thereto, is in words and figures as follows, to wit:

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

THE DENVER UNION STOCK YARD
COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE,

Defendants.

IN EQUITY

No. _____

PETITION

ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
Solicitors for Petitioner.

PERSHING, NYE, BOSWORTH AND DICK,
Of Counsel.

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

THE DENVER UNION STOCK YARD
COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE,

Defendants.

IN EQUITY

No.

PETITION

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, SITTING IN AND FOR THE DISTRICT OF COLORADO:

Your petitioner, The Denver Union Stock Yard Company, files this, its petition in equity against the United States of America and the Secretary of Agriculture of the United States, (hereinafter called the Secretary), for the purpose of suspending, restraining the enforcement and operation of, enjoining, setting aside and annulling a certain order issued by the Secretary through his Acting Secretary, Honorable Harry L. Brown, entered on the 13th day of February, 1937, in a proceeding then pending before said Secretary, conducted by the Bureau of Animal Industry, entitled: "*The Secretary of Agriculture vs. Denver Union Stock Yard Company, Respondent, Docket No. 450.*" For purposes of brevity, the Secretary and the Acting Secretary aforesaid are herein collectively referred to as "the Secretary."

As grounds for said petition and for its cause of action herein, petitioner alleges and respectfully shows:

I.

That The Denver Union Stock Yard Company is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, with its principal office and place of business in the City and County of Denver, wherein it maintains, owns and operates a stockyard conducted and operated for compensation or profit as a public market, consisting of pens and other enclosures and their appurtenances into which live cattle, sheep, swine, horses, mules or goats are received, held or kept for sale or shipment in commerce, and having an area in excess of 20,000 square feet, exclusive of runs, alleys or passageways; that said stockyards has heretofore been designated as a public stockyards by the Secretary under the provisions of the Act of Congress known and cited as "Packers and Stockyards Act, 1921". (42 Stat. L. 163; 7 U. S. C. A. Sec. 181 et seq.).

II.

That the United States of America is made a defendant herein pursuant to said Packers and Stockyards Act, 1921, and the terms and provisions of the Commerce Court Act (36 Stat. L. 539) approved June 18, 1910, and the District Court Jurisdiction Act, being part of the Urgent Deficiency Appropriation Act, approved October 22, 1913 (38 Stat. L. 219-220; 28 U. S. C. A. Sec. 41 et seq.), and amendments thereof; that the Secretary is made a defendant herein in pursuance of the same Act and particularly because the order herein complained of was made and entered in the name of said Secretary by said Harry L. Brown, as Acting Secretary of Agriculture, purporting to act pursuant to said Packers and Stockyards Act, 1921.

III.

That pursuant to and in full conformity with the requirements of said Packers and Stockyards Act, your petitioner filed with the Secretary and did print and keep open to public inspection in its stockyard, schedules showing all rates and charges for stockyard services furnished by peti-

tioner in its said stockyard, said schedule as originally filed, being designated as Tariff No. 1; that thereafter and from time to time, in full conformity with the said Act and pursuant to its provisions other and different tariffs have been filed and kept open to public inspection together with supplements thereto from time to time issued by petitioner; that at the time of the rate investigation and of the hearing conducted by the Secretary as hereinafter mentioned, the tariff showing the rates and charges then in effect at the stockyard of petitioner in Denver, Colorado, together with the supplements and amendments thereto, was and is known and designated as Tariff No. 3 and Supplements Nos. 1 to 10, inclusive; that under the rules and regulations of the Department of Agriculture, not more than ten supplements can be attached to any tariff and accordingly on August 15, 1935, effective August 31, 1935, Tariff No. 4 was issued, which said tariff did not change in any manner the marketing or other charges contained in said Tariff No. 3, Supplements Nos. 1 to 10, inclusive; that thereafter, and from time to time, there have been issued by petitioner, Supplements Nos. 1 and 4, affecting changes only under charges for feed at said stockyards, which charges of necessity fluctuate with the market on feed, and that Supplements Nos. 2, 3, 5 and 6 to said Tariff No. 4 have been issued by petitioner, the last of which supplements was effective January 17, 1937, which said supplements affect changes which are either not involved in this proceeding or which have been adopted by the Secretary in his said Findings and Order; that except for the fluctuations in feed and bedding charges carried into the rates on account of market fluctuations, the court may deem and treat the rates now existing at petitioner's stockyard as identical with those in effect at the time of the said hearing before the Examiner so far as any matters herein involved and complained of are concerned.

IV.

That on the 8th day of November, 1934, the Secretary issued and served upon petitioner, a document entitled "Or-

der of Inquiry and Notice of Hearing under the Packers and Stockyards Act 1921, as Amended" notifying petitioner that on March 18, 1936, a hearing would be held on the Secretary's motion, to determine the lawfulness of any and all rates and charges of petitioner and of any rule, regulation or practice affecting said rates and charges, or whereby any stockyard service is rendered by respondent without making a lawful charge therefor; that thereafter, pursuant to an order of the Acting Secretary of Agriculture, the hearing required by said notice was postponed until June 3, 1935.

V.

That the authority of the said Secretary and of his employes and agents, with respect to the regulation of rates and charges of public stockyards, and with respect to said order hereinafter set forth and herein complained of, is contained in and limited by the Packers and Stockyards Act, 1921, as amended, being 42 Statutes at Large, 163, 7 U. S. C. A. Section 181 et seq., and particularly Title III thereof.

VI.

That on said 3rd day of June, 1935, pursuant to the notice and orders aforesaid, said proceeding or rate investigation known as Bureau of Animal Industry, Docket No. 450, entitled "*Secretary of Agriculture v. Denver Union Stock Yard Company*" (hereinafter sometimes referred to as Docket No. 450) was commenced before an Examiner, who is an employee of the Department of Agriculture and an attorney thereof, purporting to act pursuant to said notice and orders; that said hearing continued to and including the 3rd day of July, 1935; that during the conduct of said hearing the Examiner received testimony offered by witnesses for the defendant herein; that thereafter your petitioner offered evidence offsetting and contradicting the evidence of defendants. Petitioner further shows that it was agreed to and stipulated between the petitioner and defendants herein at said hearing that upon any adverse ruling of the Examiner upon the admissibility of any evi-

dence, the party against whom the ruling went might have and thereafter urge an exception to such adverse ruling, without the necessity in each instance of reserving the same of record; that the testimony so taken and the rulings thereon of the Examiner have been caused to be transcribed by employes of the Department of Agriculture, which said transcript known and designated as the official transcript, together with all exhibits admitted in evidence, will be presented to this Court at the time this petition is heard.

VII.

That thereafter and on the 28th day of October, 1936, petitioner received from the Secretary of Agriculture, his recommendations as to proposed proceedings, findings of fact and order in said Docket No. 450; that thereafter and within the time and in the manner permitted by the rules and regulations of the Secretary in such cases made and provided, petitioner filed its exceptions to said proposed report; and that no exceptions were filed thereto by the Secretary or by the Department of Agriculture of the United States, or by or on his, its or their behalf or by or on behalf of any other person, firm, department or agency other than petitioner. A copy of said proposed proceedings, findings of fact and order, together with the exceptions of your petitioner thereto, are filed herewith, marked for identification Exhibits A and B respectively and incorporated herein by reference as fully as herein set out at length. For the convenience of the court and because of the size thereof, said Exhibits A and B have been separately printed. Petitioner states that it has indicated on Exhibit A all material differences between the proposed findings, Exhibit A and the final order, Exhibit C, hereinafter described, such changes being indicated by italicized type and by notes.

VIII.

That on January 7, 1937, pursuant to request made in exceptions, Exhibit B, oral argument was had before the Hon. Harry L. Brown, Acting Secretary of Agriculture of

the United States of America, at Washington, D. C. That on February 17, 1937, the Secretary of Agriculture did make and enter in Docket No. 450, his Findings, Conclusion and Order (hereinafter for convenience called "Findings and Order"), a copy of which said Findings and Order is filed herewith, marked for identification as Exhibit C and incorporated herein by reference as fully as though herein set forth at length. For the convenience of the court, Exhibit C has been separately printed.

IX.

That in said Findings and Order, all as will more fully appear in said Exhibit C, the Secretary found and concluded that the rates and charges in effect at petitioner's stockyards, contain rates and charges which are unreasonable and unjustly discriminatory and did order your petitioner on and after thirty days from February 17, 1937, not to publish, demand or collect any rate or charge for the furnishing of any stockyard service in excess of the rates and charges found and determined by the Secretary in said Findings and Order, Exhibit C, to be just and reasonable for the furnishing of such service, and did order your petitioner at least ten days prior to the effective date of said order to publish, give notice and file with the Secretary of Agriculture, a schedule effective on said thirtieth day showing the rates and charges for stockyard services furnished by petitioner, and all rules and regulations changing, affecting or determining such rates or charges and did require and order that no rate or charge so shown shall be in excess of the rate or charge determined in said Findings and Order of the Secretary to be just and reasonable as aforesaid; that if petitioner fails to comply with the terms and conditions of said Findings and Order within the time and times prescribed therein, petitioner will be subjected to heavy and severe fines and penalties as provided in said Packers and Stockyards Act, 1921, as amended, and in addition thereto, petitioner will be subjected to or required to bring many and vexatious suits by or against shippers of livestock to

the livestock market conducted by petitioner at its stockyards in Denver, Colorado, arising out of the payment or non-payment of the charges aforesaid.

X.

That the finding of the Secretary and his said order based thereon that the existing rates and charges of petitioner for stockyard services at its stockyards are unreasonable and unjustly discriminatory, is not supported by any evidence of record or by substantial evidence, is contrary to the evidence and contrary to the weight of the evidence taken by the Examiner in said proceeding, Docket No. 450; that the rates and charges prescribed by the Secretary insofar as the same differ from and are lower than the existing rates of petitioner at its said stockyards, are not supported by any evidence of record, are contrary to the evidence and to the weight of the evidence, are arbitrary, unreasonable and confiscatory, and are unjustly discriminatory between patrons of petitioner and shippers of livestock to the livestock market conducted by petitioner at its said stockyards in Denver, Colorado; that if the schedule of rates prescribed by the Secretary and said order of the Secretary be not set aside and annulled, your petitioner will be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

XI.

That said Findings and Order of the Secretary is contrary to law, unsupported by substantial evidence, contrary to the evidence and to the weight of the evidence, confiscatory, arbitrary, unreasonable and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States in the following additional particulars and for the following reasons, to-wit:

(a): That in and by said Findings and Order, the Secretary purports to find, among other things, the value

of the property of petitioner for rate making purposes and thereafter fixes a certain percentage of such value so found by him as a rate of return to petitioner upon and from its said property, which said rate of return the Secretary finds will be just and reasonable for the future; that he then adjusts the income and expense of petitioner as shown by petitioner's books, excluding items of expense actually paid and incurred by petitioner, adjusting depreciation rates, excluding properties of petitioner from the rate base as found by him without excluding the income derived from such properties and in many other ways altering, adjusting and changing the income and expense of petitioner; that said adjustments are arbitrary, beyond the power of the Secretary to make, contrary to the evidence and to the weight of the evidence, and operate to confiscate the property of petitioner, contrary to law as aforesaid. Petitioner alleges that upon the basis of said pretended valuation and restatement, the Secretary found that the net income of petitioner, arbitrarily, unreasonably and unlawfully adjusted and determined as aforesaid, is in excess of the amount found by the Secretary to be just and reasonable for the future, and therefore, by virtue of such purported excess the Secretary found existing rates to be unjust and unreasonable; and petitioner further alleges that by reason of the fact that said adjustments of income and expense and exclusions of property as aforesaid, are arbitrary, unreasonable and unlawful, the finding and conclusion of the Secretary and his order based thereon that the existing rates of petitioner are unreasonable and unjustly discriminatory, is invalid, unsupported by evidence, contrary to the evidence, unlawful, confiscatory and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(b): That in and by said Findings and Order, the Secretary has excluded from the rate base of petitioner, the value of 8.985 acres of land together with the structures thereon, said structures consisting of all of the railroad

trackage of petitioner, the loading and unloading docks, the loading and unloading chutes and pens, a yardmaster's office and a trackman's tool house, all upon the purported reason that such land, together with the said structures thereon, is used in the rendition of transportation services as distinguished from stockyard services and the Secretary accordingly finds that said land and structures are not used and useful in the rendition of services for which petitioner's rates are charged. The Secretary does not find that petitioner owns more trackage than is necessary for the handling of the livestock coming to its Yards or that the said facilities for the loading and unloading of livestock from cars are unnecessary or excessive in any way or to any degree. Petitioner shows and avers that all said structures and the land upon which they are situate, to-wit: 8.985 acres, is owned and used by it in the receiving, marketing, feeding, watering, holding, delivery, shipment or handling of livestock in commerce and are necessary therefor; that said structures and lands are stockyard facilities within the definition contained in said Packers and Stockyards Act, 1921, as amended, used and useful in the rendition of stockyard services for which rates are charged; that the fair and reasonable value of said 8.985 acres of land is \$136,850.00; that the present fair value for rate making purposes of said structures is \$128,059.68 or a total fair value of said land and structures of \$264,909.68; that the finding of the Secretary excluding the value of said land and structures from the rate base of petitioner is contrary to law, contrary to the evidence and is arbitrary.

(c): That the Secretary excluded from the rate base of petitioner 2.633 acres of land and the structures thereon for the reason that said land and structures are used chiefly for purposes of the annual stock show and the Secretary finds in said Findings and Order that said land and structures are not used and useful in the rendition of stockyard services. Petitioner shows that the uncontradicted evidence introduced before the Examiner, whereon the Findings and Order of the Secretary, if lawful, must be based,

established that said annual livestock show benefits the industry as a whole; that livestock in large quantities is shipped to petitioner's stockyards for or on account of said show; that buyers in large numbers from widely separated sections of the United States become permanent buyers on the market; that livestock in large volume is bought and sold at said show and in petitioner's yards on account of said show, and that said land and said structures are used in the buying and selling of livestock in commerce and are stockyard facilities within the terms and provisions of said Packers and Stockyards Act, 1921, as amended; that the true, fair and reasonable present value of said land is \$52,660.00 and of said structures, not less than \$208,043.00, or a total value of such land and structures of not less than \$260,703.00; that the finding of the Secretary excluding the said property and the value thereof from the rate base of petitioner herein is contrary to law; is unsupported by the evidence, is contrary to the evidence and to the weight of the evidence, is arbitrary and an abuse of power by the Secretary and deprives petitioner of not less than \$260,703.00 in value of its property, without due process of law and in violation of the Fifth Amendment to the Constitution of the United States; that in further substantiation of the arbitrary and unlawful nature of the Secretary's said finding, petitioner shows that the uncontradicted evidence introduced before the Examiner in said proceeding, Docket 450, establishes that the average earnings of petitioner for the five year period under review due directly to and derived from the said annual stock show is \$12,240.97; (Respondent's Ex. 13-years 1930 to 1934 incl.) that although the Secretary, arbitrarily and unlawfully as aforesaid, has excluded the value of said lands and structures from the rate base and has excluded certain income and expense connected therewith in determining what he deems to be the net income of petitioner for rate making purposes, the Secretary has not excluded from said income said item of \$12,240.97 aforesaid; that it is axiomatic in rate-making, that if property be excluded from the rate base because not used and useful in the rendition of services for which the

rates are charged, all income derived from or on account of said property and all expense incident thereto must also be excluded in determining the fair and reasonable rates to be charged for such services; and petitioner avers that even if the theory of the Secretary that the land and structures chiefly used in the conduct of livestock shows are not stockyard facilities within the meaning of the Packers and Stockyard Act, 1921, as amended, nevertheless, the finding of the Secretary in this matter is arbitrary and unlawful and operates to deprive petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(d): That the finding of the Secretary contained in paragraph 115 of said Findings and Order, that the fair value of petitioner's used and useful land is \$536,825.00 is contrary to the evidence and is unsupported by any substantial evidence of record; that the values so found by the Secretary and particularly those allocated to Zones 1, 2 and 9 as stated in the tabulation contained in said paragraph have been and are arbitrarily determined, are without substantial support in the evidence, are contrary to the evidence and to the weight of the evidence; that the sole testimony concerning the value of petitioner's lands offered by the Secretary in said proceeding, Docket 450, was by witness Zelinski, a regular and permanent employee of the Department of Agriculture who admitted in evidence that prior to said proceeding he had never appraised any land or property in Denver or its vicinity, or at any place west of Omaha, Nebraska, that he spent two weeks on the appraisal of the 130.57 acres of land assembled by petitioner in the fifty years of its existence and owned and held by it for stockyard purposes, that the evidence of petitioner on the value of its said lands and introduced before the Examiner in said proceeding, was given by three appraisers sitting as a board of appraisers, that each and all of said appraisers were and are men actively engaged for periods of twenty to thirty-five years in the appraisal, purchase, sale and handling of industrial property in Denver, and fa-

miliar for a like period with the value of the lands of petitioner and with the value of lands in the vicinity of petitioner's said property, and with the factors affecting said values; that the fair and reasonable value of petitioner's said lands as found by said appraisers is \$1,645,552.50 and petitioner so alleges the value to be; that the fair value of the land of petitioner found by the Secretary to be used and useful is \$1,213,333.00 to which must be added the fair value of the excluded lands, the exclusion of which is complained of in paragraphs B and C above, or a total fair value of petitioner's used and useful land of \$189,510.00; or a total value of \$1,402,843.00; that the finding of the Secretary and the order based thereon is arbitrary, unsupported by substantial evidence, contrary to the evidence, contrary to the weight of the evidence and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(e): That in determining what the Secretary finds to be the fair and reasonable rates to be charged by petitioner for stockyard services, the Secretary purports to evaluate the property of petitioner, the total of such evaluation being the purported rate base of petitioner; that in addition to the unlawful and arbitrary determination of the value of the lands of petitioner as hereinabove complained of, the Secretary finds in paragraph 123 of his said Findings and Order, that the reproduction new value, less depreciation of the buildings, structures and equipment used and useful in the rendition of stockyard service is 80.545% of \$2,118,960.00 or \$1,706,717.14. That said finding of the per cent condition of petitioner's property is not supported by the evidence of record is contrary to the evidence and to the weight of the evidence and is arbitrary, and petitioner alleges and shows that the per cent condition of the buildings, structures and equipment of petitioner, used and useful in the rendition of stockyard services is not less than 84% nor more than 88.9% of the reproduction new cost thereof or not less than \$1,779,927.24 or more than \$1,883,756.33. That to the above figures must be added the

fair and reasonable present value of the railroad trackage, loading and unloading docks, chutes and pens and of the stadium and other stock show properties, all wrongfully excluded by the said Secretary from the rate base as hereinabove set forth. That the finding of the Secretary deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(f): That in said Findings and Order and particularly at paragraph 155 thereof, the Secretary finds a reasonable rate of return on the fair value of petitioner's property to be $6\frac{1}{2}\%$ of the pretended value unlawfully and arbitrarily found by the Secretary as aforesaid, and petitioner shows that the evidence in said proceeding docket 450 sustains a rate of return of not less than $6\frac{3}{4}\%$ upon the fair value of petitioner's property. That the finding of the Secretary herein complained of is arbitrary, contrary to the evidence and to the weight of the evidence and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(g): That on October 28, 1936, there was received by petitioner a copy of the proposed Findings, Conclusion and Order in Docket 450 being Exhibit A hereto attached, and petitioner was then advised by the Solicitor of the United States Department of Agriculture that twenty days was allowed for the filing of exceptions, if any, to said proposed findings. Petitioner shows said proposed findings, among other things, represented that the condition per cent of petitioner's structural property would be fixed at 84% (Exhibit A, paragraph 123) and that the rate of return, plus a so-called "cushion" would be fixed at slightly over 7% (Exhibit A, paragraphs 156 and 213), unless exceptions thereto by some party in writing be taken and filed as required by the Rules of Practice under the Packers and Stockyards Act, 1921, as amended, promulgated by the Secretary and rendered effective on September 28, 1936, and Petitioner further shows that no exceptions whatever to said

proposed findings were filed either by it or by the Bureau of Animal Industry, or by the Department of Agriculture, or by any party or person whatsoever; and petitioner avers that the action of the Secretary in decreasing the condition per cent of petitioner's structural property to 80.545% from 84% and by reducing the rate of return to 6½% from a net of slightly more than 7%, as fixed by said accepted findings is arbitrary and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(h): In said Findings and Order and at paragraph 137 thereof, the Secretary finds that adequate allowance for the element of going concern value has been included in the valuations of petitioner's land, structures and equipment and makes no separate allowance therefor. Petitioner alleges and shows that the Secretary has adopted throughout the valuations of government witness Zelinski, an employee of the Department of Agriculture; that said witness testified that he valued the land not as a stockyard but stripped of all improvements; that he valued the structural property on the basis of the unit component parts, that is to say, the cost of brick per thousand delivered on the ground; the cost of lumber likewise delivered on the ground and all other items and elements entering into the construction of the said improvement; that said witness testified that he did not value petitioner's property for the special use and in the special way it is being used by petitioner (Tr. 448); that no allowance whatsoever was made by the said witness, or by any other witness on behalf of the government on account of the going concern value of petitioner's property; that the fair going concern value of petitioner's property as established by the uncontradicted testimony of petitioner is not less than \$325,500.00. And petitioner avers that the Findings and Order of the Secretary in failing to make any separate allowance for the going concern value of petitioner's property, and in failing to find that a going concern value of not less than \$325,500.00 should be included in the rate base of petitioner, is arbitrary, contrary

to law, contrary to the evidence and to the weight of the evidence, and without substantial support in the evidence, and that the said finding deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(i): The Secretary finds in paragraph 198, and elsewhere, in his said Findings and Order, that a certain class of purchasers upon petitioner's market conducted at its stockyard in Denver, Colorado, which class of purchasers is commonly known as "yard traders", is rendered free service by the petitioner and finds that such free service is unjustly discriminatory and unreasonable, resulting in an increased charge upon shippers to the market and at paragraph 210, finds that petitioner's existing rates by reason of this fact are unjustly discriminatory. Petitioner shows that the evidence establishes without contradiction that the yard trader was and is charged the same rates and charges as any other seller of livestock on petitioner's market whenever such trader avails himself of and utilizes petitioner's market in the same manner as such other sellers; that no free service whatever is rendered to the yard trader; that the bulk of the yard trader's operations is as a buyer of livestock either for his own account or as an order buyer and agent of feeders; that in the operations of the yard trader as a buyer upon the market such trader is an essential part of the buying outlet of the said market, contracted for, desired and paid for by the shipper and seller and included in the marketing charge collected by petitioner under its tariffs. Petitioner further shows that to charge the yard trader for the privilege of buying upon the said market is unjustly discriminatory, in that one class of buyers is charged for such privilege while all other buyers, with the consent and approval of the Secretary, are permitted to buy livestock at petitioner's market without payment of any charge therefor; that any such charge as now ordered by the Secretary, if his said Findings and Order be sustained, is unjustly discriminatory against the shippers to petitioner's market and petitioner avers that the said finding of the Secretary is

arbitrary, contrary to the evidence and to the weight of the evidence, unlawful, constitutes an unwarranted invasion of the managerial function reserved by law to petitioner, is an abuse of power by the Secretary and is in excess of any power granted to him by the Packers and Stockyards Act 1921, places in petitioner's tariffs a charge which is unjustly discriminatory and which the Secretary well knows is impractical and cannot be collected; that said finding deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(j): The Secretary tabulates in paragraph 158 of his said Findings and Order, the expenses of respondent for the years 1930-1934 inclusive, and at item 71 of said tabulation shows the dues, donations and subscriptions made by petitioner during each of said years and the amount excluded by the Secretary and considered by the Secretary in each of said years; that in paragraph 164, the Secretary finds that said dues, donations and subscriptions during the said five year period have run between \$3,000.00 and \$4,000.00 a year and the Secretary finds that of such expenditures, only \$325.00 should be covered into rates. Petitioner shows that in making said findings the Secretary has excluded actual expenditures of petitioner consisting of membership dues in the Denver Chamber of Commerce and other commercial organizations of like kind and character; tickets for the stock show given to employees; membership dues in the American Stockyards Association, an organization created at the behest of the government to formulate a code for the stockyards industry; charitable donations to the Denver Community Chest and other like items; membership dues in the Denver Livestock Exchange; employees' recreation teams and welfare expenses; donation to the American Red Cross and many other similar items; and petitioner avers that the dues, donations and subscriptions are not unreasonable in any particular or to any degree; that the finding of the Secretary is arbitrary, unlawful, beyond his power to make, constitutes an unwar-

ranted invasion of the managerial power and function reserved by law to petitioner, not subject to the veto of a public official and deprives petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(k): That at paragraph 163 of said Findings and Order the Secretary finds that a reasonable allowance to be covered into rates on account of the expenses of hearings resulting from the enforcement of the Packers and Stockyards Act, 1921, is \$100.00 per month or \$1200.00 annually and petitioner shows that the uncontradicted evidence introduced before the Examiner in Docket 450 upon which the Secretary's said Findings and Order is purported to be based, establishes that the average annual expense of petitioner for the five year period, 1930 to 1934 inclusive is \$8,786.76 or a total expenditure during said period of \$43,933.80. Petitioner alleges that the expenses of this pending hearing including the expenses incurred incident to the proceedings, Docket 450, will not be less than \$40,000.00; that this rate investigation, as well as the previous rate investigation of 1930, has been instituted by the Secretary upon his own motion and not upon the complaint of any shipper or patron on the market; that the said allowance of \$100. per month, as made by the Secretary, is wholly inadequate to permit petitioner either to reimburse itself for expenditures forced upon it by the Secretary or to meet probable reasonable expenditures for said purposes in the future, and that the petitioner avers said finding of said Secretary is arbitrary, unsupported by the evidence and contrary to the evidence and is confiscatory.

(l): In paragraph 181 of said Findings and Order, the Secretary finds that nothing should be covered into rates on account of the Federal surtax on undistributed profits, stating as his reason for such finding that if the dividend policy of petitioner within the next few years is the same as it was in 1934, petitioner would not be subject to such tax. Petitioner shows and the uncontradicted evidence establishes that petitioner has outstanding a certain

issue of bonds in the aggregate principal amount of \$1,500,000.00, under the terms of which petitioner must deposit annually, in a sinking fund for the retirement of said bonds, \$30,000.00, but that such sinking fund payment must be made annually if petitioner is to keep its properties and be in position adequately to serve the livestock industry and the public; that earnings devoted to such sinking fund are not exempt from the payment of the surtax on undistributed profits; that said tax stands upon the same basis as other Federal taxes allowed and included by the Secretary; that even upon the net earnings permitted by the Secretary under rates and charges prescribed in said Findings and Order, the amount of such surtax on said \$30,000.00 of sinking fund money is not less than \$2,737.35; and petitioner avers that the finding of the Secretary is arbitrary, contrary to the evidence, contrary to law and deprives petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

XII.

That in said order of the Secretary, being a part of said Findings and Order, Exhibit C hereto attached, petitioner is ordered on and after thirty days from the date of said order, to-wit: February 18, 1937, to cease and desist from making or collecting charges for yardage, feed and bedding at the existing rates, or at any rate other than that unlawfully found and determined by the Secretary, as aforesaid, to be just and reasonable in said Findings and Order, and that your petitioner is further ordered, at least ten days prior to the thirtieth day from the date of said order, to publish, give notice of and file with the Secretary a schedule effective thirty days from the date of said order showing all rates and charges for stockyard services, not, however, in excess of the rate or charge for any such service, determined unlawfully, as aforesaid, to be just and reasonable by the Secretary; that if your petitioner fails to comply with said order, it may be subject to prosecution and incur liability for penalties in an amount of Five Hundred Dollars for each

day and for each violation of said order, as against which liability your petitioner has and will have no adequate protection or remedy at law; that if your petitioner fails and refuses to publish said new schedule, or if under duress and in order to avoid said liability for penalties, it publishes and establishes the rates and charges specified in said schedule, and said rates and charges be thereafter found by this Court to be unlawful and void, your petitioner will be forced to bring a multiplicity of suits against shippers of livestock, large and small, many of whom are of doubtful financial responsibility and resident in states from the Missouri River west to the Pacific Coast; that if petitioner, under duress, as aforesaid, publish and establish the said rates and charges, it is possible that such rates and charges, even though subsequently held to be unlawful and void; would be and become the lawful rate and charge, so long as the same remain in effect and until the final orders of this Court, in which event petitioner would be without any legal means or right of collecting the difference between said rates as prescribed by said Secretary and petitioner's existing rates; that by reason of the aforesaid, if the order of said Secretary be not suspended, enjoined, set aside and annulled, and if, pending final determination herein, its enforcement be not temporarily stayed and suspended, your petitioner will suffer irreparable injury, for which it will be without adequate remedy or protection at law.

WHEREFORE, your petitioner prays:

1. That a writ of subpoena issue immediately out of and under the seal of this Court, and be directed to said defendants, the United States of America and the Secretary of Agriculture, requiring said defendants, on a day certain therein to be specified, to be and appear before this Court and answer this petition, but not under oath, answer under oath being hereby expressly waived.

2. That this Court direct that due and proper notice of this petition and proceeding issue and be served forthwith, by filing a copy hereof in the office of the Secretary of

Agriculture and in the Department of Justice, and elsewhere as may be required by law. (28 U. S. C. A. Sec. 41 (28) Secs. 43 to 48, inclusive.)

3. That a Court constituted as required by the Act of October 2, 1913 (28 U. S. C. A. Sec. 47) be convened, and that said Court so constituted and convened hear this petition upon due and legal notice to respondents and each of them.

4. That an interlocutory injunction be granted petitioner upon three days' notice to respondents and in the manner provided in the Act of October 22, 1913 (38 Stat. L. 220; 28 U. S. C. A. Sec. 47), staying and suspending the enforcement, operation or execution of the order of the Secretary of Agriculture of February 17, 1937, hereinabove complained of, for sixty days from the date of the order granting said interlocutory injunction, and that upon hearing of this application within said sixty day period a temporary injunction or restraining order be issued restraining the said Secretary or Acting Secretary of the Department of Agriculture, and all others acting for or on his or their behalf, from enforcing in any manner said order of February 17, 1937, pending final determination of this cause.

5. That said Court so convened, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling said order of the Secretary of Agriculture.

6. That petitioner have and recover of the defendants proper costs of suit.

7. That petitioner have such other and further relief in the premises as may be deemed meet and proper by said Court.

ROBERT G. BOSWORTH

NORMAN A. HUTCHINSON

Solicitors for Petitioner.

PERSHING, NYE, BOSWORTH AND DICK,

Of Counsel.

STATE OF COLORADO }
 City and County of Denver } ss:

J. A. Shoemaker being first duly sworn on oath deposes and says, that he is the President and General Manager of the petitioner in the above entitled cause; that he has read the foregoing petition, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

J. A. SHOEMAKER

Subscribed and sworn to before me this 9th day of March, 1937.

(SEAL)

LILLIAN A. SHEPARD
Notary Public

My commission expires:

April 24, 1937

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EXHIBIT A

UNITED STATES OF AMERICA

Before the **Secretary of Agriculture**

BUREAU OF ANIMAL INDUSTRY

SECRETARY OF AGRICULTURE,

v.

B.A.I.

DENVER UNION STOCK YARD
COMPANY,

DOCKET 450

Respondent.

RECOMMENDATIONS FOR PROPOSED FINDINGS
AND ORDER

(This document is Exhibit A, attached to Petition in Cause No. 10912 in the District Court of the United States for the District of Colorado, entitled "Denver Union Stock Yard Company vs. United States of America and the Secretary of Agriculture".)

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UNITED STATES OF AMERICA

Before the **Secretary of Agriculture**

BUREAU OF ANIMAL INDUSTRY

DOCKET NO. 450

SECRETARY OF AGRICULTURE

vs.

DENVER UNION STOCK YARD
COMPANY,

Respondent.

Recommendations
as to proposed Pro-
posed Proceedings,
Findings of Fact,
and Order.

I.

PROCEEDINGS.

1. This proceeding is a general inquiry under the Packers and Stockyards Act, 1921, as amended, into the lawfulness of the rates and charges of respondent for the stockyard services rendered by it at its stockyard at Denver, Colorado.

2. The proceeding was initiated by an order of inquiry and notice of hearing issued by the Acting Secretary of Agriculture on November 8, 1934. In said order and notice it was alleged that the respondent is engaged in the business of conducting and operating a stockyard at Denver, Colorado, which has been ascertained by the Secretary of Agriculture to be a "stockyard" within the definition thereof as used in Title III of the Packers and Stockyards Act, 1921, as amended, and which has been posted as such; that in accordance with the requirements of said Act respondent

had theretofore filed and put into effect schedules of rates and charges for its services as a stockyard owner; and that a proceeding under Title III of the Packers and Stockyards Act, 1921, as amended, should be had for the purpose of determining the reasonableness and lawfulness of said schedules of rates and charges. The charges for the various services of respondent are set out in Tariff No. 3, which became effective on July 6, 1931, to which ten supplements have been filed from time to time. The last of these was Supplement No. 10, which was filed to become effective on December 1, 1934.

3. It was ordered that a hearing be had for the purpose of determining the lawfulness of any and all rates and charges of respondent and of any rule, regulation or practice affecting said rates and charges, or whereby any stockyard service is rendered by respondent without making a lawful charge therefor. The order of inquiry and notice of hearing fixed the time and place of hearing and notice of the hearing was given to respondent by serving upon it a copy of said order and notice.

4. Pursuant to the aforesaid order and notice a hearing was held at Denver, Colorado, before an Examiner designated by the Secretary of Agriculture, beginning at 10:18 a. m., on June 3, 1935. The hearing was concluded at 3:00 p. m. on July 3, 1935. Respondent was present by counsel throughout the hearing. During the course of the hearing, oral testimony was taken which covered over 2300 pages of transcript. This, when reduced to narrative form, covered 1000 legal cap pages. There were introduced 118 exhibits, 68 by the Government and 50 by respondent, containing 4,000 pages, including more than 40 maps and photographs relative to respondent's property.

5. At the outset of the hearing respondent's counsel objected to the proceeding and to the introduction of any evidence on the ground that:

"(1) The Packers and Stockyards Act of 1921 is an unwarranted delegation of legislative authority

to the Secretary of Agriculture contrary to the Constitution of the United States, and is therefore void, and that

(2) The Packers and Stockyards Act of 1921, in so far as it attempts to regulate the rates and charges of the Denver Union Stock Yard Company at its stockyards in Denver, Colorado, for services there rendered, for the use of the market there established by it, and for the use of facilities there provided by it, is beyond the power of the United States, being an intra state transaction only indirectly affecting interstate commerce and, therefore, beyond the constitutional power of Congress and void."

The Examiner overruled the objection.

II.

FINDINGS OF FACT

6. On the basis of the whole record, including the oral testimony of witnesses, exhibits, and official publications introduced in evidence, I make the following findings:

A. LOCATION AND GENERAL DESCRIPTION OF RESPONDENT'S PROPERTY

7. The Denver Union Stock Yard is located within the City and County of Denver, Colorado, approximately three miles northeast of the center of the city. It is near paved highways which connect with good roads diverging in all directions. The stockyards is served on the east, west, and longitudinally through the center by railroad trackage facilities connecting with all trunk line railroads entering the city.

8. The stockyard area consists of several distinct divisions. The cattle division consists of a series of open pens, alleys, and appurtenances such as feed racks, water troughs, and yard offices or booths. This division is served on the east by the Chicago, Burlington & Quincy Railroad and the loading and unloading facilities known about the yards as the Burlington dock, and on the west by the Union

Pacific-Colorado & Southern joint tracks, and the loading and unloading facilities known as the Union Pacific docks. The cattle division extends from the southerly portion of the yards to a public street known as Race Court. It is a long, narrow strip equipped with pens and other facilities, most of which are not under cover.

9. The hog yarding facilities are in five hog barns and in portions of sheep barns Nos. 1 and 2, hereinafter described. Hog shed No. 1 was designated for receiving hogs trucked into the market, but it is used also for initial yarding of cattle and sheep received by truck. It is a one-story, open, frame shed adjoining the general truck-in loading and unloading facilities, and is generally referred to as the truck division. Its facilities consist of pens and adjacent service alleys, corn bunkers, and water troughs. The other hog sheds are of the same type of construction and in general have the same equipment as hog shed No. 1. These hog sheds are not, however, all of the same size.

10. The sheep yarding facilities are located on the first and second floors of sheep barns Nos. 1 and 2 and on the roof of barn No. 2. These facilities consist of pens and alleys in which sheep are yarded, reyarded, fed, watered, sold, and stored. The first floors, except that portion of barn No. 2 used for hogs, are occupied principally by holding and storage pens and alleys. The principal commission sections are located on the second floors. Sheep barn No. 1 is a two-story, reinforced concrete structure covering an area of approximately 320 x 422 feet. The building has a saw-toothed roof and light wells. It is equipped also with concrete ramps or inclines leading to the second floor. Sheep barn No. 2 is a three-floor, reinforced concrete structure covering an area of approximately 254 x 420 feet.

11. Adequate facilities are provided for the handling of each class or livestock in its respective division. The general arrangement of the facilities is conducive to prompt and efficient handling of livestock. The facilities now avail-

able afford ample accommodation for the current flow of livestock through the yard.

12. Trunk line railroads serve the stockyard. Not all of these have trackage into the yard. Those which do not have arranged with those which do, or with the respondent, for the use of trackage into the yard. Railroad trackage serving the yard is owned by the Chicago, Burlington & Quincy Railroad, Colorado & Southern Railroad, Union Pacific Railroad, Northwestern Terminal Railway Company, and respondent. In accordance with contracts with respondent, the railroads entering Denver serve the yards and other industries in the district over the trackage and right-of-way owned by respondent.

**B. SERVICES AND FACILITIES FURNISHED BY
RESPONDENT AND THE RATES CHARGED THEREFOR**

13. Respondent operates its stockyard at Denver, Colorado. On its premises is conducted a public market where producers and others may send their livestock, either by rail or by truck, to be sold to such buyers as may resort there to purchase livestock to meet their requirements. Any person complying with reasonable rules and regulations maintained by respondent may buy or sell livestock at its stockyards. Producers and others who ship their livestock to market for sale seldom sell it themselves. It is customary for them to employ the services of commission firms, which operate on the market and hold themselves out as salesmen of livestock on a commission basis.

14. Respondent provides the physical facilities on which the livestock market is conducted, and renders certain services in connection with livestock coming to the stockyard to be marketed, livestock shipped direct to packers, livestock stopped in transit and handled for the railroads, and livestock handled for traders. Some of the facilities of respondent are used in connection with receiving, marketing, feeding, watering, holding, delivery, shipment,

weighing, or handling of livestock at its stockyard. For these services respondent charges certain rates.

15. The transportation of livestock to the Denver market includes the unloading of it into suitable pens. The railroad companies, instead of constructing the necessary unloading facilities and doing the work in connection with unloading, employ respondent to perform this service for them. Respondent also loads onto cars that livestock which is shipped by rail away from the market. For this service respondent charges the railroads \$1.00 per car. In addition to furnishing the services described above, respondent also provides facilities and renders services for the use and convenience of persons conducting private business or furnishing public service at the stockyard for their own compensation or profit. Respondent renders a number of other miscellaneous services such as dipping and spraying and dehorning.

16. Respondent assumes responsibility for driving livestock from the railroad chute pens to the sales pens assigned to respective consignees, and placing it therein. If the consignee is a person who has no regularly assigned pens, his livestock is placed in convenient holding pens where it awaits later disposition by the consignee. Livestock arriving by truck is unloaded at convenient docks provided by respondent in the hog division. Hogs so arriving are delivered by respondent to the sales pens of consignees in the drive-in division where they are usually fed, watered, and sold. Cattle and sheep arriving by truck are yarded in suitable pens in the truck division where they are delivered to consignees, who drive them to their pens in the divisions in which rail receipts are handled.

17. Appropriate records are prepared by respondent and made available to consignees. These records give information relative to the origin of shipments, names of consignors, number of head and kinds of livestock, and the

number of the pens in which it is yarded. Suitable watering facilities are maintained in the pens by respondent. Respondent furnishes all feed fed in the cattle, hog, and sheep divisions, and maintains certain storage facilities from which feed is distributed. It is optional with a commission firm or owner of livestock whether respondent shall put the hay on the platforms, on the fences, or distribute it in the mangers. Corn is distributed to bins at convenient locations in the hog yards, and the feeding operations are performed by respondent.

18. The commission firms assume responsibility for the livestock upon its delivery to them. They see to it that the livestock is watered and properly fed. When necessary, they sort and grade the livestock so as to show it to the best advantage to prospective buyers. After livestock has been sold, it is driven to the scales by the employees of consignee. Respondent provides the weighing facilities. The scale crew, which does the weighing, consists of a weighmaster, a gate man at the entrance to the scale platform, and a counter-off at the exit gate. The weighmaster enters the names of the owner, seller, and purchaser of the livestock on the scale ticket on which the weight is registered. As the livestock is driven from the scales, he enters on the scale ticket the number and kind of livestock. The counter-off keeps a record of each draft weighed and directs the yarding operations.

19. Respondent conducts the yard-cleaning operations in the cattle and sheep divisions. In the sale section of the hog division the cleaning is done by an independent operator under contract in consideration of the corn he salvages from refuse left in the pen. All other yard facilities are cleaned by respondent except when it permits purchasers to enter its yards and remove refuse. The Colorado Horse & Mule Company cleans the premises in which it operates, and disposes of the refuse for its own account.

20. For its services in driving the livestock from the unloading chutes to pens, counting, checking, and keeping a record of each consignment, the furnishing of water, the weighing, and the use of the physical facilities necessary in performing these services, respondent charges the owner or shipper of livestock brought to market the following rates known as yardage charges:

21. On livestock received and sold, including livestock resold through commission firms, that sold or contracted in the country to weigh and/or deliver at the stockyards, and that consigned direct to packers and slaughterers:

Cattle	\$.35	per head
Calves (Under 1 year old)	.25	" "
Hogs	.12	" "
Sheep or Goats	.08	" "
Horses or Mules	.35	" "
Pure Bred Bulls	1.00	" "

Besides these charges, which apply to all livestock except that hereafter noted, additional charges are made on livestock arriving by vehicles other than rail as follows:

Cattle	\$.05	per head
Calves (Under 1 year old)	.02	" "
Hogs	.02	" "
Sheep or Goats	.02	" "

With one exception the charges stated above are assessed only once upon an animal during the time it is in the yard, regardless of the time it remains there, or the number of changes of ownership which occur. On that livestock resold through commission firms, however, the regular rates are charged. When livestock is consigned to the Denver market, offered for sale, and forwarded unsold, respondent assesses no yardage charge. A considerable amount of these "through shipments" arrive at Denver and are stopped for feed, water, and rest. The services rendered by respondent in connection with these "through shipments" consist in unloading, feeding and watering, and reloading the livestock as directed by the railroad company in whose custody the

stock is. The same classes of facilities are used for "through shipments" as for livestock consigned for sale at the market. The livestock is counted, yarded, fed, and watered. Inasmuch as no yardage charge is assessed against this class of business, the only revenues derived by respondent for handling it are the unloading and reloading charges and the profit on such feed as the animals in these "through shipments" consume.

22. The charges for feeding, bedding, etc., as set out in Supplement 10 to Tariff No. 3, are as follows:

Prairie hay or alfalfa (on fence)	\$1.40 per cwt.
Prairie hay or alfalfa (fed out)	1.50 " "
Bedding straw	.65 per bale
Corn	1.50 per bushel measure

These charges are varied from time to time in accordance with fluctuations in the market price of feed. When livestock is fed or bedded or watered while in cars, a charge of \$1.00 per deck is made in addition to the regular charge for feed or other material used. When empty stock or box cars are bedded with hay or straw, a charge of 50c per deck is made in addition to the charge for hay or straw used. On "through shipments" of hogs, ordered fed in car with feed furnished by shipper and already in car, a charge of \$1.00 per car is made. A charge of \$1.00 per car is made for livestock watered but not fed.

23. The barns and corrals composing the horse and mule division are operated by a commission company upon a consideration of a stated monthly rental of \$200 and the payment of the regular yardage charge. Respondent reserves the right to use these premises whenever necessary, and does avail itself of this privilege during the stock show.

24. Practically all livestock is sold by weight and delivered to purchasers when driven off the scales. It is seldom practicable or convenient for purchasers to receive their livestock direct from the vendors and to remove the animals from the yards immediately after they are driven off the

scales. Respondent reyards such livestock in what is known as purchasers' holding pens or catch pens. The reyarding service is practically a duplication of the initial yarding services except for the fact that the bunches of livestock are smaller and more numerous. In most cases different pens and yarding facilities are used for reyarding that livestock bought by packers, traders, or by those who ship it from the market.

25. There is a separate division within the cattle division known as the "traders' division". No such separate trader division exists either in the hog division or in the sheep division. Cattle purchased by a dealer are driven, for the most part, by respondent to the traders' division. The physical characteristics of this division are substantially similar to those of the commission department. The services rendered by respondent with respect to livestock held in each do not differ materially. A large percentage of the cattle handled at the Denver market is of the stocker and feeder class, and is destined eventually to go to country feeders and growers. The dealer purchases numerous groups of animals and grades and sorts these into classes which he thinks will best meet the demands of buyers. Respondent makes no yardage charge for facilities and services furnished in the traders' division. The regular charge is made for feed in this division. Most of the livestock purchased by traders is resold by themselves, but occasionally traders move their livestock into the commission department and employ the services of a commission firm in making the sale. This process is known as "planting". Respondent collects the regular yardage charge on "planted" livestock.

26. If the purchaser of livestock be one who desires to ship it from the market, respondent drives it to pens convenient to the loading docks and holds it there until it is ready to be loaded out. Respondent performs the loading service for which it receives \$1.00 per car from the carrier. No yardage charge is made to the purchaser for such livestock.

27. For convenience of operation the stockyard is di-

vided into divisions, and definite pens are assigned for the preferred use of commission firms and other individuals engaged in business at the market. Not all pens are so assigned. During periods of heavy runs, and as other circumstances may require, respondent may change an assignment to meet current needs of business.

28. As heretofore stated, the length of time during which an animal remains in the stockyard is not a factor in determining the amount of yardage charged. Inasmuch, however, as livestock consumes feed throughout its entire stay in the yard, the profit made on the sale of feed for such livestock tends in a degree to compensate for the time element.

29. The Exchange Building is an office building maintained by respondent for its own use and the use of those having their business locations at the market. Respondent's tariff does not set out the charges made by it for rent. Respondent's tariff sets out rates and charges covering such services as branding, dehorning, dipping, disinfecting, testing, immunizing, vaccinations, boarding horses, and special weighing. Exceptional services are rendered under special agreements. Minor items of income other than that from services hereinbefore mentioned are realized from activities for which no rates or charges are listed in the tariff.

C. CRITERION OF REASONABLE STOCKYARD RATES

30. It is the law that all rates and charges made for any stockyard service furnished at a stockyard by a stockyard owner shall be just, reasonable, and non-discriminatory, and that any unjust, unreasonable, or discriminatory rate or charge is prohibited. Respondent is entitled to charge rates for the stockyard services rendered by it which are reasonable and non-discriminatory. Such a schedule of rates assesses charges equitably among the various users of its services. Respondent is entitled also to charge rates of such altitude that they will produce gross revenues enough to pay all reasonable operating expenses, including taxes

and an adequate amount to compensate it for the depreciation in its plant and equipment, and in addition a net operating income equal to a fair return upon the fair value of its property. In the application of this standard of reasonableness an analysis of the testimony has been made to determine the fair value of respondent's land and physical structures, an examination has been made of its operating expenses over a period of years and a fair rate of return has been determined.

D. USED AND USEFUL CHARACTER OF RESPONDENT'S
PROPERTY

LAND

General Statement:

31. The land owned by respondent is located some three miles northeast of the central portion of the City of Denver. The buildings, pens, chutes, scales, railroad tracks, and other facilities occupy portions of 130.57 acres of land lying along the South Platte River, most of it on the eastern side. At the date of the appraisal of the land respondent owned 131.045 acres, but between the date of the appraisal and that of the beginning of the hearing it sold .475 acres to Armour & Company under an option of long standing.

32. Within the immediate vicinity of respondent's stockyards and contiguous to its land are the plants of Swift & Company and Armour & Company. Somewhat more remote, but within easy access of the yards, are a number of the smaller packing plants, a rendering plant, and a number of other industries such as are usually found in and around a packing center. In the vicinity of respondent's plant and on land owned by it are some commercial feed lots. Not far removed from respondent's land are to be found retail stores, garages, an industrial district developed by a railroad, in which are mills, a by-products company, lumber yards, fuel yards, gasoline stations, and the like. In the neighborhood also are feed mills, elevators, iron foundries, and metal works.

33. The premises of the stockyard company are reached by means of improved public highways from all directions and are served within by a system of roadways built by the company on its own land or on leased land. Respondent's plant and facilities are amply served by railroads and by a system of railroad trackage of its own which runs through various sections of its yards.

34. The City of Denver is served by the Chicago, Burlington & Quincy Railroad, the Union Pacific Railroad, the Colorado & Southern Railway, the Denver & Salt Lake Railway, which leases the Northwestern Terminal Railroad, the Denver & Rio Grande Western Railroad, the Chicago, Rock Island & Pacific Railway, and the Atchison, Topeka & Santa Fe Railway. Respondent's land and facilities are a suitable place for conducting its business and for rendering a high type of service.

35. Preparatory to the appraisal of respondent's land it was divided by agreement into ten zones. All appraisers employed these zones in setting a value upon respondent's land, which is described more particularly by zones in the paragraphs which follow:

Zone 1: Description, area of used and useful and of non-used and useful portions.

36. The land on which the greater portion of the cattle commission division and the hog and sheep divisions have been constructed has been designated for purposes of appraisal as "Zone 1". This zone is made up of two parcels. One is triangular in shape and lies between the Union Pacific Railroad right-of-way on the west, and the Chicago, Burlington & Quincy right-of-way on the east; the other parcel is rectangular in shape and lies between the packing plants of Swift and Armour and west of the Union Pacific Railroad right-of-way. This land is generally level and well situated for stockyard purposes.

37. At the time the land of respondent was appraised there were in Zone 1 38.534 acres, or 1,678,543 square feet.

Of the land sold to Armour & Company (see paragraph 31) .266 acres or 11,587 square feet were in this zone. On the land in this zone the greater portion of the physical facilities of respondent are located. Among the service units in the zone are the Exchange Building, the commission section of the cattle division, the hog barns, the sheep barns, the railroad chutes, the loading and unloading docks and pens, the general truck dock, the general alleys and passageways, hay barns, corn tanks, scales, immunizing facilities, roadways, the bulletin office commonly known as the chute house, an auto repair shop, a filling station, railroad tracks belonging to respondent, a few other minor service units, and several parcels of vacant land. The service units lying wholly within this zone occupy 1,126,261 square feet. Some of the facilities mentioned, such as pens and alleyways, extend over on to Zone 2. Of the facilities which are located on both zones those portions lying in Zone 1 occupy 488,158 square feet.

38. The question as to the used and useful character of the land in this zone arises with respect to certain parcels of vacant land; the land on which is located the garage and the auto repair shop and the filling station; that occupied by the unloading and loading facilities; and the land occupied by the railroad tracks belonging to respondent.

39. With respect to the vacant land, it is sufficient to state that in the construction of a plant of the character of that belonging to respondent it would be impracticable to construct physical facilities on every square foot of land owned by it. These small parcels of land may so lie with respect to the physical facilities that in due course service units may be constructed on some of them, while certain other parcels may be so situated that they will remain vacant. A consideration of these small parcels gives rise to the question of the used and useful character of small portions of land interspersed among the various service units. Interspersed land is so closely related to the other land and the physical facilities that no doubt arises as to its used and

useful character. Inasmuch as all the unoccupied parcels of land in Zone 1 are of this character, it is found that all the vacant land in Zone 1 is used and useful. The land on which is situated the garage, the auto repair shop, and the filling station is so situated with respect to the other facilities of respondent that it falls into the class of interspersed land. The land on which these units are located is found to be used and useful.

40. The unloading and loading facilities of respondent consist of unloading platforms, chutes into pens suitable for holding livestock temporarily, and sufficient alley space to give ingress and egress into and out of the holding pens and the land upon which super-structures rest. There are four railroad docks in Zone 1. The Burlington dock occupies 55,452 square feet; the Union Pacific, 54,788 square feet; the Colorado & Southern docks, 27,026 square feet; and the river dock, 24,966 square feet. The railroad companies themselves do not unload and load the livestock handled by them. They employ respondent to do this and pay it \$1.00 per car for each car loaded or unloaded. The railroad companies do not own livestock depot facilities of their own, but use the unloading and loading facilities of respondent. The Interstate Commerce Commission has decided that the service of unloading and loading livestock from and into cars is a common-carrier service subject to the provisions of the Interstate Commerce Act. (See I.C.C. Investigation and Suspension Docket No. 4109, page 342, of which notice is here taken.) [1] The Packers and Stockyards Act provides that nothing therein should affect the jurisdiction of the Interstate Commerce Commission or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission

Petitioner's Note [1]—The final report, Exhibit C, at this point contains the following: "We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago."

The Supreme Court has ruled that the loading and unloading of livestock is a transportation service (295 U.S. 193).

(Packers and Stockyards Act, 1921, Section 406). Inasmuch as the unloading of livestock from and into cars is a railroad service, the charge therefor is for a railroad service and not a stockyard service. If the expense incident to loading and unloading of livestock from and into cars is passed to the shipping public through the assessment of railroad rates, it is obvious that it should not be passed on again as a stockyard expense covered in the stockyard rates. To include in respondent's used and useful property the land and facilities used by it in the unloading and loading of livestock and allow a return on the value of such land and facilities would be to compel the shipping public to pay as a stockyard expense an amount which it had already paid in the form of railroad rates. It is found, therefore, that the land on which are situated respondent's railroad unloading and loading facilities is not used and useful in the rendition of a service for which are charged rates, the reasonableness of which is being determined herein.

41. Respondent owns and keeps in repair a system of railroad trackage throughout the yards covering an area of about 5½ acres. The land in Zone 1 occupied by these railroad tracks covered an area of 58,124 square feet when respondent's land was appraised. Between that date and the date of the hearing respondent sold to Armour & Company a parcel of land, 11,587 square feet of which were in Zone 1, leaving 46,537 square feet owned at the date of hearing. These railroad tracks were constructed at the expense of respondent and are maintained and repaired by it. It leases its railroad tracks to various railroad companies under a contract according to which they pay respondent as rental 6% of an agreed valuation of \$121,984.49. In addition the railroads reimburse respondent for maintenance, repairs, and taxes. The amount of taxes is determined by applying the current local tax rates against an amount equal to one-half of the agreed valuation. The railroads use the tracks leased from respondent and the right-of-way to get to and from the unloading and loading docks owned by re-

spondent and also to and from the various industries located in the packing district. If transportation does not cease until livestock shipped by rail is unloaded into suitable pens, as has been determined by the *Interstate Commerce Commission*, transportation has not ended when livestock is being brought to the unloading facilities regardless of whether it is brought to those facilities over tracks owned by railroad companies or leased by them. It is found, therefore, that the land on which are located railroad tracks owned by respondent, but leased to the railroads, is not used and useful in the rendition of a service, the reasonableness of the rates for which is being determined herein. The land on which is situated the yardmaster's office is used in connection with the transporting by rail and the unloading and loading of livestock and is used for a transportation service. It is found also that the land occupied in Zone 1 by the yardmaster's office and grounds is not used and useful in the rendition of a service for which are charged rates, the reasonableness of which is being determined herein. It is found that all land in Zone 1 not specifically found to be not used and useful, is used and useful.

42. The following table sets forth the land in Zone 1 found to be used and useful in the rendition of services for which are charged rates, the reasonableness of which is determined herein and the land found to be not used and useful in the rendition of such services:

Used and Useful	Square Feet
Land on which are:	
General Truck Dock	8,540
Cattle Division-Commission Section	399,070
Hog Division-General Utility Section-Hog Barns 1,2&3	42,062
Hog Division-General Utility Section-Sheep Barns # 2	11,513
Hog Div.-Commission Section Sheep Barn # 2	33,553
" Div.-Purch. Temp. Hold Sec. Hog Barns 4 and 5	28,655
" " -Traders Sec. Sheep Barn # 1, 1st Floor	2,137
" " -Purch. Temp. Hold. Sec. Sheep Barn # 1, 1st Floor	18,613
" " -General Alleys	18,349

Sheep Div.-Gen. Util. Sec. 1st Floor Barns 1 & 2	142,110
" " -General Alleys, 1st Floor	26,363
" " -Entrance to Sheep Barn # 2	1,369
Hay Barn No. 2 and Scale	9,500
Corn Tank	1,250
Sheep Dipping Facilities	14,320
Hog Dipping Facilities	5,085
Hog Immunizing and Vaccinating Facilities	5,204
Cattle Inspection Chute and Pen 2,537	513
Cattle Scales, 2, 4, 5, 10 and 11	73,363
Hog Scales 3, 9, 13, 14	13,553
Sheep Scale No. 7	1,808
Stock Viaduct	1,093
Pedestrian Viaduct over Cattle Division	120
Armour & Co. Stock Drive	1,520
Livestock Subway	703
Truck Washing & Cleaning Facilities	1,160
R/W.N.E. of Intersection C.B.&Q. and U. P. R./W	1,375
Exchange Building	50,845
Bulletin Office Building (Chute House)	16,622
Garage	11,171
Auto Repair Shop	1,582
Filling Station	2,859
Vacant Land South of Hay Barn No. 2	4,875
Vacant Land East of Cattle Pens 1,000 etc.	2,408
Vacant Land along West side Cattle Division	5,791
Cattle Div.-Commission Section)	
" " -Purch. Temp. Hold. Section)	
" " -General Utility Section)	488,158
" " -General Alleys)	
Armour & Co. Roadway	6,000

Total Used and Useful	1,453,212
	Sq. Ft. or
	33.360 Acres

Land on which are:

Yardmaster's Office and Grounds	4,975
Burlington Dock	55,452
Union Pacific Dock	54,788
Colorado and Southern Dock	27,026
River Dock	24,966
Railroad Right-of-way (Owned at date of Hearing)	46,537

Total Non-Used and Non-Useful	213,744
	Sq. Ft. or
	4.907 Acres

Total land in Zone 1	1,666,956 Sq. Ft. or 38.267 Acres
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Zone 2: Description, area of used and useful and of non-used and useful portions.

43. At the time the land of respondent was appraised Zone 2 contained 23.19 acres or 1,010,197 square feet. Between the date of appraisal and the date of the hearing 9,104 square feet of land lying in this zone was sold to Armour & Company. On Zone 2 are located the truck cattle-loading facilities, the tuberculosis pens in the cattle division, hay barns, some branding chutes, the cattle-dipping facilities, scales, manure dump frame, a large pen used at times for holding manure, the material yard, the shop and construction yard, roadways and lunch room, the truck-loading dock, some vacant land east of the manure dump and other vacant land adjacent to the Chicago, Burlington & Quincy right-of-way, portions of general alleys and pens, a roadway referred to as the Armour roadway, and railroad tracks belonging to respondent and used jointly by the railroads. This zone lies in the northern section of the yard just south of a street known as Race Court and between the Chicago, Burlington & Quincy right-of-way on the east, and Franklin Street, and the Northwestern Terminal Railway on the west. The only land in Zone 2 as to the used and useful character of which a doubt arises is the vacant land and the land on which are located the railroad tracks owned by respondent, and that occupied by a large pen known as No. 4212 in which manure is sometimes dumped.

44. With respect to the pen the evidence shows that, while it is used for purposes of dumping manure at certain seasons of the year, it is required and used at other seasons in handling cattle arriving at the stockyard. Its use for manure-dumping purposes depends upon whether it is needed for yarding purposes. Whenever it is needed for yarding the manure is removed and livestock is yarded therein. The area of the land occupied by this pen is 34,661 square feet. The lunch room on this zone is let to an independent operator on a monthly basis. Its patrons are employees of the stockyard company, the commission firms and the traders,

who operate in that section. The area occupied by this lunch room and the grounds which surround it is 1,952 square feet. If the lunch room were not on this ground it would not be excluded from the used and useful land because of the fact that it is a small parcel interspersed with other used and useful land.

45. There are two vacant areas of considerable size in this zone. One is a parcel of 49,177 square feet lying east of the manure dump and hay barn No. 4 and its grounds; the other is a parcel of 35,675 square feet adjacent to the Chicago, Burlington & Quincy right-of-way and extending from the north end of the Burlington dock to the approach to the cattle truck chute. This land is east of and outside of the stockyard fences. The larger of these areas is so situated with respect to the hay barn and manure dump and sheds located in that section of the yard that it may be considered as an extension of the land used in connection with these. The smaller parcel serves as a clearance in connection with the operation of respondent's yard. These two parcels amounting together to approximately two acres of ground may be considered as interspersed land because of their use. Due to their use these two parcels should not be excluded from the used and useful land.

46. There was in Zone 2 at the date of the appraisal 45,669 square feet of railroad right-of-way belonging to respondent. In reconciling the area expressed in square feet and in acres, 213 square feet must be deducted from the 45,669 square feet, leaving 45,456 square feet. When 9,104 square feet, which is the portion of the Armour sale lying in Zone 2, are deducted from 45,456 square feet, the remainder is 36,352 square feet, which is the railroad right-of-way lying in Zone 2. For reasons heretofore stated in those paragraphs wherein is discussed the used and useful character of the land on which are respondent's railroad tracks it is found that the 36,353 square feet occupied by respondent's railroad tracks is not used and useful in the rendition of services, the reasonableness of the rates for

which is being determined herein. It is found that the remainder of Zone 2 is used and useful in the rendition of such services.

47. The following is a summary of the used and useful and the non-used and useful parcels of land in Zone 2:

Non-Used and Useful	Square Feet
Land on which are:	
Truck Cattle-Loading Facilities	26,777
Cattle Division—T. B. Pens	11,709
Hay Barn No. 3 and scale	13,925
" " " 4	55,148
Branding Chutes 1-2-3, etc.	25,520
Cattle-Dipping Facilities	4,573
Cattle Scale No. 1	12,726
" " " 6	10,841
Manure Dump Frame, etc.	65,208
" " Pen 4212	34,661
Material Yard	9,200
Shop and Construction Yard	30,278
Roadway along Track No. 28	23,749
Roadway South of Hay Barn No. 4	7,800
Lunch Room and Grounds	1,952
Vacant Land East of Manure Dump	49,177
Vacant Land adjacent to C. B. & Q. R/W to Cattle Truck Loading Dock	35,675
Cattle Division—Traders Section)	
" " —Purch. Temp. Hold. Section)	
" " —General Utility Section)	528,472
" " —General Alleys)	
Armour & Co. Roadway	17,350

Total Used and Useful 964,741 Sq. Ft. or 22.147 Acres

Non-Used and Non-Useful	Square Feet
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Land on which are:

Railroads belonging to respondent

(After Armour sale) 36,352 Sq. Ft. or .835 Acres

Total land in Zone No. 2 1,001,093 Sq. Ft. or 22.982 Acres

Zone 3: Description, area of used and useful and of non-used and useful portions.

48. This zone is a parcel of land lying north of Race

Court west of the Chicago, Burlington & Quincy right-of-way, and in a southerly direction from the Adams County line. It contains 863,574 square feet or 19.825 acres. Something over $5\frac{1}{4}$ acres in this zone have been leased by respondent to Swift & Company. This company several years ago constructed at its own expense pens, feed troughs, wells, water lines, sheds, platforms, and other equipment necessary in operating a feed lot. Some three years ago Swift & Company assigned its lease on this land to a private individual and at the same time leased to him its buildings and improvements. The plant is now privately operated by the lessee as a commercial feed lot. Another portion of Zone 3 has been leased by this same individual from respondent. He has constructed at his own expense pens and other facilities necessary in connection with the operation of a feed yard.

49. At the extreme west end of this zone is a small parcel of land containing 6,534 square feet, which respondent has deeded to the City and County of Denver for ingress and egress in connection with the improvements along the South Platte River. One of respondent's sewers empties into the river channel in this area. About $13\frac{1}{2}$ acres of the zone are similar in character to the land in Zone 2 and are practically on the same level. The remainder, something over 6 acres, is somewhat broken and lies higher than the rest of the zone. This portion contains gravel. The land in this zone can be reached from the east by way of Race Court and from the west by way of Franklin Street. It is accessible from the Burlington Railroad on the east and the Northwestern Terminal Railroad on the west. There are in this zone also the Union Pacific tracks which belong to respondent.

50. The land in this tract other than that occupied by the commercial feed lots is vacant. Respondent claims that this land is used and useful. The witness called by the Government, for the purpose of describing the facilities of respondent and stating the use to which the various serv-

ice units are put, described the major portion of this zone as being unused land for the most part. His exception was a small area in the northwesterly corner where miscellaneous debris is dumped and the northerly corner where the stockyards obtains gravel. That portion of this zone not occupied by the feed lots, the railroad right-of-way, and the gravel deposit is not designed or permanently set aside for the primary purpose of dumping and storing manure, notwithstanding the fact that small deposits of manure and debris are scattered thereon. The assistant general manager of the stockyards is of the opinion that some portions of this zone may have greater utilization in the future than they have now, but he is of the opinion that the purposes for which this land is now being used would bring it within the classification of used and useful land in the handling of livestock in commerce at the Denver stockyards without any further utilization. He is of the opinion further that if the land were not now owned by the stockyards company it would be necessary for it to purchase this zone. One of the land appraisers of respondent was of the opinion that the land is used and useful for purposes of expansion. In placing a value upon this zone this witness designated about 10,000 square feet or approximately $\frac{1}{4}$ acre in the river channel as practically worthless. It is on this portion that the city now has an easement in connection with the river improvement. According to an agreement with the city the street known as Race Court can be moved from its present location between Zone 1 and Zone 2 to the northerly border of respondent's property along the Adams County line.

51. Portions of this land are used for the purposes of dumping refuse and manure and the procuring of sand and gravel by respondent. Portions of it, as has already been stated, have been leased to private individuals for the conducting of private feed yards. The testimony as to the present use to which some of this land is put warrants the conclusion that some of it should be found to be used and useful. If conditions develop in the future which require

further expansion of the pen area this land will be available. The used and useful character of the railroad land owned by respondent has hereinbefore been discussed in connection with the land in Zone 1. It is found, therefore, that the 521,049 square feet of vacant land in Zone 3, the 6,534 square feet in the northwesterly corner, and 213 square feet necessary to bring into agreement the areas of Zones 2 and 3, when expressed in square feet and in acres, are used and useful. It is found also that the 325,493 square feet occupied by commercial feed lots and leased to a private party and the 10,285 square feet of railroad right-of-way are non-used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein. The number of square feet in Zone 3 found to be used and useful is 527,796. This is equivalent to 12.117 acres. The number of square feet found to be not used and useful is 335,778. This is equivalent to 7.708 acres, making the sum of these two areas expressed in acres 19.825.

52. The following summary gives the land found to be used and useful and that found not to be used and useful in Zone 3:

Used and Useful	Square Feet.
Vacant Land in Tract No. 3B	521,049
Easement in northwesterly corner of Tract 3B	6,534
Adjustments necessary incident to decimal computations	213
Total Used and Useful	527,796 Sq. Ft. or 12.117 Acres
Non-Used and Useful	Square Feet
Commercial Feed Lots	325,493
Railroad right-of-way, Tract No. 28-B	10,285
Total Non-Used and Useful	335,778 Sq. Ft. or 7.708 Acres
Total Used and Useful	527,796
Total Non-Used and Useful	335,778
Total Area of Zone 3	863,574 Sq. Ft. or 19.825 Acres

Zone 4: Description, area of used and useful and of non-used and useful portions.

53. Zone 4 contains 18.722 acres or 815,510 square feet. This zone is a long circular and irregularly shaped piece of land extending from Franklin Street on the north to the Colorado & Southern right-of-way on the south. The western boundary of the zone is the eastern bank of the South Platte River, and the easterly boundary is the property of Swift and Armour and that land of respondent in Zone 1 occupied by the hog barns and the sheep barns. In this zone are located hay barns, a material shed, a roadway, an easement along the South Platte River, a railroad right-of-way, and a trackman's tool house. In addition to the land on which are located these service units, there are four separately described parcels of practically vacant land.

54. One of these parcels is south of the old Blayney-Murphy property and north of land owned by Swift & Company. In this parcel there are 177,739 square feet. Underneath this land there is a 21-inch sewer pipe extending from the cattle division across the stockyard railroad tracks, the Chicago, Burlington & Quincy right-of-way, and across other land now owned by respondent. There is also a 30-inch sewer pipe underneath this land which serves Armour & Company and receives also drainage from the cattle division thru a 12-inch sewer crossing the stockyard railroad tracks, the Union Pacific right-of-way, and passing through the Armour packing plant. Another sewer 18 inches in diameter extends from Armour & Company's plant to the river. Underneath this land is a 12-inch water pipe which extends from a well to the Armour & Company plant.

55. Another parcel of vacant land contains 64,030 square feet. This parcel of land lies between the vacant land just described and the embankment constructed when the channel of the South Platte River was straightened. This land was formerly a part of the river bed. It, too, is traversed by sewers which serve Armour & Company's pack-

ing plant directly and the stockyards indirectly, and by an extension to the cattle division. Another parcel of this vacant land lies in the south portion of the yards and borders on the Colorado & Southern right-of-way. It is triangular in shape and lies between a strip of land owned by Swift & Company and the easement along the South Platte River. The area of this parcel is 136,178 square feet. A sewer underneath this land leads from Swift & Company into the South Platte River. The rest of the land is filled and is in varying conditions of level. A fourth parcel used mainly by the employees of Swift & Company for parking purposes contains 63,318 square feet of land.

56. The railroad tracks belonging to respondent occupy in this zone a right-of-way of 127,544 square feet.

57. Between the parcels of vacant land heretofore described and the South Platte River, there is a 50-foot easement along the bank of the river. That portion of the easement which is in this zone contains 132,718 square feet. Near this easement is a roadway which is used by the city in connection with repairs and work done on the South Platte River improvement. This road is not a public thoroughfare, although it is very generally used, particularly by those industries which operate in that vicinity. It furnishes an approach for fire apparatus to the structures and buildings of respondent and the other industries in that locality.

58. Respondent claims that all the land in this zone is used and useful. The witness called by the Government to describe respondent's facilities gave a detailed account of the use which is presently being made of this land. This zone furnishes a sewer outlet to respondent and others. Certain portions of the vacant land, particularly that lying toward the southern end of the yards, can be developed into a parking space for trucks. It is possible that pens for yarding livestock might be constructed on certain portions, but in view of the fact that the yards have expanded in a northerly direction it is not probable that the land will be

so used. [2] *Moreover, adequate allowance for land for expansion has already been made in Uone 3.* In view of these facts, it does not seem reasonable to carry into the rate base the value of all the vacant land in this zone. Yet it is not practicable to determine just how much surface area is needed in connection with the structures which lie underneath this zone.

Some allowance should be made for the reason that access to sub-structures is necessary. It is not practicable, however, to determine mathematically the number of square feet which should be allowed for this purpose. It seems reasonable and just to include one-half of all the vacant land in this zone as used and useful, and it is so found. It is found that the land occupied by respondent's railroad tracks and the trackman's tool house is not used and useful. It is further found that the land occupied by the hay barns, the material shed, the roadway, and the easement along the South Platte River is used and useful. A summary of the land found to be used and useful and that found not to be used and useful is as follows:

Used and Useful	Square Feet
Land on which are:	
Hay Barn No. 5 and Scale	19,158
Hay Barn No. 6	40,750
Material Shed West of Hay Barn No. 6	5,148
Roadway (Swift & Co.)	3,956
Roadway	5,475
Roadway	39,305
$\frac{1}{2}$ Vacant Land North and West of Track No. 27	88,869.5
$\frac{1}{2}$ Vacant Land in Tract No. 10	68,089
$\frac{1}{2}$ Vacant Land in Tract No. 6	32,015.
$\frac{1}{2}$ Vacant Land in Tract No. 1	31,659
Easement along Platte River	132,718

Total Used and Useful 467,142.5 Sq. Ft. or 10.725 Acres

Petitioners Note [2]—The final report adds "at any time in the near future," and omits italicized portion.

Non-Used and Useful	Square Feet
Land on which are:	
Trackmen's Tool House	191
Railroad right-of-way	127,544
½ Vacant Land North and West of Track No. 27	88,869.5
½ Vacant Land in Tract No. 10	68,089
½ Vacant Land in Tract No. 6	32,015
½ Vacant Land in Tract No. 1	31,659
Total Non-Used and Useful	348,367.5 Sq. Ft. or 7.997 Acres
Total Used and Useful	467,142.5
Total Non-Used and Useful	348,367.5
Total area Zone No. 4	815,510 Sq. Ft. or 18.722 Acres

Zone 5: Description, area of used and useful and of non-used and useful portions.

59. This zone consists of a body of land containing 550,598 square feet of which 511,394 square feet is vacant and 39,204 square feet is an easement 50 feet wide along the bank of the South Platte River. The total area of this zone expressed in acres is 12.64. The land in this zone is no longer subject to overflow during periods of flood. The land is not now being used and any plans that may have been proposed at the time of the previous hearing looking toward the erection of pens or other improvements on this area have not been carried out. This land lies on the west bank of the South Platte River and across that river from the main body of the respondent's property. There is no approach across the river between the main body of the stockyards and the vacant land on the west side of the river. Respondent claims that this land is used and useful and that it is being held as land for expansion. Zone 4, a part of which is vacant, lies between the main body of the stockyards and the river and the river separates Zones 4 and 5. The growth of the yards has not been in the direction of Zone 5, but in a northerly direction toward Zone 3, the vacant land in which are included as used and useful for purposes of expansion. Inasmuch as ample allowance for land for expansion has been made in Zone 3 and in Zone 4 an allowance

in Zone 5 of land for this purpose would go beyond the point of reasonableness and would levy the carrying charges on account of this land upon livestock shippers during a period when there is no likelihood that it would be needed in the handling of their livestock. [3]

60. The easement along the river in this zone does not serve and facilities now operated by the respondent and is not likely to do so at any time within the predictable future. It is found, therefore, that all the land in Zone 5 is not used and useful for any service, the reasonableness of the rates for which is being determined herein. The area and detailed description of Zone 5 is as follows: Zone 5 contains 12.640 acres of land.

Non-Used and Useful	Square Feet
Vacant land in Tract No. 2—West of River contains 550,598 sq. ft. However, there is an easement to the City and County of Denver, described as follows: "Parcel 2-C—0.90 acres (39,204 sq. ft.) located on Tract 2-A west of the river". Therefore, 550,598 sq. ft. less 39,204 sq. ft equals:	511,394
Easement	39,204
Total	550,598 Sq. Ft. or 12.64 Acres

Zone 6: Description, area of used and useful and of non-used and useful portions.

61. Zone 6 is a 3.383-acre irregularly shaped area of land lying in the southerly portion of respondent's property. It lies between 46th Avenue on the south, the Colorado & Southern right-of-way on the north, the Chicago, Burlington & Quincy Railroad right-of-way on the east, and land owned now by the Pepper Packing Company. The area of this zone in square feet is 147,343. Of this area 133,905 square feet is vacant and not used except as a general city dump in which are found tin cans, automobile bodies, and general refuse. Much of this portion of the

Petitioner's Note [3]—Italicized portion omitted from final report.

land lies below the grade level of adjacent land. In this zone also there are the railroad tracks commonly known as the Chicago, Burlington & Quincy tracks, which belong to respondent. These tracks occupy 3,245 square feet. A roadway leads from 46th Avenue into the stockyards and to the Swift and Armour plants. This road is surfaced with asphalt or material of similar character and provides means of ingress and egress to and from respondent's premises and to the packing plants. The road in this zone is a portion of a roadway extending from 46th Avenue on the south to Franklin Street on the north and is used in common in the interests of respondent, Swift & Company, and Armour and Company. This roadway occupies 10,193 square feet in Zone 6.

62. Respondent contends that the whole of Zone 6 is used and useful. Respondent's assistant general manager states that this zone is being filled as rapidly as filling is available and that it is the plan of respondent to use this zone for parking empty trucks and for the storage of loaded trucks when truck arrivals come faster than they can be cared for. He states further that the City of Denver and the Chicago, Burlington & Quincy Railroad are now proposing to put a subway under the Burlington right-of-way on 46th Street and to close the road running along the Colorado & Southern right-of-way south of Zone 9 and that when this road is closed respondent will require a much wider approach and a wider road in Zone 6 than at present. A subway built under the Chicago, Burlington & Quincy tracks will be lower than the average level of Zone 6 and for this reason he claims the roadway in Zone 6 will have to have a turning radius as well as an incline and that a roadway will be required wider than that across Zone 6, which now connects the yards with 46th Avenue. This witness also states that respondent is now using by sufferance a portion of the Chicago, Burlington & Quincy right-of-way between the Exchange Building and the Colorado & Southern tracks as a road and that this roadway can be closed on short notice and undoubtedly will be closed when

the proposed subway is built unless other arrangements are made. He states that respondent's roads are narrow and that its location is such that it cannot permit long lines of trucks to extend over railroad tracks and on 46th Avenue for the reason that this would congest traffic and slow up all movements. He states that as the truck business grows respondent will be compelled to use all of Zone 6 for the parking of empty trucks or for the storage of loaded trucks, particularly when the new hog lay-out is built.

63. One of the witnesses who appraised respondent's land was of the opinion that Zone 6 is required for future railroad switching facilities. A witness called by the Government, who had made a careful analysis and given a minute description of the service units of respondent, was of the opinion that the railroad tracks in this zone are reasonably necessary in the course of commerce whereby livestock passes from the place of production or shipment to, from, or through the stockyards, to the place of its ultimate destination. This same witness was of the opinion that the roadway located in tract 6, commonly known as the Swift roadway, should be similarly classified.

64. For reasons already stated in discussing the used and useful character of the railroad land in Zone 1, the 3,245 square feet occupied by the railroad tracks in Zone 6 are found to be not used and useful in the rendition of any services, the reasonableness of the rates for which is being determined herein. The evidence shows that by far the greater portion of the land in Zone 6 is hardly more than a dump. One of the witnesses who appraised respondent's land looked upon Zone 6 as land for expansion in the extension of railroad facilities. If he were correct in his assumption that the land is being held for this purpose it would be found not to be used and useful for reasons heretofore set forth. Respondent's assistant general manager states that this land is being held in reserve largely as a parking lot for livestock trucks either before or after their unloading. He states that the land is gradually being

filled, but does not state the rate at which it is being filled or any date in the near future on which this land may be expected to be put to any use. The prospective use to which it may be put is, according to this witness, contingent somewhat upon the expansion of the hog facilities. Sufficient vacant land has already been included in Zone 4, which lies nearer respondent's main yarding area, to provide truck parking space for many years to come. The testimony with respect to the character of this land and with respect to its potential use and with respect to the date when it may be expected to come into use does not warrant including it in the used and useful land. It is found that the 133,905 square feet of vacant land in this zone is not used and useful in rendering any services, the reasonableness of the rates for which is determined herein.

65. The evidence cited above indicates that the roadway in Zone 6 is a portion of a private roadway leading through the yards and used in common by the various industries located near it. That portion of the roadway lying in this zone, while furnishing ingress and egress to Swift & Company, would be necessary in the operation of the stockyards even if it were not used by Swift, Armour, and others. The assistant general manager of the respondent states that a wider roadway will be necessary if a subway is built under the Chicago-Burlington right-of-way on 46th Avenue. No definite statement is made as to when such an underpass may be expected to be built. It is stated that the city and the Chicago, Burlington & Quincy are now proposing to put a subway under the Burlington right-of-way. No date is indicated as to when this improvement may be expected to be made. Whether and when this improvement will be made are matters of speculation. The probabilities of the need of a wider roadway than that now on Zone 6 are too remote to justify the allowance of an increased area for that purpose and the inclusion of the value thereof in the base in determining the rate for services, the reasonableness of which is being determined herein. As stated above, respondent needs a roadway

through Zone 6 for ingress and egress. It is, therefore, found that the 10,193 square feet, the area now occupied by the roadway crossing this zone are used and useful in the rendition of the services, the reasonableness of the rates for which is being determined in this order. The following is a summary of the land in Zone 6 found to be used and useful and that found not be used and useful:

Used and Useful	Square Feet
Land on which are:	
Roadway	10,193 Sq. Ft. or .235 Acres
Non-Used and Useful	Square Feet
Land on which are:	
Railroad right-of-way	3,245
Vacant Land	133,905
	137,150 Sq. Ft. or 3.184 Acres
Total Used and Useful	10,193
Total Non-Used and Useful	137,150
Total Area of Zone No. 6	147,343 Sq. Ft. or 3.383 Acres

Zone 7: Description, area of used and useful and of non-used and useful portions.

66. Zone 7 contains 200,724 square feet or 4.608 acres. The land in this zone is vacant. There is a 50-foot strip along the South Platte River which is a part of the easement granted to the city by respondent. This zone is triangular in shape. It is bounded by 46th Avenue, the Chicago, Burlington & Quincy right-of-way, and the South Platte River, along which is the easement. The surface of the zone is considerably below the river embankment and the adjacent railroad tracks. The total area of the easement in this zone is 34,412 square feet or .79 acre. This zone lies across the Colorado & Southern Railroad, is south of Zone 6 and across 46th Avenue. It is the extreme southern portion of respondent's land and is vacant and unused.

As already pointed out the physical facilities of respondent are being extended in a northerly rather than in a southerly direction and there is no likelihood that pens or other stockyard facilities required by respondent will be constructed on this land at any time within the predictable future. Respondent claims that the land is being held for purposes of expansion. *Sufficient allowance has already been made of land for expansion purposes to meet the needs of respondent within the near future. It is not reasonable to include this zone in land for expansion and pass on to present shippers of livestock in the rates paid by them the carrying charges on a piece of land which is not likely ever to be used in handling any livestock which these may ship to market. In view of the fact that ample land for expansion purposes has already been included in other zones, [4]* it is found that the 200,724 square feet or 4.608 acres is not used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein.

Zone 8: Description, area of used and useful and of non-used and useful portions.

67. Zone 8 contains .759 acre of land or 33,062 square feet. This land is occupied by the truck manure dump under which runs a sewer belonging to the Union Pacific Railroad Company. This easement is a strip 6 feet wide. This zone is located in a triangle bordered by 46th Avenue, the Chicago, Burlington & Quincy right-of-way, and the Colorado & Southern right-of-way. The area in this zone is used by truckers for dumping manure from their trucks preparatory to taking on return loads of materials and commodities which they carry back with them to the country. These premises are furnished free of charge for truckers who do not choose to avail themselves of the cleaning and washing facilities adjacent to the truck chutes. It is found that the entire area in this zone, namely, 33,062 square feet or .759 acre, is used and useful in the rendition of

Petitioner's Note [4]—Italicized portion omitted from final report.

services, the reasonableness of the rates for which is being determined in this order.

Zone 9: Description, area of used and useful and of non-used and useful portions.

68. Zone 9 contains 7.081 acres of land or 308,448 square feet. The land in this zone is occupied by the horse and mule division, operated by the Colorado Horse & Mule Company and the stock show facilities of the Western Stock Show Association, a voluntary organization of various persons and businesses interested in the livestock industry. The horse and mule division consists of horse and mule barns, corrals, try-out lots, approaches and entrances, a blacksmith shop, roadways, and other smaller units. The Horse and Mule Company pays for the use of these facilities a rental of \$1200 a year and 35c per head for each horse and mule sold in the division. The Horse and Mule Company furnishes its own light and water for the barns and sheds and half the water for its offices. The Horse and Mule Company vacates its premises when they are needed in connection with the exhibitions of the Western Stock Show Association. The horse and mule division is operated in most respects as other portions of respondent's property which is devoted to rendering stockyard services. Such differences as exist for the most part can be accounted for by the difference in character between horses and mules, which are handled in this division, and other species of livestock handled elsewhere in the yard. There is nothing in the record which would justify the exclusion of respondent's land devoted to the horse and mule division from the used and useful land used in the rendition of services for which are charged rates, the reasonableness of which is determined herein. The situation with respect to that portion of respondent's land in Zone 9 devoted to stock-show purposes is not so clear. The association which operates the show is a non-profit corporation without shares of stock. It pays no dividend. Memberships in the association were sold originally as a clever way of getting money for the

show and relieving the yard company of that expense. The livestock pavilion was built under the direction of the association which went down town and secured donations from various people for the building of this barn and the sales pavilion. [5] The show association has had revenues left over in certain years after paying rent. With these revenues they built a tile barn. Some years later respondent paid a deficit of \$2,000 or \$3,000 and took title to the barn because no rent had been paid in the past. Respondent feels that the sales pavilion belongs to it and it feels the same way about the tile barn. At various times it has absorbed deficits of the association. The evidence shows that the livestock show which is held in January tends to bring livestock to market during this month, which intervenes between two fairly heavy shipping seasons. It is claimed by respondent that the show tends to increase its receipts of livestock throughout the year. There is evidence to the effect that the livestock show has had a tendency to improve the quality of livestock in the Denver territory and that the auction sales promoted by the show bring to Denver buyers from wide sections of the country. There is testimony also to the effect that the prices received from livestock during the show week are from \$1.00 to \$1.50 per hundred higher than they are at other seasons of the year.

69. Not only are the facilities in Zone 9 used in connection with the stock show, but also some 200 pens in the south end of the yard are used for handling bulls. Other pens north of the Exchange Building are used for the holding of fat cattle. Feeder cattle, of which there are usually over 100 loads entered in the show, are yarded north of the fat cattle up to about the alley which is numbered 22. The facilities so used are on land already found to be used and useful. Regular yardage is charged on the livestock yarded in the main division of the yards and the revenues go into those of respondent. The yardage charges on animals sold

Petitioner's Note [5]—Final report adds: "Which respondent otherwise could not have built. (See Agreed Abstract p. 694 and 695.)"

on the show property in Zone 9 accrue to the show association.

70. There is no doubt but that the stock show has increased the interest of stock growers in producing a better quality of livestock. The question of the wisdom of the livestock show cannot be doubted, but this is beside the point. The matter to be determined is whether or not respondent, who is a zealous member of the stock show association (which assesses entrance fees, grants concessions for a consideration, and solicits contributions from various Denver businesses) should absorb deficits which occur in connection with the show and pass those deficits on to all those who use the regular facilities of the yards. While the character of the business conducted by respondent would naturally cause it to be interested in the stock show, there seems to be no reason why it should be more zealous than certain other industries in the stockyard section. The fact that respondent's employees keep the books of the show association and respondent furnishes labor for a consideration during the progress of the show and supervises certain of the activities of the association does not warrant respondent in assuming whatever deficits may be incurred by the association. The stock show is a community enterprise. In such an enterprise respondent may be expected to have a keen interest and to make a reasonable contribution towards its success. That it does make such a contribution in the form of services rendered without compensation is amply supported by the evidence. The expenses incident to such services ~~automatically go into~~ the rates paid by the general shipping public. But to assume that it is the responsibility of respondent to underwrite all deficits incurred by the stock show association and to pass these on to shippers in the form of regular stockyard rates is to pass on to the public in rates an amount which in justice it ought not to pay. [6]

Petitioner's Note [6]—Final report at this point contains additional reasons advanced by the secretary for the exclusion of this property.

71. The area in Zone 9 devoted to the horse and mule division is 172,310 square feet. It is found that this number of square feet in Zone 9 is used and useful in the rendition of services, the reasonableness of the rates for which is being determined herein. The total number of square feet in Zone 9 devoted to stock show purposes is 136,138. It is found that this number of square feet is not used and useful in the rendition of services for which are charged rates, the reasonableness of which is being determined herein. The following summary gives the land found to be used and useful and that found not to be used and useful in Zone 9:

Used and Useful				Square Feet
Land on which are:				
Horse and Mule Division—Barn No. 1				13,184
"	"	"	" — " " 1 A	640
"	"	"	" — " " 2	5,248
"	"	"	" — Try-out Lot	17,653
"	"	"	" — Barn No. 3	7,967
"	"	"	" — " " 4	23,184
"	"	"	" — Corral West of Barn No. 3	11,216
"	"	"	" — " East " "	5,046
"	"	"	" — Approach to Barns 3 and 4	9,199
"	"	"	" — Lafayette Street Entrance	2,187
"	"	"	" — Barn No. 5	12,084
"	"	"	" — " " 6	14,416
"	"	"	" — " " 7	12,000
"	"	"	" — Corrals	9,400
"	"	"	" — H and M Truck Chute	60
"	"	"	" — Company Horse Barn	17,310
"	"	"	" — Blacksmith Shop	3,920
Roadway N. E. Corner of Intersection C.B.&Q. & C.&S. R/W				7,596
Total Used and Useful				[7] Sq. Ft. 172,310 or Acres 3.956

Petitioner's Note [7]—These figures changed in final report due to inclusion of Hook-up shed, pen, runover shed and Hook-up shed entrance as used and useful property.

Non-Used and Useful

Land on which are:	
Club and Store Building	4,927
Stadium	77,850
Sales Pavilion	5,765
Stadium Heating Plant	1,775
Hook-up Shed	5,780
Run-over Shed	1,357
Hook-up Shed Pen	12,207
Entrance to Hook-up Shed Pen	2,096
Stock Show Restaurant	4,250
Stock Show Hog Barn	17,606
Stock Show Wash House	2,525
Total Non-Used and Useful	[7] 136,138 Sq. Ft. or 3.125 Acres
Total Used and Useful	172,310
Total Non-Used and Useful	136,138
Total Area of Zone 9	308,448 Sq. Ft. or 7.081 Acres

Zone 10: Description, area of used and useful and of non-used and useful portions.

72. This zone is separated from the other land owned by respondents by the main lines and switch tracks of the Chicago, Burlington & Quincy Railroad and County Road No. 83. It is the site of an abandoned gravel pit and is entirely vacant except for a hamburger stand operated by a squatter. The land is very irregular as a result of gravel excavation by its former owner, the Brannon Sand & Gravel Company. A land witness called for respondent testified that he placed a lower value on this land than he did when he testified at a former hearing and that at that time he and other witnesses attributed more value to the gravel than they did to the land. The witness is of the opinion that if he were to take a buyer out to see it the buyer would probably consider it worthless. He stated, however, that

Petitioner's Note [7]—These figures changed in final report due to inclusion of Hook-up shed, pen, runover shed and Hook-up shed entrance as used and useful property.

this land brought good value as a gravel pit and that it will bring a value for a dump heap when the city no longer has a place to dump refuse. Respondent claims that this land is used and useful for expansion. A witness called by the Government, who is familiar with respondent's property and operations, is of the opinion that this land is not used and useful.

73. The location and character of this land are such that it is unsuited to any general stockyard purpose at the present time. [8] It is isolated and lies across a road and a railroad track from the main body of the yards. It is in reality a wasting asset. Its potentiality as a source of gravel is already being exhausted. With a sufficient amount of vacant land already included in other zones to satisfy the requirements of respondent's growth for many years it does not seem fair to shippers to include this zone in the used and useful land of respondent when the character and time of the use are so problematical and so speculative. It is, therefore, found that the 100,319 square feet or 2.303 acres of land in this zone is not used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein.

74. A summary of land heretofore found to be used and useful and that found to be not used and useful is as follows:

	Used and Useful	Acres	Square Feet
Zone No. 1		33.360	1,453,212
" " 2		22.147	964,741
" " 3		12.117	527,796
" " 4		10.725	467,142.5
" " 5		-----	-----
" " 6		0.235	10,193
" " 7		-----	-----
" " 8		0.759	33,062
" " 9	[9]	3.956	[9] 172,310
" " 10		-----	-----
Total Used and Useful		83.299	3,628,456.5 Sq. Ft. or 83.299 Acres

Petitioner's Note [8]—Mention in final report is made that due to irregularity of surface, leveling expense would be required.

Petitioner's Note [9]—These figures changed in final report to 4.448 and 193,750 respectively.

Non-Used and Useful

Zone No. 1	4.907	213,744
" " 2	.835	36,352
" " 3	7.708	335,778
" " 4	7.997	348,567.5
" " 5	12.640	550,598
" " 6	3.148	137,150
" " 7	4.608	200,724
" " 8		
" " 9	3.125	136,138
" " 10	2.303	100,319

Total Non-Used and Useful 47.271	2,059,170.5 Sq.Ft.or 47.271 Acres
Total Used and Useful	3,628,456.5
Total Non-Used and Useful	2,059,170.5
Total Area	5,687,627 Sq.Ft.or 130.570 Acres

STRUCTURES

General statement and findings:

75. The structures located on the land hereinbefore found to be used and useful are used by respondent inseparably with the land in rendering those services, the reasonableness of the rates for which is being determined in this order. It is found that all structures located on land herein found to be used and useful are themselves used and useful in the rendition of services, the reasonableness of the rates for which is determined herein, and that all structures located on land found not to be used and useful are not used and useful.

E. VALUATION OF RESPONDENT'S PROPERTY:

VALUE OF USED AND USEFUL LAND AND VALUE OF
NON-USED AND USEFUL LAND*General statement:*

76. Four witnesses testified as to the value of respondent's land. Three of them were called by respondent and

one by the Government. The three who were called by respondent served as an appraisal committee and submitted to respondent a joint report in which is set forth their opinion as to the value of respondent's land. This joint report is in evidence. The witness called by the Government also prepared a report setting forth his opinion as to the value of respondent's land. This report is in evidence. All four witnesses testified at the hearing, and were examined and cross-examined as to the factors which they considered in arriving at the respective values which they placed upon respondent's land. All the witnesses were men of long experience and unquestioned standing. The three called by respondent are all engaged in the real-estate business in Denver and have been for periods varying from 24 to 38 years. They are all members of the Denver Real Estate Exchange. One of them has served as a member of and as chairman of the Business and Industrial Property Appraisal Committee. He has managed important business blocks in the retail business district in the center of Denver and properties located in the financial district. He has also handled trackage and industrial properties.

77. Another of the witnesses called by respondent is president of a company which conducts in Denver a general real-estate business. He has had experience in the appraisal of land for local utilities, railroads, banks, industries, and other businesses. The third witness called by respondent has been engaged in the real-estate business in Denver for nearly 40 years and has had much experience in appraising property in and around Denver. He is the loan correspondent and appraiser for two large life-insurance companies in New York and for one in North Carolina. He has had experience in appraising real estate in San Francisco, Los Angeles, and elsewhere. For a time he was chairman of the Zoning Commission of the City of Denver and is a member of the Board of Adjustments. For nine years he has been a member of the committee of the Denver Planning Commission.

78. The witness called by the Government is a civil engineer whose training was had at Ohio State University. His practical experience began while in high school and continued throughout his formal professional training. He has had engineering experience and has done consulting work in connection with sewer and water construction disposal plans, garbage reduction plants, and for some time was a member of an engineering firm with offices at Painesville, Ohio. In 1916 he entered the service of the Interstate Commerce Commission as junior land appraiser and served in that capacity until the fall of 1917. After an interval of some three years he returned to the Interstate Commerce Commission with an assignment in the Land Appraisal Department. He held all positions in this department from junior land appraiser to assistant supervisor of land appraisals, in which capacity he served until early in 1928, when he became Assistant Director of Research for the National Association of Owners of Railroad and Public Utility Securities. In the fall of 1929 he opened an office in Washington as consultant on railroad and utility regulation. In 1934 he became principal valuation engineer of the Packers and Stockyards Division, Bureau of Animal Industry, in the Department of Agriculture. In connection with his work in the Department of Agriculture he has given testimony in rate cases held for purposes of determining the reasonableness of stockyard rates for the Union Stock Yards Company of Omaha, the St. Joseph Stock Yards Company, and the Sioux City Stock Yards Company. This work was done under contract during the time he was engaged in private practice. He has made appraisals of the stockyards properties at Cleveland and Wichita as an employee of the Department. In those stockyard-rate cases in which he appeared as a witness his testimony was confined to the valuation of land.

79. The witnesses called by respondent placed a value of \$1,645,552.50 upon the 131.045 acres of land owned by respondent at the time the appraisals were made. The witness called by the Government placed a value of \$728,284

upon the same land. The value placed upon this land by witnesses called by respondent is more than twice as great as that placed upon it by the witness called by the Government. The witnesses called by respondent placed a value upon it greater by \$917,268.50 than did the witness called by the Government. This discrepancy is too great to be accounted for solely by the difference in opinions which is reasonably to be expected between well qualified and competent land experts. It becomes necessary, therefore, to examine the methods followed by the various witnesses and the factors influencing them in arriving at their respective values.

80. The methods followed by the witnesses are set forth in their reports and in their oral testimony. In the land report comprising the appraisal of respondent's land the witnesses called by respondent stated jointly that, in arriving at the values which they placed on the various zones and the total value which they placed upon all the land, they personally inspected all the lands of the company giving consideration to their proximity to related and other industries and to various features having a bearing upon their adaptability and desirability for industrial uses, including that for a stockyards company; that they compiled a list of sales of properties in the neighborhood of the stockyards, and personally inspected the properties, checking, in so far as they deemed it necessary, with the grantors and grantees the consideration involved and that thereupon they appraised each zone placing what they considered a conservative value upon it; that in arriving at the value of the land they gave weight to the fact of the location of the yards and their convenient accessibility to the business district of Denver over paved streets; to the fact that the topography of the land is such as to lend itself to industrial development including stockyard uses, and to the fact that the land of respondent has available street-car and bus service into the City of Denver and bus service to all parts of Colorado and adjoining states; to the fact that six railroads with their connection furnish excellent transportation

facilities for livestock and products of the packing houses; to the fact that truck lines radiating from Denver supplement the railroads and serve rich irrigation districts in Colorado; to the fact that respondent's land is favorably located as regards dependable labor supply within easy walking distance and that there are good schools, churches, playgrounds, and a branch library accessible; to the fact that the facilities located on respondent's land have ample fire protection; to the fact that the district in which respondent's land is situated is the only part of Denver zoned for a business such as that conducted by respondent; to the fact that there are located in the district some fifteen allied industries such as packing houses, rendering companies, serum plants, and that there are other non-allied industries in the district; to the fact that there are sugar factories north of Denver, the by-products of which can be used in feeding cattle and sheep; and finally that the City of Denver is growing. In addition to this general statement each of the witnesses called by respondent testified orally as to the factors which led him to his conclusions as to the value of respondent's land.

81. The witness called by the Government likewise made a general statement with respect to respondent's land and included in that statement those elements which he considered in arriving at the value which he placed upon each of the ten zones into which the land was divided for purposes of appraisal. This witness began his investigation of the value of respondent's land sometime in November 1934. He received a transcript of a record in a prior hearing and copies of the exhibits introduced. He obtained from the Interstate Commerce Commission such information as it had on railroad valuations in Denver and had access to the Commission's record in Denver. He went to Denver on January 7 and left the 8th of February, dividing his activities between the land work and the supervision of the engineering and the inspection of the property of both phases of the work. He gave consideration to the topography, size, shape, and location of respondent's land with

respect to highways, railroad trackage, and to certain centers of value or development in that portion of the city in which the property is located. He also took into consideration the general nature of the surrounding development and the use to which the surrounding property is devoted, the improvements in the community such as schools, churches, and fire protection. He considered also the fact that the property of respondent is favorably situated with respect to street cars and local transportation and to the fact that city facilities such as water mains and sewage outlets are available to respondent's land. He compiled a list of sales which had taken place over a period of many years indicating the location of these sales with respect to respondent's land and described each of these sales in his report. He valued the lands as naked, unimproved vacant land and considered that all the adjacent property was in place and that the situation with respect to the surrounding property was unchanged in every respect. He gave weight also to the fact that the lands of respondent are especially adaptable for a stockyards utility. He looked upon the area as bare land lacking public streets and alleys. He gave little weight to the assessed value of the property. The sales information which he gathered covers land of varying degrees of similarity to the land being appraised. Some of these individual sales suffered a degree of disability in so far as their direct application to the determination of value is concerned. Many of them had taken place a great many years in the past. None of the sales considered constitute an area as large in size as respondent's land and for this reason the witness gave consideration to the element of plottage and assembly. He placed the value of the land at a suitable level such as one would reasonably expect to exist over a period of about six months prior to the making of the appraisal, and due to that fact he did not give depression or stagnation values to the land. His report contains tabulations of general business statistics in Denver.

82. A careful consideration of the appraisal reports reveals nothing which accounts for the great difference in

the values arrived at by the witnesses for each of the zones or for the land as a whole. For an explanation of this difference in value, as is testified to by witnesses called by respondent and the witness called by the Government, the oral testimony of the various witnesses has to be examined. This has been done hereinafter in connection with the testimony of the various witnesses given with respect to each of the ten zones into which the land was divided.

*Value of land in
Zone 1:*

83. All witnesses were in agreement that the highest and best use of the land of respondent is for stockyard purposes. They are of the opinion also that the value of Zone 1 has the highest value of any of the land in the general stockyards area, that is, the land west of the Chicago, Burlington & Quincy right-of-way. Witnesses for respondent divided Zone 1 into two areas, one of which is the land in the triangle south of the Exchange Building and between the Union Pacific right-of-way and the Chicago, Burlington & Quincy right-of-way. Upon the 3.6 acres in the triangle these witnesses placed a value of \$15,000 per acre, and upon the remaining 34.934 acres in the zone they placed a value of \$17,500 per acre. The total value placed upon the smaller portion was \$54,000 and that placed upon the larger was \$611,345, a total of \$665,345 for the 38.534 acres. This total value includes that portion of Zone 1 which was sold to Armour & Company. The witness called by the Government did not sub-divide this zone, but valued it as a single parcel of land. He placed a value of \$8,500 an acre upon the zone as a whole, or a total of \$327,539 for the 38.534 acres.

84. A careful reading of the oral testimony of the witnesses called by respondent leads to the inescapable conclusion that while they visualize respondent's land as stripped of all improvements and available for industrial uses generally they considered not merely the availability of the land for all uses and purposes including its availability for

stockyard purposes but that they attached peculiar weight to the actual and profitable use to which the land is being put as a stockyard. That this is true is borne out by the following statement by one of the witnesses called by respondent: "What I meant when I answered * * * * * that if pens were constructed on Zone 3 it would increase the value of Zone 3, is that any appraiser in appraising land for industrial uses necessarily figures into his valuation the potential value of the site. Perhaps I should not limit this solely to industrial appraisals. Here in Denver we use statistics covering the number of people passing certain corners, and these figures are compiled by the University of Denver School of Commerce. I think these facts are recognized by all appraisers. The same thing is true in a certain measure in industrial property. If a particular site has clearly a highest and best use, I do not believe any appraiser can overlook the utilization of the tract, and therefore its potential value or potential earnings to a concern engaged in the highest and best use. If pens were on the tract north of Race Court in Zone 3, it would mean that the highest and best use, which all of us, including the Government appraiser, have recognized, namely the stockyards use, had come up to some of the potentialities as we saw them, viewing the land as naked land on March 23, 1935, and since those potentialities would have actually been realized by the construction of pens, this area would have tied in closely and become a part of the main area (namely Zones 1 and 2) as an enlargement of that area. Hence, the value of Zone 3 would then more nearly approach the value of the main tract than it did on March 23, 1935".

85. This same witness looked upon certain land as "land necessary for expansion". He did not limit the expansion solely to stockyards, but to any large industrial use such as steel mills, which, as its business grew would bring land on the outside into more intense use. Questioned as to the effect of construction on such lands he replied: "Yes, I would think that if the expansion lands which I have mentioned were built up with pens or covered with

railroad tracks it would add to their value". This same witness gave it as his opinion that he could sell the stockyards land at the value he had placed upon it to a stockyards industry; that he did not know as to whether he could sell the land at that value to another industry such as to a steel plant, but that he believed he could though he might have to hold the land for a year or two, but that he does not know of any industry that has made a bona fide attempt within the past five or ten years to secure 131 acres of land in or near Denver.

86. Another witness called by respondent is of the opinion that the easiest way to sell the land would be to offer it to someone wanting to go into the stockyard business. He thinks it would be an easy matter to secure some other stockyard to buy the property at the value at which witnesses for respondent have appraised it. He is of the opinion that it could be sold at the value at which these witnesses appraised it within a fair time which might be a year or two. He is of the opinion that he could sell it at that price for stockyards purposes within a period not to exceed three months. This same witness stated: "It is beneficial to any business to have increased business. It creates values for adjoining land and gives industry a potential earning power. In 1930 we tried to keep away from that (giving any weight to the fact that the stockyards was doing a good business or doing business at all) and think we did, but having had an experience of one appraisal we have been very careful, more careful in this appraisal to keep away from that than we might have been in the other. Now, I will not say that we did, but you have in mind all the time that there is an industry there and the whole thing is to keep in mind the use of the property for the highest and best purpose (stockyard purpose) that it can be used. We considered the property for the highest and best use . . . did give thought to the intensive use of the land".

87. Another land witness called by respondent testified as follows: "Yes, I think I could sell the stockyards land

today if they were vacated. My first effort would be for a stockyards industry, and as to whether any other industry could be found to take such a tract, that is a matter of effort on the part of the salesman. I think it is possible. Personally, I do not think I would go outside of the stockyards industry, bearing in mind that the packing houses and related industries are all in place as they are today. It seems to me that it would require no particular effort right in the city of Denver to secure a purchaser for that piece of land with all other industries in place. No, I did not say that I felt no other industry would take 131 acres. After I had exhausted the stockyards chance it seems to me that an oil refinery, a steel mill or a smelter or something in the rubber industry might be found to use the tract. Yes, it has been some time since any industry requiring 131 acres has located in Denver. I could not say just how long. The Chamber of Commerce's efforts in this regard have evidently not met with success."

88. Again this same witness testified: "Accessibility and utility are not wholly synonymous. Utility is the use of the tract. Yes, accessibility is one of the elements of value and utility is another. Utility also means usefulness but that does not necessarily mean the ability to make money. What I considered was the use to which the land could be put; the element of the ability of the land to make money applies to their use. I considered it in connection with the stockyards area from the standpoint of potential use. Yes, I mentioned the fact that the land was available for any industry, but it is true that no industry within my memory has sought an acreage of that extent in the city of Denver."

89. Other testimony shows that while the land witnesses called by respondent visualized the land as vacant, they unconsciously thought of it as actually in use for a stockyard. This is particularly true with respect to the so-called Blayney-Murphy sale discussed more fully herein-after (see paragraphs 90-91). On this land, which lies

directly across the Chicago, Burlington & Quincy right-of-way from respondent's property, there was constructed a few years ago a packing plant on land assembled for that purpose. A viaduct was constructed from the packing company across the railroad on to respondent's land. Other expenditures were incurred for a railroad siding, grading, surfacing, and for legal services. The cost of the viaduct was \$40,000. With respect to this viaduct one of the witnesses stated: "In my opinion, those additional expenditures must be considered in determining the per-acre cost of this triangular tract because they were necessary to make the tract properly accessible to the stockyards". Another testified as follows: "I considered the land in Zone 1 to be of equal value, if not greater value than the land in Zone 9, because the land in Zone 1 is the very heart of the stockyards district." Still another testified: "As to the stockyards, there is only one piece of property in Denver that is available for stockyard purposes and that lessens competition in property for sales for that purpose and when you lessen the competition in property for any purpose it creates a higher value for that property for that purpose."

90. As already pointed out all witnesses listed sales of land made over a long period of years within varying distances of respondent's land. Witnesses called by respondent listed in their report 11 sales which they said they took into consideration in arriving at the value which they placed upon this zone. The first of these sales was from the Hollis-Platt Horse Company to the Denver Union Stockyard Company on August 3, 1918. Witnesses estimated the value of this land at the time of the sale at \$19,340 per acre. This land consisted of a series of lots located in a block in which there was a bank and a hotel. They are near some retail establishments and a residential section and are easily accessible to 46th Avenue. They are across the Chicago, Burlington & Quincy Railroad right-of-way and at a considerable distance from Zone 1. The character of this land and its location are quite different from that in Zone 1. The land in this sale is more nearly similar to

that which would be found in a retail and business section than in an industrial section. The second sale to which they gave consideration was one from Gordon B. Hollis to Joseph P. Murphy on August 23, 1924. This also was a sale of a series of lots in the sub-division known as West Elyria. This property fronts 250 feet on Humboldt Street and 125 feet on 47th Avenue. It is in the same general section as sale No. 2. On the land are horse barns and sheds which are being used as a sales barn and feed lot for horses and mules. This property lies across the Chicago, Burlington & Quincy Railroad from the respondent's land and is dissimilar so far as the location and potential use are concerned. The land in this sale is now being held for \$22,500. Sale No. 3 is one from Gordon B. Hollis to the Drovers National Bank on January 8, 1920. This was of two lots. The indicated land value, as stated by witnesses, was \$17,500 or \$121,960 per acre. Sale 5, which was given consideration by witnesses is in the form of a lease of land belonging to the stockyards company and leased to the railroads which serve respondent and the industries in the packing district. The other sales considered by witnesses were 10 to 15, inclusive, and sale 24. These sales are those which took place in the assembling of the Blayne-Murphy tract. The total land purchased by the Blayne-Murphy Company was 8.649 acres. With respect to the hearing of sales upon the value which witnesses placed upon Zone 1, one of them testified: "In Zone 1 we had to go outside of the stockyards district to find lands comparable. We found none that I considered of similar or equal value, but we figured that those lands reflected the values in Zone 1". Another of the witnesses called by respondent stated: "I do say that the valuation of the stockyards is very hard to establish by any sales that have been made in the immediate vicinity. There are a few sales that are comparable with lands in the stockyards and I have appraised the value of the stockyards by my experience and best judgment of this character of property. We considered the sale, but I do not think you can appraise the

value of stockyards ground by sales that have been made in that vicinity. There are not sufficient sales to place a valuation on such a large tract of ground as that, and it has to be appraised by experience and better knowledge of relative values in this section and other sections in the city." With reference to the land in the Blayney-Murphy tract one of the witnesses stated that: "The Blayney-Murphy tract, I do not consider, does not reflect the value in Zone 1, but Zone 1 reflects the value out there. I use it as corroborative of the opinion I formed of land in Zone 1". Another of these witnesses testified as follows: "Yes, I think we would have reached the same conclusion as to value if we had ignored the sales on all the property."

91. The witness called by the Government listed among the sales considered by him some of those enumerated as having been considered by witnesses called by respondent. He is of the opinion that sales Nos. 1, 2, and 3 by witnesses called by respondent are not indicative of the value of land in Zone 1 for the reason that one of them is a small corner lot occupied by a bank and that the other two are so far removed from Zone 1 and are of such different character as to location and potential use as to make the selling price of no worth in arriving at the value of Zone 1. Witnesses called by respondent state that whether they considered the cost of the land in the Blayney-Murphy tract, or whether they considered as the value of the land the cost of the land itself together with \$40,000 expended on the viaduct and certain other expenses bringing the total amount up to \$89,717.75 for the 8.649 acres, would have had no effect upon the value which they placed upon Zone 1. Witness called by the Government did give consideration to the cost of the Blayney-Murphy tract. He was of the opinion, however, that the viaduct leading from the Blayney-Murphy plant across the Chicago, Burlington & Quincy Railroad is a plant facility and that its cost of construction is not a land cost. This opinion seems to be warranted for the reason that the inclusion of the \$40,000, the cost of the viaduct, with the land would be justified, if at all, only on

the assumption that a stockyard existed on respondent's land. This is contrary to the fundamental hypothesis that in arriving at the value of land it must be considered as naked available for stockyard purposes, but not in use for that purpose. They would include also in land value the cost of a railroad siding, the cost of construction of which was \$5,413.27. If the purchase price of the land, the cost of the grading, the cost of levelling and the legal expense incurred in acquiring land should all be included with the cost price of the land itself the value of the Blayney-Murphy tract at the time of its acquisition would be approximately \$5,100 per acre. If the cost of the land be computed as witnesses for respondent think it ought to be the value of this tract is \$10,373 per acre.

92. Respondent's contention is that the improvements are necessary in order to make this land comparable to the stockyards land. Even if this were true, the value of the land in Zone 1 would not reach the figure which witnesses called by respondent have placed upon it, namely, \$17,500 per acre, for the greater portion of it and \$15,000 per acre for what they term the "triangle". If the improvements be left out of consideration, and the Blayney-Murphy land after being levelled is compared with land in Zone 1, the general impression to be gained from the testimony of all witnesses is that the Blayney-Murphy land is less valuable than the land of respondent in Zone 1. It is also the general impression to be gained from the record that the cost of the Blayney-Murphy tract reflected somewhat the fact that the sellers of the land received all their land was worth. The witness who assembled the Blayney-Murphy tract testified: "Yes, I assembled the Blayney-Murphy tract. I think the people that sold got a good stiff price but not more than the property was worth for the use to which it was put."

93. *As already pointed out the witness called by the Government gave no weight to the sales in the neighborhood of Lafayette Street, Humboldt Street, and 46th Avenue.*

Perhaps he should have given some weight to these sales. Had he done so his value would have been somewhat above that which he placed on Zone 1. After giving due consideration to the character of the land in Zone 1 as compared with the character of contiguous and nearby land and after giving some consideration to the high-priced land in the vicinity of 46th Avenue, Lafayette Street, and Humboldt Street and considerable more weight to the cost of the land in the Blayney-Murphy tract, excluding, however, the cost of the spur track and the viaduct as cost of land, and taking into consideration other sales of lower priced property, ^[10] it is found that the value of the land in Zone 1 owned by respondent is \$9,000 per acre or \$300,240 for the 33.36 acres in this zone heretofore found to be used and useful in the rendition of services, the reasonableness of the rates for which is being determined in this order, and \$44,163 for the 4.907 acres found not to be used and useful in the rendition of such services. ^[11]

VALUE OF USED AND USEFUL LAND IN ZONE 2:

94. Zone 2 contains at the present 22.982 acres (after the Armour sale), of which 22.147 acres have been found to be used and useful and .835 acre not used and useful. Witnesses called by respondent placed a value of \$15,000 per acre upon this land and stated that this value is supported by sales 10 to 15 (the Blayney-Murphy tract) and by lease No. 5, which is a joint lease by the Denver Union Stock Yard Company to the six railroads under date of August 1, 1921. The witness ^[12] called by respondent placed a value of \$15,000 per acre on the land in Zone 2 and stated that the value of the zone is arrived at by giving considera-

Petitioner's Note [10]—Final report adds at this point: "and all pertinent testimony of record bearing upon the value of respondent's land in Zone 1,"

Petitioner's Note [11]—The final report reduces valuation on used and useful land to \$8,500 per acre, or a total of \$283,560; and to \$41,710 for the 4.907 acres of the land found to be non used and useful.

Petitioner's Note [12]—Final report shows this witness to have been called by the Government and placed a value of \$5,000 on the land in Zone 2.

tion to the same supporting data used in Zone 1 with a scaling down on account of the greater distance of the area from the more developed portions of North Denver. The witness called by respondent also looked upon the land in Zone 2 as less valuable than a portion of Zone 1, but equal in value to that portion of Zone 1 lying south of the Exchange Building. One of the witnesses stated that judged from the industrial use standpoint the lands in Zone 1 and Zone 2 are very similar, that Zone 2 is equally adaptable for industrial purposes as the land in Zone 1, but that it is a little further removed from the peak of trading activities and has, therefore, a slightly diminished value in relation to Zone 1. He states that for the purposes of utility it is just as ideal as Zone 1.

95. It has already been pointed out why the values placed upon Zone 1 by witnesses called by respondent cannot be accepted. The same reasons which led to this determination lead to a like determination with respect to the value placed by them upon the land in Zone 2. *It is possible, of course, that witnesses may be in error as to the absolute values of these two parcels of land and yet correct with respect to the ratio of the values.*

96. The witness called by the Government placed a value of \$5,000 per acre upon this land as contrasted with \$8,500 per acre on the land in Zone 1. With regard to the difference in value between these zones, the witness was not considering the market activity on the zones at the present time for the reason that if the lands were stripped of their present improvements it is impossible to tell whether the stockyard arrangements would be rebuilt the way it has been even though the property is being valued from the standpoint of the highest and best use. He states that a shading down of values from Zone 1 to Zone 2 is not on the basis of actual use which is being made of the property. He feels that the higher levels of values would exist at the southerly portion of the zone because it has a more direct access and is closer to the zone itself. He

is of the opinion that Zone 2 should have a lower value than Zone 1. If Zone 2 were stripped of all improvements the only access to it would be through Race Court and the north end of Franklin Street.

97. The testimony with respect to Zone 2 is such as to make it unnecessary to discuss the various sales and leases which may have a bearing on its value. These have already been discussed in arriving at the fair value of the land in Zone 1. It becomes a matter, therefore, of the extent to which the value of Zone 2 should be shaded down from that of Zone 1. Witnesses called by respondent think that Zone 2 is as valuable as a portion of Zone 1 and only a little less valuable than the other portion. The witness called by the Government is of the opinion that the land in Zone 2 is considerably less valuable than the land in Zone 1. The question of the value of Zone 2 turns then largely upon the situation of this land with respect to industries, other than that conducted by respondent, in the packing district. Leaving out of consideration the railroad tracks of respondent, this tract has railroad facilities on two sides. It has an improved street on the entire northerly boundary and a roadway on a portion of the westerly side. It is contiguous to the property of Armour & Company and is on the whole as conveniently located with respect to the Cudahy Packing Company as Zone 1. It is less conveniently located with respect to Swift & Company than is most of Zone 1. It is farther removed from the main activity in the packing district than is Zone 1. None of the witnesses attempted to make any mathematical computation as to the relative values of these two zones. No such mathematical computation seems to be possible. If one were made it would depend upon hypotheses resting upon personal opinion and the result of such a computation would still be a matter the validity of which depends upon the exercise of a reasonable judgment. A careful consideration of all the evidence with respect to this zone leads to the conclusion that it is less valuable than Zone 1; that witnesses called by respondent have not made a sufficient

reduction from the value of Zone 1; and that the witness for the Government has made a reduction somewhat larger than the facts seem to warrant. It is found that the value of the land in Zone 2 is \$6,000 per acre, and that the value of the 22.147 acres found to be used and useful is \$132,882 and that the value of the .835 acre found to be not used and useful is \$5,010. [13]

VALUE OF USED AND USEFUL LAND IN ZONE 3:

98. Zone 3 contains 19.825 acres of which 12.117 acres have heretofore been found to be used and useful (paragraph 52) and 7.708 acres have been found to be non-used and useful. Witnesses called by respondent placed a value of \$8,000 on this land and supported that value by a lease of the Denver Union Stock Yard Company to the Union Pacific Railroad of 9200 square feet of right-of-way extending to the feed lots located in this zone. They supported it also by the sale of approximately 366 square feet by the Northwestern Terminal Railway Company to the City and County of Denver for a consideration of \$150.

99. The witness called by the Government placed a value of \$3,500 an acre on this land. He stated that he valued this land relative to the value which he placed upon Zone 1 and that he gave due regard for the cost of the land which, with a part of Zone 2, was purchased from the Riverside Cemetery Association in 1916 for \$3,000 per acre.

100. One of the witnesses called by respondent stated that the capitalized value of the lease covering the 9200 square feet of right-of-way leased to the Union Pacific is at the rate of \$8,772 per acre. He stated that this land is needed for expansion as business of the stockyards increases. It was this witness who said that when pens were constructed on this zone its value would more nearly approach the value of the main tract than it did on March 23, 1935.

Petitioner's Note [13]—Final report changes values to \$5,000 per acre making total used and useful value \$110,735, and non-used and useful value \$4,175.

101. The witness called by the Government took into account the accessibility of Zone 3 and the rail connections other than respondent's tracks which are upon it. He thinks that the fact that Race Court is on the southern boundry of this zone gives it an accessibility which the land would not have if Race Court were shifted northward to the county line. He is of the opinion, however, that the shifting of Race Court would make the tract more available for an uninterrupted use than it has at present. The witness is of the opinion that it would be feasible to get railroad trackage to this land either from the Burlington Railroad or from the Northwestern Terminal. Two sales near this land are known as the Local Beef & Mutton Company sales. These sales occurred in 1922 and 1920 and were at the rate of \$3,000 per acre, and the land is subject to overflow. The witness thinks that this land is not worth what was paid for it. One of these sales consisted of 1.41 acres and the other of 1.34 acres purchased from the Fairmont Cemetery Association, the same association from which respondent purchased in 1916 all of Zone 3 and other lands in Zone 2.

102. These sales and the sale and lease referred to by witness for respondent are all very small when compared with the total area of Zone 3. All witnesses shaded down the value of Zone 3 from that of Zone 2, all of them giving it a value per acre of more than half of the value per acre placed upon Zone 2. It is found that the value of this zone is \$3,500 per acre and that the value of the 12.117 acres found to be used and useful is \$42,409.50 and that the value of the 7.708 acres found not to be used and useful is \$26,978.

VALUE OF USED AND USEFUL LAND IN ZONE 4:

103. Zone 4 contains 18.722 acres of which 10.725 acres have been found to be used and useful and 7.997 acres have been found to be non-used and useful. The land in this zone is that heretofore described as lying between respondent's hog and sheep division, Armour & Company's plant,

and Swift & Company's plant on the east, and the South Platte River on the west. Witnesses for respondent divided this land into two portions. One portion contains 16.382 acres which does not require filling; the other, 2.34 acres which does require filling. On that portion not requiring filling they placed a value of \$12,000 per acre or \$196,584 and on the other portion they placed a value of \$10,000 per acre or \$23,400. The total value which they placed upon this zone was \$219,984. This zone contains railroad trackage belonging to respondent and used jointly by the railroads which serve the yards. Witnesses for respondent took into consideration the right-of-way leased by respondent to the railroads and the reflected values of Zones 1 and 2. They stated that the lease on the land by respondent is on the basis of \$8,772 per acre and that the total cost of grading to bring the land up to stockyard level was \$30,000 and that the average capitalized value of this land on this basis is \$15,834 per acre. They mentioned in their report no sales on which they relied to determine the value of this land.

104. The witness called by the Government placed a value of \$2,500 per acre on this land. He gave some consideration to the sales discussed in connection with other zones and in addition he considered a series of sales numbered from 114 to 126. Some of these sales are of small portions of land; some of them were distressed sales, which throw little light upon the value of the land in this zone. In the case of the land involved in one sale from one packing company to another, the 2.7 acres involved were carried on the books on December 31, 1930 at \$2,500. It is reported that the seller of this land considered it of a value of \$10,000 per acre. A portion of this land later sold in a distressed transaction which throws no light upon its value. Another sale which took place in the vicinity of this zone was of 2.4 acres by respondent to a packing and provision company at a price of \$1,000 per acre. Most of the sales in this series were of land at less than \$3,000 per acre. A few were at a figure above \$3,000. None of these sales involved

any considerable acreage. Giving some consideration to the sales which have taken place within varying distances from Zone 4 and the character of the land itself and to its location with respect to other more valuable land owned by respondent, it is found that the value of Zone 4 is \$2,500 per acre and that the value of the 10.725 acres heretofore found to be used and useful is \$26,812.50 and the value of the 7.997 acres found not to be used and useful is \$19,992.50.

VALUE OF NON-USED AND USEFUL LAND IN ZONE 5:

105. Zone 5 contains 12.64 acres all of which has been found to be non-used and useful. Witnesses called by respondent placed a value of \$3,500 per acre on the land or a total of \$44,240 for the entire tract. In support of this valuation they use a series of sales, some of them to the City and County of Denver made in connection with the improvement of the Platte River. One of these is of 7.29 acres for \$26,600, or \$3,548 per acre. Another is the so-called Ruedy Products sale of approximately one acre at the rate of \$3,562 per acre and another by the same company to Meyer and Dave Averich of something over an acre at the rate of \$2,584 per acre. Another sale took place between the same parties and the land involved brought \$3,000 per acre. Another sale was from the Fairmount Cemetery Association to private parties of something less than an acre at the rate of \$2,500 per acre.

106. The witness called by the Government placed a value of \$2,000 per acre on this zone. He gave consideration to a series of sales numbered 114 to 127, some of which have already been discussed in connection with the land in Zone 4. Giving due consideration to the character and location of this land with respect to industries in its locality and some consideration to the sales of these small areas of land, it is found that the value of this land is \$2,000 per acre or \$25,280 for all of the zone, heretofore found to be non-used and useful.

VALUE OF USED AND USEFUL LAND IN ZONE 6:

107. Zone 6 contains 3.383 acres of which .235 acre, used as a roadway, has been found to be used and useful and 3.148 acres, of which a small portion is used for a railroad right-of-way and the rest of which is vacant land, has been found to be not used and useful. Witnesses for respondent placed a value of \$10,000 an acre on this land or a total of \$33,830 and supported this value by a sale of 2.7 acres by the Burkhardt Packing & Provision Company to the Western States Packing Company in 1928 at a price of \$10,000 per acre. The witness called by the Government placed a value of \$4,000 per acre on this land or a total value of \$13,532. This witness states that this zone is valuable for small packing-house development and due to the nature of the terrain would require more than the usual expenditure for heavy foundations. In arriving at the value which he placed upon the land this witness gave consideration to sales in the so-called Union Pacific Industrial development and to sales by the stockyard company to the Burkhardt Packing Company and the Union Rendering Company. This witness gave little consideration to the Burkhardt offer to respondent of \$10,000 per acre for acreage in Zone 6 because of the divergence between this amount and the value at which the land was carried on the books of the Western States Packing Company, successor to the Burkhardt Packing & Provision Company. On the basis of all the information in the record with respect to the character and location of this land and with due consideration to the sales of parcels of land in this vicinity it is found that the value of the land in this zone is \$4,000 per acre and that the value of the .235 acre heretofore found to be used and useful is \$940, and that the value of the 3.148 acres found to be not used and useful is \$12,592.

**VALUE OF NON-USED AND USEFUL LAND IN
ZONE 7:**

108. There are in this zone 4.608 acres of land, all

of which has been found to be not used and useful. Witnesses called by the respondent valued this land at \$4,500 per acre or a total of \$20,736. They stated that this value is supported by their sales 25, 33, 34, 35, and 36. This is a series of sales of small parcels of land some distance south of respondent's property. In 1920 the American Smelting & Refining Company sold to the City and County of Denver about 41 acres on which there had formerly been a smelting plant. The land was practically a slag dump. The purpose of the city in purchasing the land was to buy some 300,000 or 400,000 cubic yards of slag which might be crushed and used. After the slag had been removed there were some 300,000 cubic yards of first class gravel in the tract. After the land had been bought by the city an offer of \$7,500 and later one of \$10,000 was made to the city for the land with the provision that the city might reserve the slag for its own use. The price per acre paid by the city for this land was \$1,220. This sale hardly represents a straight-out land sale. Another sale considered by the witnesses called by respondent was one of Union Pacific Railroad Company to the National Fuse & Powder Company. The area involved in this sale was slightly more than an acre and the price paid was \$3,532 per acre. The land is rough and has no street frontage. In order to reach it from the street an arroyo about 20 feet deep would have to be filled on the northeast; a deep open cut shuts off approach from that direction. This property has no trackage facilities. It is less favorably situated than is the land in Tract 7. Another sale was one from the Union Pacific Railroad Company to the City and County of Denver in 1932. The area of the land involved was .92 acre. The sale price was \$2,174. This land fronts on no street and was used by the city to provide an outlet for a storm sewer. This land is less favorably situated than is the land in Zone 7. The City and County of Denver in 1929 sold 2.8 acres to the National Fuse & Powder Company for \$7,000. This is a price of \$2,500 per acre. This land fronts on no highway or street. Another sale con-

sidered by witness called by respondent was one from Simon J. Feely to the National Fuse & Powder Company in 1929. The area of land is 1.83 acres and consists of a series of 26 lots. These lots are located in a block bounded by 38th Street, Brighton Boulevard, and Delgany Street. These lots lie at a considerable distance south of respondent's property and on the main boulevard leading from the packinghouse center into the city. These lots are much more favorably situated than is the land in Zone 7.

109. The witness called by the Government placed a value of \$3,000 per acre on this zone. He stated that the same sales information was considered by him as was the case in Zone 6, due regard being had for the triangular shape of the parcel and the difficulty of efficient industrial development on the southerly point. When respondent sold the County and City of Denver land for the purpose of widening 46th Street, it retained the privilege of building railroad tracks under, over, or at grade with 46th Avenue. A witness called by respondent is of the opinion that, because of this right retained by respondent, Zone 7 has accessibility to the industrial tract. The zone as such is not now served by the railroad, but in his opinion rails could easily be brought into the zone. The conclusion to be drawn from all the evidence with respect to this zone is that it is more valuable than some of the sales enumerated by the witnesses called by respondent, but that it is less valuable than the solid city block of lots cited by them. On the basis of all the testimony it is found that the value of Zone 7 is \$3,000 per acre and that the value of the 4.608 acres hereinbefore found not to be used and useful is \$13,824.

VALUE OF USED AND USEFUL LAND IN ZONE 8:

110. Zone 8 contains .759 acre, all of which has hereinbefore been found to be used and useful. Witnesses for respondent placed a value of \$10,000 per acre upon this ground or a total of \$7,590. This zone is a triangle with its longest side fronting on 46th Street. The Colorado & Southern

Railroad right-of-way and the Burlington right-of-way border it on the other two sides. In valuing this land witnesses called by respondent took into consideration the street frontage of this land, the nearness of it to the stockyards and to the business district of Elyria. *This is another instance in which witnesses unconsciously use as a standard of value for a piece of respondent's land the use to which the bulk of its land is being put.* One of the witnesses testified that as regards this zone the land is so close to the main body of the stockyards that it is not affected by the depression.

111. The witness called by the Government valued this land at \$6,000 per acre, or a total of \$4,554. This zone in his opinion is available for a gasoline station or some like development or it has the possibility of being used for a minor industry which might have railroad trackage available from the Union Pacific and Colorado & Southern joint track. Its shape, however, in all probability precludes its use for any important industrial development. On the basis of all the testimony it is found that the value of this zone is \$6,000 per acre and that the total value of the entire zone, namely, .759 acre heretofore found to be used and useful, is \$4,554.

*Value of used and useful land in
Zone 9:*

112. The land in Zone 9 contains 7.081 acres of which 3.956 acres have heretofore been found to be used and useful and 3.125 acres to be not used and useful. Witnesses called by respondent placed a value of \$20,000 per acre upon this land or a total value of \$141,620. The witness called by the Government placed a value of \$15,246 an acre upon this land or a total of \$107,957. All the witnesses considered numerous sales which have been made in the vicinity of this zone. One set of sales is the so-called Union Pacific development near the intersection of 46th Street and Brighton Boulevard. Another sale to which much attention was

given was that of the Murphy barn and lot, which is listed by the witness called by the Government in his report as Sale No. 21. This report gives the consideration for the land as \$6,000 and the consideration for the improvement thereon as \$16,000. The evidence is clear that regardless of the relative values of the land and improvements there is a reversal of figures and that the source of information gives the value of improvements as \$6,000 and that of the land as \$16,000. The area involved was slightly less than an acre. Most of the sales which are involved in the Union Pacific industrial development are at figures considerably below the value per acre placed upon Zone 9 by witness called by respondent. In the few cases where the per-acre sale price exceeds that placed upon Zone 9 by witnesses called by respondent the areas are so small as not to be indicative of the value of the land in this much larger zone. As heretofore pointed out the land in this zone is more of a retail character than of an industrial character such as the lands of respondent lying across the Chicago, Burlington & Quincy Railroad. The evidence is clear that the sales in the Union Pacific industrial development were bona fide sales.

113. Giving due consideration to the character of this land, its location to the sales which have taken place around it, and to the fact that the prices of the land and improvements were interchanged in the Murphy sale, it is found that the value of the land in this zone is \$16,000 per acre and that the value of the 3.956 acres, heretofore found to be used and useful, is \$63,296 and that of the 3.125 acres, heretofore found to be not used and useful, is \$50,000. [14]

*Value of Non-Used and Useful Land in
Zone 10:*

114. Zone 10 contains 2.303 acres, all of which heretofore have been found to be not used and useful. Witness

Petitioner's Note [14]—In final report used and useful acreage was placed at 4.448, total value \$67,814; non-used and useful acreage was placed at 2.633, total value \$40,143; value per acre set at \$15,246.

called by respondent placed a value of \$2,500 an acre upon this land or \$5,757.50 upon the zone. The witness called by the Government placed a value of \$1,500 per acre upon this zone or a total of \$3,455. This land is practically unusable for any other purpose than the mining of gravel. It lies across the Chicago, Burlington & Quincy Railroad and County Road No. 83 from the main body of respondent's other land. One of the witnesses called by respondent referred to its potential value as a dump heap and to the fact that one looking at the land would perhaps consider it worthless. All witnesses supported the values placed upon this land by various sales which have taken place at varying distances from the zone. A small triangular portion of this zone was sold by respondent as a filling station site at the rate of \$3,500 per acre. A number of sales listed by witnesses called by respondent were made at about \$3,000 per acre. Giving consideration to all the information in the record with reference to this zone and to the depleted condition of the gravel pit on it and its lack of suitability for any other purpose, it is found that the value of the 2.303 acres, all of which has heretofore been found to be not used and useful, in this zone is \$1,500 per acre or a total of \$3,454.50.

115. A summary by zones of the value of the land of respondent hereinbefore found to be used and useful and of that found to be not used and useful is as follows:

Zone	Price per Acre	Total Area		Used and Useful		Not Used and Useful	
		Acres	Total Value	Acres	Total Value	Acres	Total Value
1	\$ 9,000	38.267	\$344,403.00	33.360	\$300,240.00	4.907	\$ 44,163.00
2	6,000	22.982	137,892.00	22.147	132,882.00	.835	5,010.00
3	3,500	19.825	69,387.50	12.117	42,409.50	7.708	26,978.00
4	2,500	18.722	46,805.00	10.725	26,812.50	7.997	19,992.50
5	2,000	12.640	25,280.00	....	....	12.640	25,280.00
6	4,000	3.383	13,532.00	.235	940.00	3.148	12,592.00
7	3,000	4.608	13,824.00	....	....	4.608	13,824.00
8	6,000	.759	4,554.00	.759	4,554.00	....	....
9	16,000	7.081	113,296.00	3.956	63,296.00	3.125	50,000.00
10	1,500	2.303	3,454.50	....	....	2.303	3,454.50
Total		130.570	\$772,428.00	83.299	\$571,134.00	47.271	\$201,294.00

[15]

Petitioner's Note [15]—The tabulation in the final order differs in Zones 1, 2 and 9 by reason of reductions in land values made by secretary.

VALUE OF RESPONDENT'S USED AND USEFUL
STRUCTURES AND EQUIPMENT AND VALUE
OF NON-USED AND USEFUL STRUCTURES
AND EQUIPMENT

General statement:

116. Two witness were called to testify on the value of respondent's structures and equipment. One of these was the engineer who testified with respect to respondent's land. His qualifications have been given hereinbefore. The other witness, who was called by respondents, is an engineer and architect of wide experience. He is vice president of the American Appraisal Company, and has had many years' experience in connection with construction and has had ample opportunity to observe the operations of stockyards plants including the yard of respondent. No question was raised in the hearing as to his qualifications. None is raised here. He is thoroughly competent and widely experienced.

117. The engineer called by the Government testified that the cost of reproduction of respondent's structures and equipment, that is, the total cost of material and labor together with overheads, is \$2,525,150. Counsel for respondent stated on behalf of respondent that it would accept as correct this cost of reproduction new of its property, provided a slight adjustment be made on account of an error in inventory in the water and sewer systems. These adjustments were made and later introduced in evidence by the Government. The engineer for the Government stated that in valuing the property he reached his conclusion upon the basis that the material was in place and that the property is able and willing to function as a stockyard, that is, as a business earning income. The total cost of reproduction new of all respondent's structures and equipment, together with direct construction overheads but not indirect overheads, of \$2,525,150 was allocated in accordance with a finding hereinafter made, \$2,114,699 to used and useful structures and equipment, and \$410,451 to non-used and useful structures and equipment. [16]. The engineer for respondent stated that in his judgment the cost of reproduc-

tion new of respondent's structures and equipment as of the date of the valuation and as determined by the witness called by the Government is substantially correct in detail. It is his opinion, however, that this amount is only the cost of the reproduction new of the properties and construction overheads. The witness called by respondent placed a value of \$2,491,233.44 upon respondent's structures and equipment new before depreciation. To the cost of reproduction new of structures and equipment the engineer called by the Government added certain percentages to cover a number of indirect construction overheads. To the cost of reproduction new as found by the engineer called by respondent he added a lump sum of \$446,438. It has already been found that all the structures and equipment located on land found to be used and useful are used and useful, and that all structures and equipment located on land hereinbefore found to be not used and useful are not used and useful.

*118. In conformity with this general finding, it is found specifically that the following units of property as indicated in the table are used and useful and not used and useful, and that the value of each unit, including construction overheads, is as set forth opposite the various items, and that the total cost of reproduction new of respondent's used and useful property, including direct overheads, is \$2,114,699 and that of the non-used and useful structures and equipment, including direct overheads, is \$410,451. [17].

**BUILDINGS, STRUCTURES AND EQUIPMENT
FOUND TO BE USED AND USEFUL AND
NON-USED AND NON-USEFUL**

Reproduction New
Non-Used &
Used & Useful Non-Useful

Office Buildings

New Exchange Building	\$ 228,259
Old Exchange Building	96,900

Petitioner's Note [16]—In the final report the allocation was: \$2,118,961 to used and useful structures, and \$406,189 to non-used and useful structures.

Petitioner's Note [17]—The final report shows total cost of reproduction new as billing \$2,118,961 for used and useful property, and \$406,189 for non-used and useful property.

Chute House (Bulletin Office)	32,361	
<i>General Buildings</i>		
Garage and Shop	21,952	
Club House		\$ 31,513
Stadium		176,371
Stadium Run-Over Shed		* 917
Stadium Hook-up Shep		* 3,345
Stadium Heating Plant		6,115
Restaurant	1,819	
Stadium Restaurant		6,066
Carpenter Shop	837	
Material Shed	436	
Hide Storage (One Story Tile Building)		14,845
<i>Cattle Division</i>		
Open Pens	489,548	
Feed Lots (Pens 4204-4212-4226)	2,723	
Cattle Dip	5,166	
Branding and Dehorning Chute #1	3,714	
Branding and Dehorning Chute #2	3,637	
Branding and Dehorning Chute #3	4,756	
<i>Viaducts and Subways</i>		
Foot Viaducts	13,229	
Stock Viaduct	19,684	
Subway	7,066	
<i>Hog Division</i>		
Hog Shed #1	10,501	
Hog Shed #2	12,557	
Hog Shed #3	12,528	
Hog Shed #4	17,762	
Hog Shed #5	6,706	
Immunization Plant	6,688	
Sheep Dip and Drain Pens	5,033	
Sheep Pens at Sheep Dip	2,193	
<i>Sheep Division</i>		
Sheep Barn #1	282,254	
Sheep Barn #2	285,465	
<i>Horse and Mule Division</i>		
2 Story Brick Barn #1	37,816	

Petitioner's Note [18]—In final report items marked (*) appear in used and useful column. In final report total used and useful figure was \$2,118,961 and for non-used and useful the total figure was \$406,189.

Covered Alley Between H & M 1
and H & M 2

	509
2 Story Brick Barn #2	15,809
Frame Shed #6	4,170
Frame Shed #7	11,956
Brick Barn	21,757
Frame Barn (Show Barn)	10,089
Brick Barn (Show Barn)	15,163

Wash House

5,942

Sales Pavilion

12,885

Horse & Mule Barn #3 (3 Story Brick) 89,517

Blacksmith Shop 5,124

Retaining Wall 5,285

Corrals & Outside 5,334

Feed Facilities

Hay Barn #6 6,022

Hay Barn #2 4,328

Hay Barn #3 13,372

Hay Barn #4 18,564

Hay Barn #5 5,980

Corn Tank 3,189

Loading and Unloading Facilities

Burlington Chutes 29,654

Union Pacific Chutes 34,761

C & S Chutes 11,851

River Chutes 17,522

Truck Out Pens 916

Hog & Sheep Truck-In Dock & Area 3,426

Office at Hog & Sheep Truck Drive-In 902

Scale Houses and Scales

Cattle Scale #1 4,692

Cattle Scale #2 4,192

Cattle Scale #4 5,963

Cattle Scale #5 5,394

Cattle Scale #6 5,379

Cattle Scale #10 6,222

Cattle Scale #11 6,279

Sheep Scale #7 5,663

Sheep Scale #8 5,427

Sheep Scale #12 5,206

Hog Scales 3-9 6,119

Hog Scales 13-14 6,492

Hay Scale 1,180

Hay Scale	1,600	
Hay Scale	1,180	
<i>Manure Disposal</i>		
Manure Dump (& Area)	8,058	
Manure Dump Office	923	
Manure Dump Shed	1,435	
<i>Railroad</i>		
Railroad Tracks		58,039
Trackmen's Tool House		261
Yard Master's Office		364
General Roadway	13,810	
Sewer System	97,806	
Water System	57,064	
Fire Protection	1,404	
Floating Equipment (Wagons, etc.)	7,221	
Horses, Mules and Harness	2,979	
Total Material and Labor	\$2,114,699	\$410,451

119. *Condition percent:* The witness called by the Government who appraised respondent's structures and equipment gave it as his opinion that taken as a whole respondent's property was 80.545 percent as good as new. It is the opinion of the engineer who was called by respondent that the structures and equipment and other physical property of respondent lacks 11.1 percent of being as good as new. This percentage deducted from 100 leaves a condition percent of 88.9. In arriving at these respective condition percents the engineers followed somewhat different methods of procedure. The engineer called by the Government was assisted in his work of appraisal by a number of engineers who are employed in the office of the principal valuation engineer at Kansas City, Missouri. There were five assistant engineers engaged in this work, each of whom gave particular attention to certain portions of respondent's structures and equipment. The chief engineer had each of these five engineers inspect each unit of equipment and structure of respondent's property and place upon it an estimate of its present conditions compared with its condition if new. The chief valuation engineer then took the percents condition

as reported to him by his assistant engineers and, giving double weight to the opinion of the engineer who inventoried a particular unit, averaged the percents reported to him. *The chief engineer, using this information as a guide only, then independently determined the condition percent of each unit.* [19] He applied the condition percent of certain groups of structures and equipment against the total cost of reproduction new of each unit, thus ascertaining the cost of reproduction new less depreciation of those groups. The sum of the reproduction cost new less depreciation was related to the sum of the reproduction cost of those units. The resulting percentage represents the weighted average percent condition of all respondent's structures and equipment as testified to by Government engineer.

120. The engineer called by respondent is familiar with respondent's property, having observed it during the process of construction of a number of units at different periods, particularly in 1923, 1925 and 1928 of the cattle yards, and the construction of the new sheep house in 1929. The witness has for many years observed also the concealed construction of the water and sewer systems, particularly when they were opened up for repair or alteration. Both witnesses took into consideration the factors of structural and economic obsolescence, together with the actual physical structural deterioration. The witness called by respondent is of the opinion that the remaining expectancy of life of a property item as compared to a similar expectancy of a new item is a definite factor in establishing the value of the property for sale, but that it is not a factor of material weight in the valuation of a property for rate-making purposes. For this purpose the actual condition of the property is controlling. Observed depreciation is all that should be given consideration, which depreciation would include such obsolescence as might exist. It is the personal conviction of the

Petitioner's Note [19]—At this point the final report substitutes in place of italicized portion as follows: Then using this information as a guide, he inspected the property, checking the estimates as reported to him and arrived at a condition percent.

witness that the only elements of depreciation properly to be deducted in setting up value of structures and equipment as a part of a rate base is the actual depreciation which affects the capability of the property to render services as compared with new. He states, however, that observed depreciation has been given a somewhat broader interpretation by some authorities whereby it has been claimed that not only the depreciation that could be observed should be recognized but also allowances made for depreciation in certain portions of the property which could not actually be seen or inspected.

121. As regards the condition percent of many of the units of respondent's structures and equipment the two witnesses were in close agreement. With respect to the condition percent of that portion of respondent's equipment which is under the ground, such for instance as its system of water and sewer facilities and the underground portion of posts throughout the stockyard and the inside of concrete pavements, there is considerable difference in the opinion of the witnesses as to the percent condition. *Due to the fact that witness for respondent is more familiar with the underground facilities of respondent than is the witness called by the Government or his assistants, somewhat more weight should be given to his testimony with respect to the condition percent of this invisible property than to the opinion of the witness called by the Government. While the cost of reproduction new of respondent's sewer and water systems does not constitute a major portion of the total cost of reproduction new of respondent's structures and equipment, it does constitute a considerable portion and a placing of a subnormal percent condition on these invisible structures would tend to produce a weighted average condition for the property as a whole lower than the facts warrant. If it be assumed that the engineer for the Government is correct in his opinion as to the condition percent of the major portion of the structures and equipment of respondent, his underestimate of the percent condition of the invisible structures would result in a condition percent some-*

what lower than the facts warrant. The witness called by the Government is less familiar with the effect of climate on respondent's structures and equipment than is the witness who was called by the respondent. The witness called by respondent testified that the physical condition of respondent's stockyards is well nigh the best in the country. It may be that the witness called by the Government placed a somewhat lower percent condition on respondent's structures and equipment than climatic conditions would warrant. [20]

122. On the other hand the witness called by respondent stated: "It is my personal conviction that the only elements of depreciation to be properly deducted in setting up value as a part of the rate base is the actual depreciation which affects the capability of the property to render services as compared with new." This view of depreciation gives less weight than is warranted to the actual physical condition of the property. A property in a very poor state of repair and destined to remain in use for only a short time might render service quite similar to that of a new property. Nevertheless, from the standpoint of management it would be unwise to follow a policy which looked upon these two properties as being anything like equal in point of physical deterioration. It is reasonable to conclude that the witness called by respondent placed a percent condition upon respondent's property somewhat higher than conditions warrant.

123. A very considerable portion of respondent's property consists of concrete alleys, pens with concrete flooring, and is constructed of posts, wood gates, troughs, and other facilities which can be replaced piece by piece and thus maintained in a high state of preservation through repairs. *In the case of such a property one would expect to find a comparatively high condition percent. Due consideration of the character of respondent's property and of the fact that the evidence warrants the conclusion that the en-*

gineer called by the Government placed a lower condition percent than was warranted, and that the witness called by respondent gave greater weight than was warranted to the capability of respondent's property of rendering a service comparable to that which it would render if entirely new, leads to the conclusion that the condition percent of respondent's structures and equipment is 83 percent. An examination of the testimony with respect to the condition of the property found to be not used and useful shows that it is somewhat less than the weighted average condition percent of all the property. The condition percent, therefore, of those portions of the structures and equipment hereinbefore found to be used and useful is somewhat higher than the weighted average condition percent of all structures and equipment. It is found, therefore, that the property of respondent found to be used and useful is in 84 percent condition. [21]

General Overheads:

124. The engineer for the Government added to the total cost of labor and material 5 percent of reproduction cost new for omissions and contingencies. He then added to this total certain percentages thereof on account of engineers' and architects' fees, legal expenses, general salaries and expenses, and fire insurance. He added also taxes paid by respondent during the year next preceding that in which the hearing was held. To the sum of the total cost of material and labor and the items enumerated above he added $3\frac{1}{2}$ percent to cover interest at 7 percent for a period equal to one-half of that taken by him to be the period of construction. He used the six-months period for the reason that not all of the capital would have to be raised at the beginning of the construction period but could be raised at various

Petitioner's Note [21]—In place of portion italicized final report reads as follows: In the case of such a property one would expect to find it in a comparatively high state of preservation. On the basis of all the testimony and giving due weight to all of the factors shown by the record to have a bearing upon the condition percent of respondent's property, it is found that the condition percent of the property is 80.545.

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times during the year and that on the whole the interest paid would be on an amount of capital averaging about half of the total cost of reproduction new of material and labor.

125. Taking the total cost new of material and labor of the used and useful structures and equipment as heretofore found and the total cost of reproduction new of the non-used and useful structures and equipment as \$2,114,699 and \$410,451, [22] respectively, and considering the omissions and contingencies, general overheads, and interest during construction, a summary of the total cost of reproduction new of respondent's structures and equipment found to be used and useful and those found not to be used and useful is as follows:

	Used and Useful	Not Used and Useful
Total cost of reproduction new labor and material	\$2,114,699	\$410,451
Omissions and contingencies 5%	105,735	20,523
	<u>\$2,220,434</u>	<u>\$430,974</u>
Engineers' and architects' fees 5%	111,022	21,548
Legal expense 1%	22,204	4,310
General salaries and expenses 2%	44,409	8,619
Fire insurance ½ of 1%	11,102	2,155
Taxes during construction	30,551	5,930
	<u>\$2,439,722</u>	<u>\$473,536</u>
Interest during construction	85,390	16,574
	<u>\$2,525,112</u>	<u>\$490,110</u>
Net additions to used and useful property on account of inventory correction in water and sewer systems	2,283	----
Total cost of reproduction new	<u>\$2,527,395</u>	<u>\$490,110</u> [23]

Petitioner's Note [22]—Final report puts these items at \$2,114,699 and \$410,451 respectively.

Petitioner's Note [23]—This table appears in the final report as follows:

	Used and Useful	Not Used and Useful
Total cost of reproduction new labor and material	\$2,118,961	\$ 406,189
Omissions and contingencies 5%	105,948	20,310
	<u>\$2,224,909</u>	<u>\$ 426,499</u>
Engineers' and architects' fees 5%	\$ 111,245	\$ 21,325
Legal Expenses 1%	22,249	4,265
General salaries and expenses 2%	44,498	8,530
Fire Insurance ½ of 1%	11,125	2,132
Taxes during construction	30,613	5,868

	<u>\$1,134,936</u>	<u>\$ 485,483</u>
Engineers' and architects' fees 5%.....	\$ 111,245	\$ 21,325
Legal Expenses 1%	22,249	4,265
General salaries and expenses 2%.....	44,498	8,530
Fire Insurance ½ of 1%.....	11,125	2,132
Taxes during construction	30,613	5,868
	<u>\$2,444,639</u>	<u>\$ 468,619</u>
Interest during construction	85,562	16,402
	<u>\$2,530,201</u>	<u>\$ 485,021</u>
Net additions to used and useful property on account of inventory correction in water and water systems.....	2,283	
	<u>\$2,532,484</u>	<u>\$ 485,021</u>

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126. The engineer for respondent placed a value of reproduction cost new upon all of respondent's property of \$2,491,233.44. To this he added on account of indirect construction costs \$446,438, making a grand total of reproduction cost new of labor and materials and indirect construction costs of \$2,937,671.44. These figures are not precisely comparable for the reason that the engineer called by the Government reached his conclusion as to value of respondent's structures and equipment by assuming that the materials were in place and that the property is able and willing to function as a stockyard and as a business earning income, that is, as a going concern, whereas the engineer for respondent testified as to an additional sum for going concern value. [24]

127. On the basis of all the testimony and with due consideration to the factors discussed hereinbefore, it is found that the value of structures and equipment in place on respondent's property as a going concern capable of earning money, and earning money, is \$2,527,395 for the structures and equipment hereinbefore found to be used and useful, and \$490,110 for the structures and equipment hereinbefore found to be not used and useful. Applying 84 percent, the percent condition hereinbefore found, to these respective values, the total cost of reproduction new less depreciation of respondent's used and useful structures in place as a going concern is \$2,123,012, and that the cost of reproduction new less depreciation of respondent's non-used and useful structures is \$411,692. [25]

Petitioner's Note [24]—Italicized portion omitted in final report.

Petitioner's Note [25]—Corresponding paragraph is 126 of the final report and reads as follows: On the basis of all the testimony and in consideration of those factors relating to value discussed hereinbefore, it is found that the cost of reproduction new of respondent's used and useful structures and equipment in place in a property which is a going concern capable of earning money, and earning money, is \$2,532,484 and that the cost of reproduction new of its non-used and useful structures and equipment \$485,021. It is also found that the total cost of reproduction new less depreciation of respondent's used and useful structures and equipment in place is 80.545 percent (the percent condition hereinbefore found) of \$2,532,484 or \$2,039,789. It is also found that the cost of reproduction new less depreciation of respondent's non-used and useful structures and equipment is 80.545 percent of \$485,021 or \$390,660.

INTEREST ON LAND DURING CONSTRUCTION

128. The engineer for the Government did not include in the value of respondent's land or in the cost of reproduction-new of respondent's structures and equipment anything on account of interest on the value of the land during the period of construction. The value of the land of respondent hereinbefore found to be used and useful is \$571,134 and the value of the land found not to be used and useful is \$201,294. Seven percent of the value of respondent's used and useful land is \$39,979.38, and seven percent of the value of respondent's non-used and useful land is \$14,090.58. Seven percent is the rate used by the engineer for the Government in computing interest which he included in the value of respondent's structures and equipment. It is found that there should be included in the value of respondent's used and useful property \$39,979 to cover interest on land during a construction period of one year. [26]

WORKING CAPITAL

129. An accountant called as a witness by the Government to audit the books and accounts of respondent gave it as his opinion that respondent requires \$117,000 as cash working capital in the conduct of its business. From the books and records of the company he ascertained the cash-requiring items and the amounts of money necessary to meet each item as it fell due. He ascertained also the rate of turnover of commodities used by respondent and the frequency of labor payment.

130. Respondent paid out during the 5-year period from 1930 to 1934, inclusive, \$784,308.73 for hay, \$34,159.93 for bedding, and for grain \$80,987.48. The average annual amounts expended for these commodities during the period

Petitioner's Note [26]—Final report shows:

Value of used and useful land	\$536,825.00
Value of non-used and useful land	188,149.00
7% of value of used and useful land	37,577.75
7% of value of non-used and useful land	13,170.43
Amount included for interest	30,267.00

were \$156,861.55 for hay, \$6,831.99 for bedding, and \$16,197.50 for grain. The average turnover of hay was 3.1 times during the year, of bedding 3.8 times, and of grain 9 times. The total annual cost of each of these divided by the rate of turnover shows the amount of cash which is necessary to finance the supplying of these commodities to patrons. The resulting working capital ascertained through this computation is \$52,287.18 for hay, \$1,708 for bedding, and \$1,799.72 for grain. These average amounts of money would not, however, be sufficient to meet the requirements at the peak seasons of the inventories. The accountant included in addition to the average amounts shown above \$20,000 as working capital to meet the peak season inventory requirements. Respondent kept on hand during the 5-year period an average inventory of materials and supplies amounting to \$10,633.84. The monthly average expenses incident to other cash-requiring items was \$14,417.30. The weekly payroll for the period was \$3,926.05.

131. Translating these figures into round numbers the accountant summarized the items of working capital, which, in his opinion, are required by respondent in the conduct of its business as follows:

Inventories - Hay	\$ 52,000.00
- Bedding	2,000.00
- Grain	2,000.00
- Material & Supplies	11,000.00
Cash not elsewhere provided	14,000.00
Insurance and Deferred	12,000.00
Pay Rolls - Weekly	4,000.00
Cash to meet Peak Inventory	20,000.00
	<hr/>
	\$117,000.00

132. Respondent did not introduce any testimony as to the amount of working capital required in the conduct of its business. It did, however, introduce in evidence a statement showing its accounts receivable as of December 31, 1934, and the number of days the respective items had been due. The bills receivable outstanding on this date totalled \$23,271.40

and the average number of days during which these bills had been due was 91.5. This witness testified that the average amount of bills receivable for the year 1934 was in excess of that shown to be outstanding as of December 31, 1934. The average amount outstanding during the year was \$38,000. The witness called by the Government included nothing in his working capital on account of these bills receivable because he believes that respondent has nothing to sell other than service, which is dependent upon the furnishing of labor, materials, supplies, and feed.

133. For purposes of computation, the accountant for the Government reduced the actual experience of respondent to a hypothesis in which inventories would be kept constant and perpetual, and the payroll continuous. In order that inventories and payroll may be kept at a hypothetical level, all sales from inventory and sales of the results of labor must be paid for when due. In the instant case not all of these are paid for when due. As of December 31, 1934, respondent's accounts receivable were \$23,271.40. For the year the average of accounts receivable was about \$38,000. Under these circumstances either the hypothesis is wrong or the \$117,000 for working capital is inadequate. No question is raised in the evidence as to the validity of the hypothesis. The conclusion is, therefore, that the \$117,000 for working capital is somewhat too small. [27]

134. Of the accounts receivable on December 31, 1934, \$8,423.43 was overdue on account of rents and manure sales, which are both non-cash-requiring items, and unloading and loading, which is not a service the reasonableness of the rates for which is being determined herein. If the \$8,423.43 be subtracted from the \$23,271.40 the remainder is \$14,847.97, which is approximately 64 percent of the total bills receivable. Assuming that this same percentage prevailed throughout the year 1934, the accounts receivable incident to cash-requiring items would be 64 percent of \$38,000, which is approximately \$24,300. This added to the \$117,000

Petitioner's Note [27]—Italicized portion omitted in final report.

gives \$141,300. It is found that \$141,300 is the amount of *working capital* which respondent is entitled to have included in the value of its property. [28]

GOING CONCERN-VALUE [29]

135. The information of record upon which dependence must be placed to arrive at going-concern value was given by two engineers and the assistant general manager of respondent. The engineer called by the Government to testify as to the value of respondent's land, structures, and equipment stated that he valued the property of respondent in place and reached his conclusion by considering the fact that the material was in place and that the property is functioning as a successful stockyard, and as a business earning an income. The assistant general manager of respondent testified that respondent had donated to packing companies and railroad companies land which cost respondent originally \$254,589.38 in order to induce them to locate near respondent's stockyard. To this cost he added carrying charges up to the date of the hearing, which brought the cost up to \$325,547.10. The engineer called by respondent testified that in addition to the cost of reproduction new less depreciation of respondent's property there should be added \$330,000 to cover the element of going-concern value. At one time this witness was engaged by the Pullman Company to determine

Petitioner's Note [28]—Corresponding paragraph is 133 of the final report and reads as follows:

Of the approximately \$23,271 of bills receivable on December 31, 1934, whose average life was 91 days, slightly less than \$8,500 was overdue on account of non-cash-requiring items, rents and manure sales, and the non-stockyard service of loading and unloading. Not all bedding is used in rendering a stockyards service. Not all capital tied up in straw, therefore, is used rendering a stockyards service. Respondent has increased wages 8%, which will tie up somewhat more capital. It is not possible to make an exact mathematical allocation of these amounts as between stockyard services and non-stockyard services or as to the exact amount incident to bills receivable on account of stockyard services. On the basis of the computations as made by the accountant, the testimony of respondent's secretary and treasurer, and all other information of record, it is found that \$139,000 is the amount of working capital which respondent is entitled to have included in the value of its property.

Petitioner's Note [29]—In the final report this entire division is materially changed.

the going-concern value of its business. The amount of going-concern value which he attributed to this company together with the method used by him in arriving at it was rejected by the Interstate Commerce Commission along with other estimates and other methods submitted by other witnesses. This engineer enumerates a number of elements which tend to create value in excess of investment in the physical properties. Among these he includes the volume of business handled by respondent, an established organization of executives and personnel, a system of records, good credit, and a well-balanced layout of physical facilities. He considers as one of the most outstanding features to be given consideration the expenditure of upwards of \$325,000 by respondent to induce packers and railroads to locate near its property. He refers to the fact that in his 1930 appraisal of the property he made some studies as to the reasonable cost of development, that is, the expenditures which theoretically would have to be made in bringing the company to a status of normal operations following the completion of the physical properties, and that, if capital should come to him with the request that he establish a price which it could afford to pay to purchase the assets of the Denver company as an alternative to making a similar investment in purchasing the land and developing a new stockyard, he would recommend a figure greater than \$350,000 as going-concern value of respondent.

136. Original cost of land which respondent has given away plus carrying charge neither indicates the presence of going concern or measures its amount even though present. The sum of the original cost and carrying charges on this land increases from year to year. Given a sufficient life span, respondent's going-concern value would reach infinity, irrespective of efficiency or the lack of it.

137. Another factor relied upon by the witness was the high character of the personnel of respondent. It is to be presumed that the personnel is of a high character, and that respondent pays it adequately out of current income for services rendered. Payroll of officers and manager and oth-

er employees is an operating expense and not a capital expenditure. No question has been raised as to the reasonableness of the remuneration of officers or manager in arriving at reasonable expenditure hereinafter determined.

138. There is nothing in the record of sufficient definiteness to make it possible or practicable to determine a definite amount for going-concern value which it would be appropriate to include as a separate item in the value of respondent's plant. This is not, however, to deny the existence of going-concern value. The testimony throughout is indicative of the high character of the services rendered by respondent and its efficiency in the operation of its business. The testimony shows that the various witnesses arrived at their valuations having in mind that the property was a part of a going concern and that their values were arrived at with this element in mind. In adopting the cost of reproduction new less depreciation of the structures and the value of the land as found consideration has been given to the element of going-concern value and the values so found include the value of the property as a going concern. To include an additional specific amount in the rate base would be a duplication and no separate allowance is, therefore, made on account of going-concern value.

139. A summary of the value of respondent's used and useful land, the cost of reproduction new of its structures and equipment, including direct construction overheads, indirect overheads, interest on used and useful land during construction, and working capital, and the cost of these, less depreciation where depreciation exists, for respondent as a going concern is as follows:

	Cost of Reproduction New	Condition Percent	Cost of Reproduction New Less Depreciation
Land - Used and Useful	\$ 571,134	100	\$ 571,134
Total Material, Labor, Direct Construction Overhead and Indi-			

rect Construction Overhead	2,527,595	84	2,125,012
Interest on Used and Useful Land during Construction	39,979	100	39,979
Working Capital	141,300	100	141,300
Total			<hr/> \$2,875,425

140. It is found that the fair value of the property of respondent as a going concern is \$2,875,425, and that the rate base on which respondent is entitled to earn a fair return is \$2,900,000.

F. REASONABLE RATE OF RETURN

141. Two witnesses testified as to what rate of return in their opinions a schedule of rates for respondent should produce in order to be reasonable. Both of these witnesses gave opinions with respect to this matter in a former hearing. One of them is a local investment banker with wide experience. He is a member of the board of directors of the General Stockyards Corporation, and of the Denver Union Stockyard Company. No question was raised as to his qualifications at the time of the hearing and none is raised here. At the time he testified he had carefully read the testimony of the other witness who testified on rate of return and had examined certain investment information submitted by that witness. He stated it as his belief that the theory of limiting electric light and power or other similar public-utility concerns to a fixed rate of return is in large part due to the fact that such utilities exercise a governmental function, and that frequently this is under a franchise which has a truly monopolistic grant and generally is accompanied by a truly sovereign grant of eminent domain. Where the Government elects to delegate to individuals the right and power to perform its duties (the performance of which if done by the Government would theoretically be on a non-profit basis, or if profit were made it would be used to reduce taxes) the Government unquestionably has the right to say how much compensation those individuals shall have, namely, how much

they shall be permitted to earn. In stockyard companies, he thinks, the situation is different; they do not exercise a Governmental function, do not have the right of eminent domain, and they are not monopolies.

142. The witness pointed out the competitive character of respondent's business and discussed at length the hazards to which it is subject. He stated that it is always easier to raise capital for an enterprise which bids fair to grow rapidly in size and importance and that investors prefer to place their money in common stocks of going businesses which are enjoying rapid growth in sales and earnings. In the opinion of the witness, purchasers of common stock almost universally buy stock, not only on the strength of the current showing of earnings, but on prospect of earnings as well, whereas investors in bonds and preferred stock are more interested in stability of earnings and a sufficient margin above interest and dividends so that a fixed rate of return will be paid regularly. The witness stated that the common-stock purchaser, however, has a different view, and that if one studies the earnings records of stockyards it is apparent that this is not a line of business where very rapid growth can be expected. The holder of common stocks of stockyard companies can rarely expect a stock dividend or any great increase in cash dividends. Therefore it is necessary for the common stock of stockyard companies to pay a much higher yield if the investor's dollar is to be obtained. The witness stated it as his opinion that the best measure of what the public will demand as a rate of return on stockyard property, is the composite rate of return at which the securities of stockyards have been selling in the past. As indicative of what this composite rate of return on stockyard property is he submitted information showing the composite return arrived at by averaging the interest paid on the bonds, the dividends paid on the preferred stock, and the earnings per share on the common stock. This composite average yield for the years 1930 to 1934, inclusive, was 8.39 percent. The year 1934 was a grossly abnormal year because of the Government's cattle-buying program. If this year be eliminated,

the composite average for the remaining years of the period is 7.75 percent.

143. Witness called by respondent submitted other information in which was shown, as of December 31, 1934, the same data for the stockyards operating at Wichita, Omaha, St. Louis, St. Paul, Fort Worth, St. Joseph, Kansas City, and Sioux City, which showed a composite average return for these yards of 9.923 as compared with a yield of 10.965 for Denver. The witness is of the opinion that 1934 was an unusual year and that it would be unsatisfactory to submit only this year. During 1933 the Government's hog-buying program was in operation and the witness is of the opinion that another year should be taken as representative. He took, therefore, figures for 1932 at Omaha, Kansas City, Fort Worth, Wichita, and St. Paul. These show that the composite return for these markets averaged 8.2 percent in 1932.

144. At the time the witness' testimony was given, the bonds of the Denver Union Stock Yard Company were selling to yield less than 5 percent and the preferred stock, which is callable, to yield 6.7 percent. It is the witness' opinion that, if the company had had no securities outstanding at the time he testified, it might have been possible to issue bonds on a 4½ percent basis and preferred stock on a 6½-percent basis. These securities, in his opinion, would sell at these yields only in case a substantial portion of the valuation of the property were represented by common stock.

145. In the opinion of the witness, the earnings per share of this common stock would have to be very attractive, at least 10 percent of its par value or market value in case the stock had no par value. It is the belief of the witness that the Denver Union Stock Yard Company is entitled to and should have a rate of return of 8 percent on the valuation of the property.

146. The witness is of the opinion also that, if the Secretary should permit respondent an 8 percent return, and if that 8 percent return when applied to the value of respond-

ent's property as found by the Secretary should result in an increase in yardage charges, he would feel that respondent was entitled to make those charges as a matter of right, that is, to earn 8 percent on the fair value of the property, but that other considerations might enter into the wisdom of attempting to earn that return at a certain time, as, for instance, during a depression. The witness is of the opinion that the dividend policy of a corporation ought to be as liberal as possible to the stockholders, but not so liberal as to make impossible the building up of a reserve to take care of possible catastrophies or unforeseen contingencies. In 1930 the witness was of the opinion that the Denver Union Stock Yard Company was entitled to a rate of return of 10 percent.

147. The witness called by the Government to give his opinion as to what rate of return a schedule of rates should produce in order to be reasonable, is an economist who has given many years to the study of investments and has made a first-hand study of the subject throughout the United States. His qualifications were not questioned at the hearing. They are not questioned here. He stated that in his opinion a schedule of rates which would produce over the next few years a return varying from $6\frac{1}{2}$ to 7 percent would be reasonable. He qualified this statement, however, by saying that he did not think that a schedule of rates would be unreasonable if in the then current year, namely 1935, it should produce a rate of return somewhat below this zone of reasonableness. He stated that 1935 would in all likelihood be a year of subnormal receipts and that a schedule of reasonable rates could not be expected to yield a normal return in a year of subnormal volume and by the same token that if there should occur within the next five years a year of abnormally high receipts and the rates should produce a return of above 7 percent he would not for that reason alone judge the rates to be unreasonably high.

148. He testified in 1930 that it was his opinion that a schedule of rates which would have produced a rate of return of from $7\frac{1}{2}$ to 8 percent in the year 1929 would have been

reasonable. In his statement he included a table showing the average monthly yield of long-time Government bonds from January 1926 to June 1935. The average yield in 1930 of these bonds was 3.28 and for the year as a whole varied from 3.17 to 3.43. He introduced into evidence also a statement showing for industrial and public-utility corporations the trends in bond yields, preferred stock yields, and common stock yields. These yields were bracketed in steps of one-fourth of one percent from $4\frac{1}{2}$ percent up to 7, and the number of issues showing the yield below $4\frac{1}{2}$ percent and above 7 percent stated for each of the years from 1927 to 1935 inclusive. The tabulation shows also the weighted average annual yield for these same securities.

149. The average annual yields on public utility and industrial bonds were as follows:

Year	PUBLIC UTILITY	INDUSTRIAL
	Percent	Percent
1927	4.93	4.90
1928	4.81	4.66
1929	4.45	5.09
1930	4.59	5.03
1931	5.05	5.42
1932	5.59	6.05
1933	5.51	5.60
1934	5.31	5.64
1935 *	5.04	5.21

* As of May 10 only.

150. The average yields on preferred stocks for the same years are as follows:

Year	PUBLIC UTILITY	INDUSTRIAL
	Percent	Percent
1927	5.63	5.42
1928	5.29	5.24
1929	5.27	5.46
1930	5.14	5.36
1931	5.44	5.62
1932	7.05	7.72

1933

6.56

5.09

1934

*

**

* Thirteen out of 16 issues sold at 6.75 percent or more.

** Eleven out of 41 issues sold at between 4.76 and 5 percent, and 5 sold above 7 percent.

151. The average yields on common stock for the same years are as follows:

Year	PUBLIC UTILITY	INDUSTRIAL
	Percent	Percent
1927	4.99	4.98
1928	4.39	4.27
1929	3.26	4.09
1930	3.78	4.65
1931	5.20	5.75
1932	8.18	7.36
1933	7.58	4.82
1934	*	**

* Three issues selling at 5.50 or below, and 6 selling at 7 or above.

** Thirty-two out of 52 issues at 5 percent or below, and 6 selling at 7 or above.

152. The witness stated: "The conclusion which I draw from these yields is that within the period since the last hearing the yield on high-grade public-utility and industrial bonds has declined by about one percent. I am of the opinion that the yield obtainable on good preferred stocks at the present time is approximately one percent less than that obtainable at the date of the last hearing." He qualified this statement, however, by saying that an exception ought to be made in the case of public-utility stocks, both preferred and common. He attributed the decline in price, which would raise the yield, to special conditions, and did not believe that the situation with respect to public utility stocks should be taken as typical of the general investment market.

153. With respect to common stocks the witness stated:

"The common-stock situation has been abnormal for many years, and it is difficult to draw any conclusion from facts relative to it which is thoroughly reliable in forming an opinion with respect to a normal yield on common stocks, but I do know this—that for much of the time for the last ten years the purchaser of common stocks has not been able to get as large a yield in current cash dividends as investors in bonds of the identical corporations issuing the stock."

154. After having formed a tentative opinion of his own investigation of the earnings and yields of various types of securities issued by corporations and after having reached a tentative conclusion with respect thereto, the witness checked these opinions by the yields on various types of securities as shown by financial service organizations and by other information issued by them. The purpose of this investigation was to determine the measure of decline in yields during the past few years. He gave it as his opinion also that stockyard properties in general represent a stable type of business, and included in his statement a comparison of the profits of industrial and public-utility corporations generally with earnings of a large number of stockyard companies throughout the United States and the earnings of the Denver Union Stock Yard Company.

155. The rate of return testified to by the investment banker in 1930 as reasonable was 10 percent and in the instant case 8 percent. The zone of reasonableness testified to by the economist called in 1930 by the Government was from $7\frac{1}{2}$ to 8 percent, and in the instant case, from $6\frac{1}{2}$ to $7\frac{1}{2}$ percent. This represents a 2-percent decline in the yield testified to by the investment banker as of the two dates, and a difference of 1 percent in the zones testified to by the economist.

156. The conclusion to be drawn from the testimony is that there is a margin of at least one percent between the yield at the present time and that in 1930. In the litigation growing out of the 1930 hearing the court upheld as reasonable a rate of return of $7\frac{1}{2}$ percent and stated that this was

a minimum. If from this figure there be deducted the minimum difference between the investment yield procurable, then, and that procured now, a return of $6\frac{1}{2}$ percent would be reasonable in the instant case. But rates are made for the future and mathematical computations and the opinions of expert witnesses must be tempered by the exercise of a reasonable judgment. Notwithstanding the low yield now procurable on investments and the opinion of at least one of the witnesses that the yields would continue low for a number of years, consideration must be given to the fact that the period from 1930 to 1934 was an unusual one. For these reasons and on the basis of all the testimony of both witnesses who testified as to what constitutes a reasonable rate of return, it is found that respondent is entitled to charge rates which will yield $6\frac{3}{4}$ percent on the rate base hereinbefore found, namely \$2,900,000. [30]

G. THE REASONABLE NET STOCKYARDS OPERATING INCOME EXPENSES.

157. It is found that the reasonable annual net operating income which should be produced by the rates hereinafter prescribed is $6\frac{3}{4}$ percent of \$2,900,000, or \$195,750. [31]

H. EXPENSES AS INCURRED AND REASONABLE OPERATING EXPENSES.

General Statement:

158. In addition to producing a fair return upon the fair value of respondent's used and useful property, a reasonable schedule of rates and charges should produce enough revenues to pay all reasonable stockyard operating ex-

Petitioner's Note [30]—In the final report there was substituted for these last two sentences the following: The low yield procurable on investments, and the opinion of at least one of the witnesses that the yields would continue low for a number of years, lead to the conclusion that the respondent is entitled to charge rates which will yield an average rate of return of $6\frac{1}{2}$ percent on \$2,792,700 hereinbefore found to be the base rate.

Petitioner's Note [31]—Final report shows $6\frac{1}{2}$ percent of \$2,792,700 or \$181,525.50.

penses, including adequate provision for depreciation and taxes. The audit hereinbefore referred to, and made by an accountant employed by the Government, sets forth in minute detail all the expenses incurred by respondent on all accounts during the 5-year period from 1930 to 1934, inclusive. This audit contains also the balance sheets as of the beginning and end of each accounting period and reconciliations of surplus. No question was raised at the hearing as to the accuracy of this audit in reflecting the facts as shown by the books and accounts of respondent. In arriving at the amount of expenses incurred in rendering the services for which are charged the rates the reasonableness of which is determined in this order, an analysis has been made of the expenses as actually incurred in order to determine whether they were incurred in the rendition of a stockyard service and, if so incurred, whether reasonable. The table which follows lists all expenses as incurred and the purpose for which they were incurred. It shows also those which have been eliminated from consideration altogether, those which were modified, and those which were taken into consideration in determining reasonable expenses to be covered into rates.

159. Some of the eliminations of expenses were made because the amounts shown to have been expended were on account of the rendering of services for which are charged rates the reasonableness of which is not being determined herein, and others were made in order that there might be substituted therefore amounts determined to be reasonable on the basis of all the testimony. Respondent incurs certain expenses which do not vary greatly from year to year, irrespective of the volume of business received and handled. In the case of those expenses which show a marked degree of uniformity from year to year, the amount considered to be reasonable is a round figure equal substantially to the 5-year average or the average for a lesser number of years when no expenses on account of the item were incurred in some years. In the case of the expenses on account of those items as to which there is variation, a tendency upward or a tendency downward, all the surrounding circumstances relating to the

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Gov't.	1934				1933				1932				1931				1930				5-Year Average of
Ex. 38 Sched. NO.	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Expenses Con- sidered		
34 Cost of Sales—Hay	\$174,614.51	\$174,114.20	\$ 500.31	\$105,264.66	\$105,205.87	\$ 58.79	\$120,789.57	\$120,607.75	\$ 181.82	\$173,671.33	\$173,607.92	\$ 63.46	\$200,653.18	\$200,369.48	\$ 283.70	\$ 217.62					
35 " " "—Grain	13,254.27	13,254.27		9,009.58	9,009.58		12,310.14	12,310.14		18,733.67	18,733.67		30,129.24	30,129.24							
36 " " "—Bedding	4,694.02	4,691.06	2.96	5,145.82	5,142.32	3.50	6,259.58	6,259.58		8,551.89	8,551.89		10,762.72	10,735.31	27.41	6.77					
37 Yard Labor	118,348.84	36,788.78	81,560.06	88,680.92	32,033.46	56,647.46	97,217.34	33,754.97	63,462.37	103,015.28	33,298.93	69,716.35	108,711.66	34,674.09	74,037.57	69,084.76					
38 Horse and Truck Labor	4,692.24		4,692.24	3,227.80		3,227.80	3,994.16		3,994.16	4,908.41		4,908.41	4,550.80		4,550.80	4,274.68					
39 Current Yard Expense	2,959.79		2,959.70	2,682.18		2,602.18	2,603.72		2,603.72	2,540.01		2,540.01	3,110.89		3,110.89	2,779.32					
40 Yard Cleaning	16,021.36	1,359.43	14,661.93	10,855.67	811.98	10,043.69	12,332.68	852.75	11,479.93	16,003.26	779.11	15,224.15	17,869.14	791.01	17,078.13	13,697.57					
41 Office & Management Salaries	36,409.21		36,409.21	30,889.49		30,889.49	34,481.07		34,481.07	33,856.84		33,856.84	33,129.76		33,129.76	33,753.27					
42 Officer's Travel & Entertain. Exp.	1,203.26		1,203.26	1,119.24		1,119.24	882.44		882.44	561.70		561.70	568.03		568.03	886.93					
43 Rental of Offices	2,223.50		2,223.50	2,572.20		2,572.20	2,572.20		2,572.20	2,572.20		2,572.20	2,572.20		2,572.20	2,502.46					
44 Office Supplies	2,419.00		2,419.00	1,698.56		1,698.56	1,876.07		1,876.07	2,103.48		2,103.48	2,280.26		2,280.26	2,075.47					
45 Office Expense	155.33		155.33	176.89		176.89	281.62		281.62	303.71		303.71	297.11		297.11	242.93					
46 Bank Service—Handling Cash	710.34	710.34																			
47 Engineering Expense	1,549.77		1,549.77	1,439.10		1,439.10	1,569.33		1,569.33	1,599.83		1,599.83	1,279.84		1,279.84	1,487.57					
48 Legal and Collection Expense	625.68		625.68	677.68		677.68	788.40		788.40	1,184.72		1,184.72	604.45		604.45	776.19					
49 Storehouse Expense	2,547.05		2,547.05	2,388.54		2,388.54	2,643.04		2,643.04	2,673.48		2,673.48	2,623.87		2,623.87	2,575.20					
50 Telephone and Telegraph	1,298.67		1,298.67	1,407.93		1,407.93	1,661.09		1,661.09	1,673.25		1,673.25	1,493.63		1,493.63	1,506.92					
51 Postage	370.56		370.56	343.71		343.71	374.65		374.65	369.76		369.76	311.72		311.72	354.08					
52 Audit Fees	475.00		475.00	450.00		450.00	450.00		450.00	450.00		450.00	450.00		450.00	455.00					
53 Directors' Fees	630.00		630.00	730.00		730.00	465.00		465.00	515.00		515.00	535.00		535.00	555.00					
54 Rate Hearing Expense	1,044.39		1,044.39	14,543.02		14,543.02	4,076.55		4,076.55	1.35		1.35	19.65		19.65	3,936.99					
55 Rates and Charges	6,069.21		6,069.21	6,100.00		6,100.00	9,809.75		9,809.75	15,773.34		15,773.34	6,182.08		6,182.08	8,786.88					
56 Yard Electricity	959.70		959.70	801.09		801.09	818.50		818.50	802.67		802.67	760.99		760.99	828.59					
57 Yard Heat Expense	341.88		341.88	242.26		242.26	338.24		338.24	430.06		430.06	362.23		362.23	342.93					
58 Yard Water Expense	10,116.24		10,116.24	9,687.22		9,687.22	11,311.86		11,311.86	11,296.18		11,296.18	10,457.92		10,457.92	10,573.88					
59 Car Partitions, Etc.	137.66		137.66	76.98		76.98	93.5		93.51	164.36		164.36	209.15		209.15	136.33					
60 Estrays and Claims	418.72		418.72	166.36		166.36	270.83		270.83	463.49		463.49	719.41		719.41	407.76					
61 Yard Casualty Insurance	2,536.92	709.48	1,827.44	3,538.26	1,156.10	2,382.16	1,265.85	404.98	860.87	2,526.99	709.51	1,817.48	3,755.65	1,028.39	2,727.26	1,923.04					
62 Lease of Property	616.86		616.86	616.86		616.86	616.80		616.80	616.81		616.81	462.65		462.65	586.00					
63 Horse & Mule Boarding Barn Exp.	3,240.60	3,240.60		2,455.41	2,455.41		3,156.20	3,156.20		3,459.58	3,459.58		2,301.94	2,301.94							
64 Company Barn Expense	3,801.94		3,801.94	3,781.23		3,781.23	5,857.37		5,857.37	9,167.80		9,167.80	9,841.05		9,841.05	6,489.88					
65 Grain Elevator Expense	32.40		32.40	33.09		33.09	32.86		32.86	33.15		33.15	32.85		32.85	32.87					
66 Traffic—Solicitors' Salaries	6,929.83	491.52	6,438.31	5,582.19	387.77	5,194.42	8,030.00	555.87	7,474.13	7,490.45	474.03	7,016.42	6,790.79	454.64	6,336.15	6,491.89					
67 " —Casualty Insurance	3.18		3.18	2.04		2.04	2.38		2.38	3.30		3.30	4.10		4.10	3.00					
68 " —Miscellaneous	45.15		45.15	74.30		74.30	45.00		45.00							32.89					
69 " —Soliciting Expense	6,667.39	472.90	6,194.49	4,921.79	341.90	4,579.89	6,650.10	460.35	6,189.75	6,775.02	428.76	6,346.26	6,914.10	462.89	6,451.21	5,952.32					
70 Advertising	9,893.96	701.76	9,192.20	7,013.33	487.19	6,526.14	6,922.98	479.24	6,443.74	7,059.42	446.75	6,612.67	6,735.10	450.91	6,284.19	7,011.79					
71 Dues, Donations & Subscriptions	3,823.84	3,600.59	223.25	3,148.68	2,900.28	248.40	3,154.51	2,786.11	368.40	2,968.04	2,604.56	353.48	3,342.07	2,944.95	397.12	318.13					
72 Exchange Building Expense	19,626.02		19,626.02	14,800.72		14,800.72	17,177.54		17,177.54	19,491.47		19,491.47	17,972.09		17,972.09	17,813.57					
73 Cigar Stand Expense	14,293.84	14,293.84		14,209.30	14,209.30		17,943.44	17,943.44		19,653.59	19,653.59		21,192.08	21,192.08							
74 Garage Expense	16,473.05	12,361.98	4,111.07	7,820.97	5,583.11	2,237.86										1,269.79					
75 H & M Div. and S. S. Property	6,308.24	3,386.96	2,921.28	4,332.49	2,326.16	2,006.33	3,969.81	2,131.43	1,838.38	8,075.03	4,335.56	3,739.47	8,988.09	4,825.80	4,162.29	2,933.55					
76 Insurance—Fire, Tornado, Etc.	7,745.33	528.37	7,216.96	6,317.66	559.37	5,758.29	6,999.12	623.33	6,375.79	7,109.00		6,485.67	7,705.91	606.42	7,099.49	6,587.24					
77 Taxes	80,127.02	48,850.94	31,276.08	65,208.72	33,220.49	31,988.23	63,110.92	31,638.14	31,472.78	66,677.88	32,645.06	34,032.82	71,845.70	35,402.29	36,443.41	33,042.66					
78 Depreciation Expense	54,823.60	54,823.60		54,031.99	54,031.99		53,931.31	53,931.31		54,247.37	54,247.37		53,178.30	53,178.30							
79 Interest on Bonds	66,242.37	66,242.37		69,375.00	69,375.00		70,125.00	70,125.00		70,875.00	70,875.00		71,625.00	71,625.00							
80 Interest Paid							19.37		19.37	679.61		679.61									
81 Bond Discount and Expense	3,190.56	3,190.56		3,252.48	3,252.48		3,314.52	3,314.52		3,376.47	3,376.47		3,438.36	3,439.36							
82 Fiscal Agents, Registrar & Tra. Ex.	1,168.85	1,168.85		710.16	710.16		572.36	572.36		726.51	726.51		718.58	718.58							
83 Appraisal Expense	3.40		3.40													.68					
84 Interest and Cashings Expense	812.47		812.47	986.24		986.24	1,881.31		1,881.31	2,280.22		2,280.22	2,153.31		2,153.31	1,622.71					

79 Interest on Bonds	66,242.37	66,242.37	69,375.00	69,375.00	70,125.00	70,125.00	70,875.00	70,875.00	71,625.00	71,625.00		
80 Interest Paid					19.37	19.37	679.61	679.61				
81 Bond Discount and Expense	3,190.56	3,190.56	3,252.48	3,252.48	3,314.52	3,314.52	3,376.47	3,376.47	3,438.36	3,438.36		
82 Fiscal Agents, Registrar & Trs. Ex.	1,168.85	1,168.85	710.16	710.16	572.36	572.36	726.51	726.51	718.58	718.58		
83 Appraisal Expense	3.40		3.40									.68
84 Dipping and Spraying Expense	812.47	812.47	986.24	986.24	1,881.31	1,881.31	2,280.22	2,280.22	2,153.31	2,153.31	1,622.71	
85 Blacksmith Shop Expense	3,575.90	3,575.90	2,818.95	2,818.95	4,568.81	4,568.81	4,908.12	4,908.12	5,216.55	5,216.55		
86 (Repairs—Yd Structures, Fences, Pens	12,896.88	12,896.88	4,340.71	4,340.71	5,255.73	5,255.73	9,712.01	9,712.01	6,490.05	6,490.05		
86 " —Chutes	1,361.58	1,361.58	750.59	750.59	911.09	911.09	1,041.14	1,041.14	696.28	696.28		
87 " —Scales	199.94	199.94	262.63	262.63	262.24	262.24	247.16	247.16	648.66	648.66		
88 " —Equipment & pers. Property	444.42	444.42	656.36	656.36	2,218.43	2,218.43	2,406.21	2,406.21	2,769.45	2,769.45		
89 " —Railroad Tracks	37.50	37.50	73.10	73.10	11.86	11.86	44.68	44.68	10.78	10.78		
90 " —Sewers	3,468.18	3,468.18	758.44	758.44	842.54	842.54	973.44	973.44	1,707.71	1,707.71		
91 " —Water Pumps & Service L.	2,257.41	2,257.41	1,984.46	1,984.46	2,134.21	2,134.21	2,353.10	2,353.10	2,806.77	2,806.77		
92 " —Roadway	325.68	325.68	191.53	191.53	249.98	249.98	114.18	114.18	128.26	128.26		
93 " —Pavements	1,662.06	1,662.06	141.35	141.35	584.00	584.00	346.58	346.58	320.59	320.59		
94 " —Garage	205.62	205.62	58.60	58.60	165.13	165.13	121.04	121.04	15.31	15.31		
95 " —Company Auto Truck	704.59	704.59	426.68	426.68	451.86	451.86	147.65	147.65	241.32	241.32		
96 " —Hay Barns	90.44	90.44	265.64	265.64	57.75	57.75	147.86	147.86	26.92	26.92		
97 " —Grading	91.72	91.72			230.38	230.38	42.68	42.68	51.81	51.81		
98 " —Grain Elevator	3.61	3.61	3.28	3.28	42.07	42.07	155.22	155.22	164.86	164.86		
99 Furniture and Fixtures	127.11	127.11	4.19	4.19	18.08	18.08	16.85	16.85				
100 Branding, Dehorning, Etc.	3,793.76	3,793.76	4,435.81	4,435.81	4,625.42	4,625.42	6,983.33	6,983.33	9,524.20	9,524.20	5,872.50	
101 Drayage Expense	24.38	24.38	44.22	44.22	118.15	118.15	114.10	114.10	217.99	217.99		
102 Bad Debts	44.69	15.10	29.59	519.06	44.90	474.10	1,610.40	33.91	12.20	12.20	432.04	
103 Stadium Expense									201.93	201.93		

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Cost of Sales:

160. There have been eliminated the costs of all sales of hay, grain, bedding, and the like supplied to patrons of respondent. This has been done for the reason that an adequate amount of cash working capital has been included in the rate base to enable respondent to maintain its inventory. This allowance is in effect a revolving fund which is constantly being recouped from the sale of supplies purchased with it. The small items of expense incurred in the handling of these supplies and not included in other expenses have been included among the miscellaneous expenditures. In the rates hereinafter prescribed, a reasonable spread has been provided between the cost and the selling price of hay, grain, bedding, and other supplies. This spread has been made sufficiently wide to cover the expenses incurred in connection with handling not otherwise provided for. [31½]

Yard Labor:

161. The audit reveals an expenditure of \$118,348.84 in 1934 on account of yard labor. The expenditure for this purpose during this year was considerably higher than for any other year from 1930 to 1934, inclusive. This increase was due to the handling by respondent of Government cattle during the year 1934. The record shows that the additional expenses incident to handling these cattle were slightly over \$6,000 on account of labor and overheads. The figure of \$118,348.84 on account of yard labor shown in the audit includes also the labor used in connection with the loading and unloading of livestock arriving by rail which is not a

Petitioner's Note [31½]—Corresponding paragraph of final report, being paragraph 159 reads as follows:

159. The rates hereinafter prescribed include a provision for a reasonable spread between gross selling price and gross costs of hay, grain, and bedding. One of the factors taken into consideration in arriving at this spread was the actual gross difference between the revenues received for these items and their costs. This eliminates the necessity of carrying throughout the computations the two gross figures, and reaches the same result through the use of one net figure. Cost of sales has, therefore, been eliminated from the expense account.

stockyard service for which are charged rates, the reasonableness of which is being determined herein. After deducting the extraordinary cost of yard labor in 1934 and the cost of labor employed in the loading and unloading of livestock arriving by rail, the 5-year average expenditure on account of that labor employed in connection with the services for which respondent charges rates the reasonableness of which is being determined herein was \$69,084.76. It is found that there should be covered into rates on account of this item \$70,000.

Salaries:

162. The expenses incurred on account of officers' salaries and on account of management averaged for the 5-year period \$33,573.27. It is found that there should be covered into rates on account of these salaries \$34,000.

Interstate Commerce Commission hearings:

163. Respondent incurred small amounts in 1930, 1931, 1932, and 1934 on account of hearings before the Interstate Commerce Commission, and in 1933 approximately \$14,500. Respondent is vigilant in the matter of railroad rates and looks to the end that those who ship livestock to its yards by rail may do so at reasonable rates. A reasonable amount for this purpose is a legitimate item to be covered into rates. Giving due consideration to respondent's expenditures in the past and to the testimony as a whole, it is found that there should be covered into rates on account of this item of expense \$100 per month, or \$1,200 annually. [32]

Packers and Stockyards hearings:

164. The audit shows that the average expenditure on account of the hearings resulting from the enforcement of the Packers and Stockyards Act during the years from 1930 to 1934, inclusive, is \$8,786.78. During this period more investigational work has occurred than is likely to be the case when once the reasonableness of the rates charged by

Petitioner's Note [32]—Final report gives \$300 per month or \$3,600 annually.

respondent has been finally determined. Hearings before the Secretary of Agriculture in connection with the enforcement of the Packers and Stockyards Act are not formal litigation the expense of which the losing litigant customarily bears. Such hearings are in the nature of informal investigations and it seems reasonable to assess some of the expenses incident thereto upon respondent's patrons. It is to be presumed that there will be less expense in the future on account of this item than there has been during the last five years. It is found, therefore, that \$100 a month, or \$1,200 annually should be covered into rates on account of this item.

Dues, donations, and subscriptions:

165. Respondent has many calls for donations to local charities, local philanthropic organizations, and in support of civic activities. Its total contributions on account of these requests during the past five years have ranged between \$3,000 and \$4,000 a year. In determining what dues, donations, and subscriptions should be passed on to the public through the rates charged, the guide has been that those contributions which are of peculiar benefit to the respondent's employees and patrons should be covered into the rates and that the remainder of them should not. This criterion was followed in the determination of reasonable rates to be charged by the St. Joseph Stock Yards Company, the reasonableness of which rates was upheld by the Supreme Court of the United States. An analysis of these dues, donations, and subscriptions as set forth in the audit shows that slightly over \$300 was contributed to activities which benefit respondent's employees or patrons. It is found that there should be covered into rates on account of these items \$325.00.

Garage Expense:

166. Respondent owns and for the years 1933 and 1934 operated a garage at which it repairs its own automobiles and trucks, buys its own gas and oil and furnishes these services to others who may desire them. It is difficult to

analyze the receipts and expenditures in connection with the operation of the garage in such a way as to determine the profit or loss sustained on it. The land on which the garage is located and the structures have been included in the used and useful property, and a return on these does not constitute an expense paid by the general public. The yearly cash income from the garage does not equal the cash outlay, but if respondent did not repair its automobiles and trucks in its own garage it would incur expenses elsewhere in doing so. It seems fair, therefore, to cover something into rates. Leaving out of consideration the cost of material and its selling price, the other expenses amounted in the year 1935 to \$2,237.86 and in 1934 to \$4,111.07, or an average for the two years of \$3,174.46. It is found that there should be covered into rates on account of this item \$3,175.00.

Horse and Mule Division expenses and livestock show expenses:

167: The horse and mule division has heretofore been found to be used and useful and the stock show property not. Many of the expenses incurred in connection with this property are incurred jointly by these two divisions on account of a small payroll, the use of horses, casualty insurance, heat, light, water, boiler inspection, and repairs and maintenance which constitute the largest single item. Some method of allocation of these expenses has to be employed and, inasmuch as repairs and maintenance occasion the largest single expenditure, the expenses have been allocated on the basis of the value of the structures. On this basis of allocation the 5-year average of expenses allocable to the horse and mule division is \$2,933.50. It is found that there should be covered into rates on account of expenses in connection with the horse and mule division \$3,000.00.

Taxes other than Federal:

168. Taxes other than Federal paid by respondent have been declining annually from 1930 to 1934. The taxes paid by respondent as revealed in the audit are on account of all

of respondent's land and structures, irrespective of whether used and useful. Altogether, slightly over 81 percent of the total value of respondent's property is on account of used and useful land and structures. Eighty-one percent of the average amount of these taxes paid during the 5-year period is \$33,042.66. In the three most recent years of the five, taxes computed on this basis would have amounted to less than \$32,000 but more than \$31,000. It is found that there should be covered into rates on account of taxes other than Federal \$32,000. [33]

Miscellaneous Expenses:

169. There are a number of other activities on account of which respondent incurs expenses or sustains a slight operating loss. These have not been discussed in detail but they have been given consideration in arriving at the total of miscellaneous expenses which respondent will be called upon to pay out of revenue received under rates prescribed as reasonable.

170. The total amount of the items hereinbefore found to be coverable into reasonable rates and those not discussed specifically is \$250,238. [34]

Repairs:

171. In setting forth the expenses incident to the operation of certain portions of respondent's property, the accountant for the Government included the repairs as incurred by respondent. These repair expenses are not set forth in the table hereinbefore shown as separate items. The expenses on account of repairs therein set forth are applicable only to those items of property against which the figures appear. The 5-year averages on account of repairs of the specific items of used and useful property therein set forth are as follows:

Yard structures, fences and pens	\$ 7,739.08
Scales	324.13

Petitioner's Note [33]—Corresponding paragraph, being paragraph 167 of final report, is materially different and allows \$41,545 for this item.

Petitioner's Note [34]—Final report allows \$262,040 for this item.

Personal property	1,698.97
Sewers	1,550.06
Water pumps	2,307.19
Roadway	201.94
Pavements	610.92
Garage	113.14
Trucks	394.42
Hay barns	117.72
Grading	83.32
Grain elevators	73.81
Furniture and fixtures	33.24

\$15,247.94

It is found that there should be covered into rates on account of repairs not hereinbefore allowed in connection with other expenses \$15,300.

Depreciation Reserve:

172. In addition to those miscellaneous expenditures which it is possible for respondent to pay as they are incurred, there is another item of expense which it cannot so pay, namely, depreciation. Deterioration is constantly taking place in respondent's property through rust, rot, decay and obsolescence. In order that respondent may not suffer an invisible wastage of assets, there must be set aside in a reserve a sufficient amount to offset this irreparable physical deterioration and accruing obsolescence. During the five years from 1930 to 1934, inclusive, respondent carried into its depreciation reserve the following amounts, the annual average of which is \$54,042.51:

1930	\$53,178.30
1931	54,247.37
1932	53,931.31
1933	54,031.99
1934	54,823.60

173. The engineer called by respondent who valued respondent's structures and equipment gave it as his judgment that \$73,080 per year would be the amount necessary for respondent to carry into its depreciation reserve. He arrived

at this figure by determining that \$58,080 was the depreciation which should be provided for periodic retirements and renewals of items of property with a definite life span, and \$15,000 for general obsolescence. He further testified that the accrued depreciation of respondent's property as of December 31, 1934, was 11.1 percent which is to say that respondent's property was 89 percent as good as new on that date.

174. The engineer called by the Government placed the straightline depreciation upon all of respondent's property at \$95,020 per year which did not include depreciation on certain items of underground structure heretofore discussed in connection with the water and sewer system. This witness estimated that the condition percent of the property was 80.545 percent, but stated that there is no relation between condition percent and the period of remaining life as set up in his percentage tables. The reason for this is that condition percent is based upon observation of respondent's plant, while the composite life was arrived at by use of life-expectancy tables and the experience which one would expect in the course of normal maintenance.

175. The accountant called by the government gave it as his opinion that, if \$36,274 should be set aside each year and interest thereon computed at five percent semi-annually on a sinking-fund basis respondent could make good the annual straight-line depreciation of \$95,020 as testified to by the engineer. These amounts have reference to all of respondent's structures and equipment. The engineer called by respondent testified that in his practice he had not found the sinking-fund method of determining depreciation in use. The accountant called by the Government stated that the straight-line method of determining depreciation is commonly used.

176. Substantial justice in arriving at a proper amount to be covered into rates on account of depreciation of respondent's property is not dependent upon a particular method of mathematical computation but upon the observa-

tion of the condition of respondent's property, how this condition is maintained, what its policy has been with respect to repairs and retirements, and what its depreciation accounts show. Some of respondent's property is comparatively new. Other items have been in existence for considerable periods of time. The character of respondent's property is such that much of it, such as its pens and their appurtenances, can be maintained almost indefinitely through adequate repairs. Its buildings, such as the Old Exchange Building and the New Exchange Building, suffer depreciation. All these matters are factors which it is necessary to consider. Expenditures on account of repairs have already been set forth.

177. The books and records of respondent do not show in detail the history of respondent's depreciation reserve account prior to January 1, 1917, but on that date the amount stood at \$133,143.11. On December 31, 1934, it stood at \$982,654.27, against which there had been charged on account of depreciation in property which had been retired \$64,640.21. Of this amount, \$4,805.39 represented depreciation on property retired prior to January 1, 1917. These amounts do not represent all the depreciation in these items of property, but only that which had taken place up to the date of their retirement. From 1923 to 1934 inclusive, or during the 12-year period prior to this inquiry, the surplus account of respondent had been increased by \$2,994.50 on account of property retired and had been decreased by \$14,377.12. This in effect represents additional depreciation over that shown in the depreciation account. The annual average depreciation taken out of the surplus was \$948.50.

178. The actual depreciation observed by the witness called by the Government was \$589,622. The condition percent observed by this witness was 80.5 percent, the lowest observed by any witness who testified with respect to respondent's property. In 1930 the same engineer called by respondent in this proceeding testified that the condition percent of the property at that time was 95 percent. The engineer called at that time by the Government placed the

condition percent of the property at 85 percent. The testimony of these witnesses and all the other testimony of record lead irresistibly to the conclusion that respondent's property has been maintained currently in a high state of physical preservation and in a condition to render an exceptionally high type of service. The observed depreciation by that witness whose condition percent was the least of all the percents testified to was \$589,622, while the net balance in respondent's depreciation reserve on December 31, 1934, was \$918,018.06. The conclusion to be drawn from all the testimony is that respondent throughout a long period of years has been carrying into its reserve account an annual amount more than sufficient to make good the physical deterioration and obsolescence in its property not restorable through repairs. As already set forth, the average annual amount carried into the depreciation reserve on account of all respondent's depreciable structures and equipment was slightly over \$54,000. The accountant for the Government gave it as his opinion that an amount of \$40,000 a year would be sufficient for the company to set aside annually as a depreciation reserve to provide for retirements and replacements in both used and useful and non-used and useful property. On the basis of a segregation of respondent's property into used and useful and non-used and useful as testified to by a witness who made a careful study of the uses to which respondent's property is put, the accountant gave it as his opinion that \$33,200 should be carried annually into the depreciation reserve on account of used and useful property. The property heretofore found to be used and useful, while corresponding in a large measure with that so defined by the witness referred to above, does not do so entirely. Giving due weight to the mathematical computations shown in the record, but considerably more to the experience and the policy of respondent, it is found that \$35,000 annually on account of depreciation should be covered into rates, the reasonableness of which is being determined herein.

Federal Income Tax:

179. In the table of expenses shown immediately following paragraph 159, all Federal income taxes paid by respondent were eliminated for the reason that an amount adequate for this purpose should be restored computed upon the income to be received from the rates hereinafter prescribed. The Revenue Act of 1936, of which judicial notice is here taken, provides that the first \$40,000 of corporate taxable income shall be taxed at \$4,840 and the remainder at 15 per cent. This Act also levies a tax on undistributed income.

180. The gross revenue produced by an application of the rates hereinafter prescribed to the number of head of livestock and the amount of feed hereinafter found to be a reasonable rate factor amounts to \$531,993. From this amount of gross revenue certain items are deductible in arriving at the net taxable corporate income. These are operating expenses, including repairs; a reasonable amount on account of depreciation; bond interest paid; and bond interest received on certain types of Government obligations. The bond interest paid by respondent during the year 1934 was \$66,242.37. The value of these portions of respondent's land, structures, and equipment heretofore found to be used and useful is 82.43 per cent of the total value of all of respondent's land, structures, and equipment. This percentage applied to the \$66,242.37 bond interest paid by respondent is \$54,604. This amount has been taken as the bond interest allocable to respondent's used and useful land and property. This same percentage applied against \$2,171.68 interest received from investment in Government bonds is \$1,790. The sum of these two deductions is \$56,394. Total deductions are \$356,932. The income tax payable by respondent is \$25,099. It is found therefore that \$25,099 should be covered into rates on account of Federal income tax. [35 and 36]

Petitioner's Note [35]—In final report, after computation from different figures \$21,130 was covered into rates on account of Federal income tax.

Petitioner's Note [36]—Final report allows \$13,075 to be covered into rates on account of payroll increases.

Federal Surtax on Undistributed Profits:

181. Should respondent receive gross revenues equal approximately to those indicated from the application of the rates prescribed to the volume of business used as a rate factor and pursue the same dividend policy in the next few years as it pursued in 1934, it would not be subject to the Federal surtax on undistributed profits. It is found that nothing should be covered into rates on account of this tax.

[36]

I. REASONABLE EXPENSES

182. A summary of the amounts heretofore found to be reasonable expenses to be covered into rates to be charged by respondent is as follows:

Reasonable rate of return	\$195,750
Miscellaneous expenses other than repairs ..	250,238
Repairs	15,300
Federal income tax	25,099
Depreciation reserve	35,000
	<hr/>
	\$521,387 [37]

J. VOLUME OF BUSINESS REASONABLY TO BE EXPECTED

183. Respondent is entitled to charge rates which will produce revenues adequate to meet all of the costs, expenses, return, and reserve requirements set forth in paragraph 183. In arriving at a schedule of rates which will produce this amount of revenue consideration must be given to the num-

Petitioner's Note [36]—Final report allows \$13,075 to be covered into rates on account of payroll increases.

Petitioner's Note [37]—Corresponding table in final report as follows:

Reasonable rate of return	\$181,526
Miscellaneous expenses other than repairs and depreciation reserve	262,040
Repairs	15,300
Depreciation reserve	35,000
Federal income tax	21,130
Increase in pay roll	13,075
	<hr/>
	\$528,021

ber of head of livestock yarded and to the amount of feed, grain, and bedding sold, and to the miscellaneous services rendered.

Livestock Received Fresh from the Country, Resold to the Commission Division, Resold Elsewhere, and Reweighed for the Purpose of Sale:

184. The number of head of livestock arriving fresh from the country, resold in the commission division, resold elsewhere, and reweighed for the purpose of sale during the 5-year period from 1930 to 1934 is set forth in the following table:

	1934	1933	1932	1931	1930	5-Year Average
Cattle						
Rail and Resales.....	403,543	233,474	249,845	319,829	390,496	
Federal Surplus Relief Corp.....	146,408					
Truck-ins.....	257,135	233,474	249,845	319,829	390,496	290,156
Federal Surplus Relief Corp.....	111,449	88,150	79,245	62,086	41,285	
Pure Bred Bulls.....	111,445	88,160	79,245	62,086	41,285	76,442
	842	833	1,269	1,639	1,535	1,224
Total Rail and Resales, Truck-ins and Pure Bred Bulls.....	369,422	322,457	330,359	383,554	433,316	367,822
Resold and Reweighed for Purposes of Sale:						
Resold to Dealers.....	16,526	9,771	9,287	12,561	21,201	13,869
Resold to Others.....	40,591	56,042	25,445	30,670	54,931	41,636
Sold on Order*.....	68,710	49,608	44,473	54,742	56,645	54,836
Slaughtered at Denver*.....	12,492	11,605	10,949	12,417	11,269	11,746
Total Resold and Reweighed.....	138,319	127,026	90,154	110,390	144,046	121,987
Calves						
Rail and Resales.....	75,687	25,724	20,342	33,676	51,535	
Federal Surplus Relief Corp.....	53,375					
Truck-ins.....	22,312	25,724	20,342	33,676	51,535	30,718
Federal Surplus Relief Corp.....	37,452	27,655	26,460	24,548	21,454	
	5					
Total Rail, Resales & Truck-ins Resold and Reweighed for Purposes of Sale:						
Resold to Dealers.....	581	769	505	375	1,031	652
Resold to Others.....	2,883	1,707	744	537	1,911	1,556
Sold on Order.....	Included with cattle					
Slaughtered at Denver.....	Included with cattle					
Total Resold and Reweighed.....	3,464	2,476	1,249	912	2,942	2,208
Hogs						
Rail and Resales.....	190,649	248,053	178,129	227,099	265,717	
Fed. Surplus Relief Corp.....		21,842				
Truck-ins.....	190,649	226,211	178,129	227,099	265,717	217,561
Fed. Surplus Relief Corp.....	260,579	294,312	308,928	237,624	168,486	
Total Rail, Resales & Truck-ins Resold and Reweighed for Purposes of Sale:						
Resold to Dealers.....						
Resold to Others.....	162	57	43	365		12
Sold on Order*.....	7,959	11,136	28,590	18,966	18,975	222
Slaughtered at Denver*.....	26,061	30,050	27,173	27,645	20,831	17,125
Total Resold & Reweighed.....	34,182	41,259	56,121	46,976	40,016	26,352
Sheep						
Rail and Resales.....	2,296,212	1,993,748	2,129,302	1,796,185	1,529,587	
Fed. Surplus Relief Corp.....	116,627	39,079				
Truck-ins.....	2,179,585	1,954,669	2,129,302	1,796,185	1,529,587	1,917,866
	80,022	66,930	67,240	54,112	31,342	59,929
Total Rail, Resales and Truck-ins Resold and Reweighed for Purposes of Sale:						
Resold to Dealers.....						
Resold to Others.....	77,638	58,311	51,834	123,897	1,170	760
Sold on Order*.....	12,030	19,506	30,089	23,072	68,841	76,104
Slaughtered at Denver*.....	35	1,168	2,488	3,860	2,174	20,259
Total Resold and Reweighed.....	89,703	80,931	84,491	151,433	88,780	1,945
						99,068

See Govt. Ex. 38, p. 72 to 76 and Govt. Ex. 43.

*Petitioner's note [38, 39 & 40]—Final Report omits these items.

185. Another source of income to respondent is the profits made on the hay, grain, bedding, and other types of feed sold. During the years 1934 and 1933 considerable amounts of hay and some grain were sold to the Federal Surplus Relief Corporation. This is not business upon which respondent can depend each year, but is an abnormal volume of sales incident to the handling of Government animals. Respondent also transfers at cost some of its inventory to the company barn and the boarding barn. The amount so transferred is also contained in the totals shown in the audit. Inasmuch as respondent makes no profit on these transfers they should be deducted in arriving at the amount of hay, grain, and bedding on which respondent may be expected to make a profit. The following table shows the amount of all kinds of hay, the amount of corn and other grain, and the amount of bedding which respondent sold, the amount which it sold to the Federal Surplus Relief Corporation, and the amount which it transferred at cost and the amount on which it made a profit during the 5-year period from 1930 to 1934.

	1934	1933	1932	1931	1930
All Kinds of Hay					
(Cwt.)					
Fed. S. R. Corp.	236,169	2,007	161,229	167,708	217,652
Transfers—					
Co. Barn	1,135	1,416	2,894	4,837	4,325
Board. Barn	1,557	1,377	1,643	1,748	894
Other		990	5,790		
	75,847		1,650	6,187	6,586
Amount Sold					
at Profit	160,322	155,439	161,521	211,067	221,667
Corn Regular					
(Bu.)					
Fed. S. R. Corp.	17,423	1,712	19,541	22,109	26,543
Transfers—					
Co. Barn	(34,450)	(36,000)	(55,700)	(88,300)	(78,150)
	(lbs. or)	(lbs. or)	(lbs. or)	(lbs. or)	(lbs. or)
	bu.—615	bu.—643	bu.—995	bu.—1,577	bu.—1,396
Board, Barn	(41,950)	(35,400)	(41,950)	(50,300)	(32,150)
	(lbs. or)	(lbs. or)	(lbs. or)	(lbs. or)	(lbs. or)
	bu.—749	bu.—632	bu.—749	bu.—898	bu.—574
	1,364	2,987	1,744	2,475	1,970
Amount Sold					
at Profit	16,059	16,354	20,365	24,068	26,181
Bedding (Bales)					
Transfers—					
Co. Barn	477	454	726	980	945
Board. Barn	509	451	565	608	315
Other		50	50	70	35
	986	955	1,341	1,658	1,295
Amount Sold					
at Profit	23,026	26,633	32,578	40,417	42,384

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186. The number of head of livestock handled and the amounts of the different kinds of feed sold by respondent are helpful in determining a schedule of reasonable rates in that they are an indication as to the volume of business to be expected in the future. The record contains much evidence with respect to the trade territory from which respondent draws the bulk of its livestock, the number of head which have moved to various markets, including that at Denver, and the trend of the receipts of respondent from this trade territory. It contains also much testimony with respect to conditions which have prevailed and the opinions of two competent witnesses as to what volume of receipts respondent is likely to receive within the next few years.

187. Respondent's assistant general manager considered the years 1933 and 1934 as abnormal, and stated that in his opinion the livestock industry would not recover from the effects of the drought before the first of January, 1937. He estimated that respondent's net operating income in the year 1935 would be \$189,430.71. This was \$54,936.96 below that received in 1933. He predicated this net operating income upon revenue-producing receipts in the following numbers:

	Rail	Drive-ins	Total
Cattle	203,530	76,815	280,345
Registered bulls	1,043	.....	1,043
Calves	20,430	21,955	42,385
Hogs	135,958	140,942	276,900
Sheep	1,651,829	56,371	1,708,200
Horses and mules	6,951	.....	6,951

188. It was stipulated at the time of the hearing that the monthly reports of respondent to the Department of Agriculture showing receipts of livestock at the Denver market for the year 1935, and for the calendar months thereafter, should become a part of the record. [41] According to these

Petitioner's Note [41]—Final report covers full years 1935 and 1936.

reports the volume of receipts for the year 1935 and for the first seven months of 1936 was as follows:

	1935	1936 (January to July, Inc.)
Cattle	482,421	219,856
Calves	78,279	32,069
Hogs	362,919	269,320
Sheep	2,903,355	1,339,269 [41]

189. Not all receipts of livestock at respondent's yard pay a yardage charge and some of them do not consume feed while in the yards. During the 5-year period from 1930 to 1934, inclusive, respondent collected yardage on approximately 89 per cent of the cattle arrivals, 82 per cent of the calf arrivals, 76 per cent of the hog arrivals, and 75 per cent of the sheep arrivals. During this same period the arrivals of cattle during seven months of each year amounted to 43 per cent of the total for the year, calves to 45 per cent, hogs to 65 per cent, and sheep to 50 per cent of the total arrivals for the year. The receipts of the various species for the first seven months of 1936 would indicate that during the year respondent would receive: [42]

Cattle	511,291
Calves	71,264
Hogs	414,338
Sheep	2,678,638

190. The application of 89 per cent as to cattle, 82 per cent as to calves, 76 per cent as to hogs, and 75 per cent as to sheep to the total computed receipts for 1935 and the indicated receipts for 1936 results in the following volume of revenue-producing livestock for the two years:

Year	Cattle	Calves	Hogs	Sheep
1935	429,355	64,189	275,818	2,177,516
1936 [42]	455,049	58,436	314,897	2,002,904

Petitioner's Note [41]—Final report covers full years 1935 and 1936.

Petitioner's Note [42]—The final report covers full year 1936, hence actual figures are substituted for these estimates.

191. A comparison of the figures showing the receipts for 1935 with the receipts used by respondent's assistant general manager in computing the net operating income which he predicted for that year shows that he greatly underestimated the receipts for 1935. The indicated receipts for 1936 are greater than those anticipated by respondent's general manager, judged by the general tenor of his testimony. [43]

192. The volume of receipts set forth in the preceding paragraph does not include the trader business handled within respondent's yards. The rates of respondent now in effect assess no yardage charge upon trader livestock except that sold in the commission division. The only contribution other than this which this class of livestock makes toward the support of the yards is the profit to respondent on hay and grain which it sells to dealers. The number of animals resold, reweighed for purposes of sale, resold to dealers, and resold to others, *sold on order, and sold for slaughter at Denver* is set forth in the table following paragraph 184.

193. The livestock purchased and disposed of by traders occupies a considerable portion of respondent's yards. In September each year traders are assigned pens in blocks 2600 to 3500 of respondent's property. These blocks contain approximately 160 pens and the adjacent alleys. During the light season traders operate in the commission section in order to avoid the necessity of driving livestock to the trader division. In these portions of the yards occupied by the traders there are scales used for the most part by them.

194. Respondent claims that it is both impracticable and impossible to assess and collect a yardage charge on trader livestock other than that which is sold for the traders in the commission division. It is impracticable, respondent claims, because it would discourage traders from buying and thus lessen the demand for livestock, and impossible because the traders will not pay the charge.

Petitioner's Note [43]—Paragraph 191 above is omitted from final report.

195. This same witness computes the amount of trader volume which does not appear upon the supply side of the market after the traders purchase it, and of the amount which does so appear. According to his estimate, only 21 per cent of trader livestock would come back into the market and compete with livestock already on the market or that to arrive in the future. The conclusion which the witness draws is that the traders increase the demand for livestock to a greater extent than they increase the supply of it, and thus tend to maintain prices at a higher level than would otherwise prevail.

196. The claim is made that since this is the case the shipping public derives more benefit from the higher prices resulting than it suffers disadvantage because the traders pay no yardage charge and thereby increase the yardage charges which have to be paid by the shippers.

197. Another witness testified that traders increase the competition on the market and for this reason should have whatever is necessary for them to complete their operations without having to pay additional charges.

198. The presence of the traders on the market is doubtless a stabilizing factor for they can buy and hold livestock when the runs are heavy and dispose of it when the runs become lighter, but to say that they raise the general price level higher than it would be but for their presence is speculative. The effect of all the marketing machinery is to bring about prices at all markets which bear such relationship to each other as the various factors warrant. The price at one market affects prices at other markets. Prices will not remain out of line for any great length of time. A trader who buys livestock at Denver and ships it to another market for sale appears on that market as a seller and tends to lower the price. The lowering of the price at that market may have the effect of lowering the price at Denver. It is difficult, if not impossible, to determine what effect the presence of traders at the various markets has upon the average altitude of prices. This is not to say, however, that the trader does not play a

necessary part in price determination. Furthermore, the fact that the trader is a desirable part of the market machinery is not to say that he should not pay his proportionate and reasonable share of the cost of the conduct of the market.

199. The assistant general manager of respondent testified that the gross annual amount of revenue which would result from the application of an approximate-half charge to livestock resold and reweighed would amount to only slightly over \$10,000 a year. In arriving at this figure he assumed that the charge would apply only to the cattle resold to dealers and resold to others, and left out of consideration livestock sold on order and that sold for slaughter locally. He referred to the fact also that a former attempt to collect a yardage charge from traders resulted in a strike on their part and a cessation of buying which practically paralyzed the demand for cattle. But he states further that when this happened outside fatteners showed up on the market and attempted to purchase at prices materially below those prevailing the previous week. With buyers thus ready to come to the market when traders ceased to buy it is difficult to see how the traders' strike would last long. [44]

200. The traders have set up their places of business within respondent's stockyard and conducted it without charge, except in so far as respondent makes a profit on feed which the traders purchase and from the yardage which respondent collects on livestock resold for traders in the commission division. It may be that respondent has the right to render free services to one class of its patrons if by so doing it does not have to maintain higher charges for services rendered to others. It is, however, unjustly discriminatory as well as unreasonable for respondent to maintain a large section of valuable property and to incur numerous expenses in the rendition of free services to one class of its patrons and then remunerate itself through a charge on another class which is greater than necessary to cover the cost of rendering the service to the latter class.

Petitioner's Note [44]—This paragraph omitted from final report.

201. Respondent claims that its condition is peculiar and that it is in a different state with respect to the traders operating on the Denver market than are those stockyards located on the Missouri River, and the Mississippi River, and that at Chicago. This may well be the case, but the evidence of record does not warrant the rate-maker in relieving the traders of any yardage charge whatsoever.

202. Another witness, an employee of the Bureau of Agricultural Economics, who is thoroughly familiar with the movement of livestock throughout the country, gave extended testimony with respect to the livestock conditions in the states of Colorado, Wyoming, and New Mexico from which originate by far the greater proportion of respondent's cattle. During the 5-year period from 1925 to 1929 respondent received a number of cattle ranging from about 14 percent to about 21 percent of the number on farms in these states on January 1 each year. For the 5-year period from 1930 to 1934 these percentages ranged from 11.1 percent to 18.3 percent. For the first of these 5-year periods the average number of cattle receipts of respondent was approximately 609,000, and for the second 5-year period 541,000. The witness estimates that there will be an increase of cattle in Colorado during the period from 1935 to 1939. He was of the opinion that the marketings at the beginning of this period, that is in 1935 and 1936, would probably be small because of the necessity of restocking, but he was of the opinion that for this period as a whole he did not expect marketings to average smaller than for the five years from 1929 to 1933.

203. Receipt of hogs at the Denver market has increased somewhat steadily for the 15-year period from 1920 to 1934. Most of the hogs received by respondent came from Colorado and Nebraska and practically all the rest of them from Wyoming and Kansas. Hog numbers have been drastically reduced throughout the entire country, and especially in the States that furnish supplies to the Denver market. The witness is of the opinion that this will result in a sharp reduction in hog receipts at Denver for the period for 1935 and

for the greater part of 1936. He is of the opinion that the yearly receipts for the five years from 1936 to 1940 will not average as large as during the five years from 1929 to 1933, when the average receipts from the five States of Colorado, New Mexico, Wyoming, Kansas, and Nebraska were 611,400.

204. The supply of sheep at the Denver stockyards comes from a much wider area than do the supplies of either cattle or hogs. These supplies originate largely in Colorado, Idaho, Wyoming, New Mexico, Utah, Oregon, California, and Texas. During the five years from 1924 to 1928, inclusive, there were on farms in these states on the average 19,572,000 sheep. The average receipts at Denver during this period were 1,965,000. For the five years from 1929 to 1933, inclusive, the average annual number of sheep on farms in these states was 25,023,000, and the average annual marketings at Denver were 2,443,000. In 1934 there were 25,691,000 head of sheep on farms and there were marketed at Denver 3,014,000. The witness is of the opinion that to the extent that probabilities favor a series of good feed years from 1935 to 1939 the number of lambs raised in these eight states can be expected to be as large as or larger from 1935 to 1939 than they were from 1929 to 1934. The witness is of the opinion that business and industrial conditions during the five years from 1935 to 1939 will be better than they were in the preceding five years, that this will result in better prices for lambs and wool, that this will bring better care of flocks, and tend to raise the percentage of the lamb crop. His conclusion is that lamb supplies in the eight states which furnish practically all of the Denver receipts will be smaller in 1935 than in 1934 and below the 5-year average from 1929 to 1933. The witness states that for the five years from 1936 to 1940 there is little reason to believe that the average will be below the 1929 to 1933 average, and it may be above.

205. It is a reasonable conclusion to be drawn from all the testimony that under ordinary conditions the revenue-producing cattle, calves, and sheep which will arrive at respondent's yards during the five years following the hearing

under ordinary circumstances would exceed somewhat the receipts during the 5-year period from 1930 to 1934, and that the number of revenue-producing hogs arriving would be less than the number which arrived during that period.

206. The amount of hay, grain, and feed consumed in the yards fluctuates with the volume of livestock received. It is a reasonable conclusion from all the testimony that the amount of hay sold at a profit during the five years following the hearing will exceed the amount sold during the five years previous, but that the amount of corn sold at a profit will be less. During the 5-year period from 1930 to 1934, inclusive, the hay sold on the fence amounted to approximately 80 per cent of the total hay sales, and that sold fed, to approximately 20 per cent of the total sales. [45]

207.—The number of head of each species of livestock and the amount of different kinds of feed hereinafter used as a rate factor in determining a reasonable schedule of rates for respondent have not been arrived at by any purely mathematical computation, but by a consideration of the receipts which have been handled by respondent and all the testimony which has a bearing upon what the receipts of respondent are likely to be within the years immediately following those as to which specific and definite information is contained in the record.

208. On the basis of all the statistical information of record and all the opinion evidence of witnesses it is found that the following number of animals of each species and the following amounts of feed of the various kinds should be used as a rate factor in arriving at reasonable rates to be prescribed for the rendition of services for which are charged by re-

spondent rates the reasonableness of which is being determined herein. [46]

	Rail and Resale	Truck- ins	Resold and Reweighed for Purposes of Sale
Cattle	325,000	75,000	110,000
* Calves	20,000	30,000	3,000
Hogs	160,000	225,000	40,000
Sheep	2,000,000	80,000	85,000
Horses and mules	6,000		
Hay		200,000 cwt.	
Corn		20,000 bu.	
Bedding		25,000 bales	
Miscellaneous grain and feed		150,000 lbs.	

209. In the finding in the preceding paragraph as to the number of animals and the amount of hay, corn, bedding, and miscellaneous feed which are herein used as a rate factor in the determination of the reasonable rates prescribed herein, no prediction is made as to the exact number of head of livestock which respondent will receive in any particular year or as to the number which traders will handle in respondent's stockyard. The finding constitutes the number of head of livestock and the amount of hay, grain, bedding, and miscellaneous feed around which respondent's revenue-producing business will fluctuate during the years immediately following the date of this order. The finding is based upon the statistical information of record, the opinions of witnesses, and a test of these opinions in the light of the receipts of livestock as determined in accordance with the reports of respondent filed monthly by it with the Department of Agriculture.

210. Respondent renders certain special stockyard services the charges for some of which are set forth in its schedule and for some of which the charges are not set forth. The most important of these sources of revenue is rental from the Exchange Building, which has been included in respondent's used and useful property, but for which no rate

is set forth in its tariff. The rental paid by respondent's tenants in said building is a matter of contract. The income from this building and from other miscellaneous services constitutes a portion of its revenues available for paying all of its reasonable operating expenses, taxes, and a fair return upon the fair value of its property. These revenues do not vary greatly from year to year, and the amount of revenues anticipated for the years following the date of this order has been taken to be the average for the five years from 1930 to 1934. During this 5-year period the revenues received from these miscellaneous services were as follows:

	1930	1931	1932	1933
Exchange Bldg. rents.....	45,234.50	45,636.32	43,606.66	42,044.78
Dining room	1,809.89	2,579.48	2,012.32	1,742.07
Profits from company horse and mule barn...	8,705.18	8,927.16	6,331.08	5,293.72
Manure sales	4,306.05	4,880.75	2,784.77	2,281.60
Drive-in delivery service.....	916.54	.....	.....	913.05
Branding, dehorning, etc.....	16,005.61	10,429.40	4,735.27	6,838.76
Weighing	743.00	712.00	1,029.00	1,124.00
Car partitions*	375.50	360.00	224.00	187.00
Drayage revenue*	2,589.53	2,454.50	-3,960.00	4,723.50
Rental stock hog plant.....	804.00	804.00	804.00	651.00
Auto truck washing.....	657.00	616.15	255.45	163.25
Yard pen rental.....	.....	1,439.20	873.25	684.75
Dipping and spraying.....	2,973.71	3,542.23	3,163.46	881.57
Services on through hogs (watering, etc.)*	649.90	2,016.50	2,399.15	4,750.07
Miscellaneous income	1,883.74	1,208.88	2,087.42	1,601.71
Total				

*Omitted from final report, and total changed accordingly.

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K. THE UNREASONABLENESS OF EXISTING RATES

211. The amount of money hereinbefore found to be necessary to pay all of respondent's operating expenses, repairs, Federal income tax, depreciation, and a reasonable return on the fair value of respondent's property found to be used and useful is \$521,383. A reasonable schedule of rates should produce this amount of gross revenue. The miscellaneous revenues derived from the rental of the Exchange Building and various other miscellaneous services the charges for which are either not set forth in respondent's schedule or have not been increased or reduced in the schedule of rates hereinafter prescribed as reasonable averaged \$80,823 during the 5-year period from 1930 to 1934, inclusive. This \$80,823, the \$327,170 procurable from yardage, and the \$124,000 procurable from profit on hay, grain, and bedding amount to \$531,998. The revenues resulting from the application of the yardage charges now being assessed against the number of animals hereinbefore found to be a rate factor and the average per-unit profit applied against hay, corn, bedding, and miscellaneous feed during the 5-year period from 1930 to 1934, inclusive, and the miscellaneous revenues are \$612,133 or \$90,830 in excess of the \$521,303 necessary to pay all reasonable operating expenses and leave a fair return on the fair value of respondent's used and useful property. Moreover, respondent has not assessed a yardage charge against traders' livestock resold or reweighed for purposes of sale except that resold in the commission division. It is, therefore, found that respondent's tariff schedule *now in effect* contains rates and charges which are unreasonable and discriminatory. [47]

L. REASONABLE RATES

212. On the basis of all the foregoing findings and on the basis of the statistical information contained in the record, the opinion of the various witnesses who testified, and

Petitioner's Note [47]—The italicized figures are changed in final report.

all other information in the record, it is found and concluded that the following constitute and are the maximum reasonable rates and charges for the following services rendered by respondent, namely:

SECTION 1.

YARDAGE CHARGES:

Yardage will be charged as shown below:

- (1) On livestock received and sold at these yards, also including livestock resold through commission firms.
- (2) On livestock sold or contracted in the country to weigh and/or deliver at these yards.
- (3) On livestock consigned direct to packers and slaughterers.

Rail:

Cattle	\$.28 per head
Calves (under one year old)	.18 per head
Hogs	.10 per head
Sheep or Goats	.065 per head
Horses or Mules	.35 per head
Pure Bred Bulls	1.00 per head

Resold and/or Reweighed for purposes of sale:

Cattle	\$.14 per head
Calves (under one year old)	.09 per head
Hogs	.05 per head
Sheep or Goats	.03 per head
Horses or Mules	.35 per head
Pure Bred Bulls	1.00 per head

Trucked in or driven in:

Cattle	\$.32 per head
Calves (under one year old)	.20 per head
Hogs	.12 per head
Sheep or Goats	.08 per head
Pure Bred Bulls	1.00 per head

Subject to exceptions hereinafter stipulated.

EXCEPTIONS:

On livestock consigned to the Denver market and offered for sale, but forwarded unsold to another market, yardage will be waived.

On through shipments, handled for railroads and not sold, yardage will be waived.

Cattle over 400 lbs. or over one year of age will take cattle yardage.

SECTION 2.

FEED, FEEDING, BEDDING, ETC.:

Hay (On fence) Current market price, F. o. b.	
stockyards, plus _____	\$.50 per cwt.
Hay (Fed) Current market price, F. o. b.	
stockyards, plus _____	.60 per cwt.
Misc. feed, Current market price, F. o. b.	
stockyards, plus _____	.50 per cwt.
Corn, Current market price, F. o. b.	
stockyards, plus _____	.45 per bu.
Bedding, Current market price, F. o. b.	
stockyards, plus _____	.40 per bale

The charges on hay, corn, and miscellaneous feed and bedding shall be divisible by five and respondents shall amend its charges whenever the margin between the cost and the sale price varies five cents from the margin of profits set forth above. When feed other than that set forth above is desired it will be furnished if obtainable by special arrangement.

When livestock is fed or bedded or watered while in cars, a charge of \$1.00 per deck will be made in addition to the regular charge for feed or other material used.

When empty stock or box cars are bedded with hay or straw, a charge of 50c per deck will be made in addition to the charge for hay or straw used.

On through shipments of hogs, ordered fed in car with feed furnished by shipper and already in car, a charge of \$1.00 per car will be made.

For livestock watered but not fed \$1.00 per car will be charged. [48]

SECTION 3.

BRANDING, MARKING, CASTRATING, TIPPING, DEHORNING, ETC.:

Branding:

One iron _____	\$.08 per head
Each additional iron _____	.02 per head

Dehorning or Tipping:

Cows and Steers _____	.15 per head
Bulls or Stags _____	.50 per head

Castration _____	.50 per head
Ear Cropping _____	.05 per head
Wattling _____	.05 per head

DELIVERING CATTLE TO OR FROM BRANDING CHUTES:

Two cents per head each way additional will be charged for handling cattle to or from pens in the 100 to 2,500 series, inclusive. To and from cattle pens numbered above 2,500 series, no additional charge will be made.

The company is not responsible for loss or damage to livestock incident to any of the above operations.

Petitioner's Note [48]—Italicized portion omitted from final report.

SECTION 4.

DIPPING CHARGES:

Cattle	25c per head—minimum	\$25.00
Calves	15c per head—minimum	25.00
Lambs	6c per head—minimum	25.00
Ewes	7c per head—minimum	25.00
Bucks	10c per head—minimum	25.00
Hogs	10c per head—minimum	25.00

The charge for dipping includes use of facilities, material, and labor incident to that service.

The company is not responsible for loss or damage to livestock incident to dipping.

All dipping of livestock is subject to the supervision and regulations of the Bureau of Animal Industry of the United States Department of Agriculture.

SECTION 5.

DISINFECTING CHARGES:

Whenever the Bureau of Animal Industry or other governmental authority deems it necessary to disinfect any portion of this company's yards, occasioned by the movement of infected stock, the following will be collected from owner of such infected stocks:

Pens, Single load	\$2.50 each
Pens, Double load	4.00 each
Chutes	2.50 each
Alleys	Same proportions as pens.
Disinfecting stock cars	2.50 per car
Disinfecting stock wagons	.25 per wagon
Disinfecting stock trucks	.50 per truck

SECTION 6.

IMMUNIZATION AND VACCINATION:

Use of Facilities only:

Use of facilities for vaccinating cattle, 2c per head when the work of vaccinating is done in connection with branding, dehorning, or tipping.

1933	1934	Average
42,044.78	40,448.96	43,394.24
1,742.07	1,712.53	1,971.25
5,293.72	8,045.18	7,460.46
2,281.60	2,533.55	3,357.34
913.05	3,492.67	1,774.08
6,838.76	6,488.20	8,899.44
1,124.00	2,491.00	1,219.80
187.00	297.25	288.75
4,723.50	4,831.50	3,705.81
651.00	600.00	732.60
163.25	268.60	392.09
684.75	519.50	879.17
881.57	684.79	2,249.00
4,750.07	4,562.55	2,875.63
1,601.71	1,332.54	1,622.86
		<u>\$80,822.52</u>

Where facilities are used exclusively for vaccination of cattle 5c per head will be charged.

Facilities for vaccinating and immunizing swine are leased to private parties but reasonable rates must be charged by them for this work.

The work of temperaturing and vaccinating swine is done under the supervision and regulations of the Bureau of Animal Industry, United States Department of Agriculture.

SECTION 7.

SPECIAL SALES:

Charges in connection with special sales will be made by mutual agreement.

SECTION 8.

BOARDING AND STABLING CHARGES:

Draft horses	_____	\$.75 per day
Saddle horses	_____	.75 per day
If owners call for and deliver saddle horses		
at company barn	_____	.50 per day
Single feeds	_____	.35 each

Above charges include feeding of grain and hay, watering, bedding, cleaning, saddling and/or harnessing.

Milk cows and saddle or other horses kept in cattle, sheep, and/or hog yards and not in regular movement through market _____ \$.25 per day
5.00 per month

SECTION 9.

WEIGHING:

Weights will be furnished as a basis for freight charges on request of the Western Weighing and Inspection Bureau or railroads for a charge of \$2.00 per draft.

SECTION 10.

MISCELLANEOUS:

Use of facilities and water for cleaning and washing trucks 50c each.

Special arrangements may be made for water troughs and feed troughs, papering cars, partitions in cars, double decking cars, drayage, tying bulls, etc. [49]

213. The revenues to be derived from the application of the yardage rates and the unit profit on hay, grain, and bedding hereinbefore found to be a reasonable volume factor, and the miscellaneous revenues receivable from other of respondent's stockyard activities are as follows: [50]

	Volume Used As A Rate Factor	Rates	Revenues Procurable
YARDAGE:			
Cattle, Rail	325,000	\$.28	\$ 91,000
Truck-ins	75,000	.32	24,000
Resales	110,000	.14	15,400
Bulls	850	1.00	850
Calves, Rail	20,000	.18	3,600
Truck-ins	30,000	.20	6,000
Resales	3,000	.09	270
Hogs, Rail	160,000	.10	16,000
Truck-ins	225,000	.12	27,000
Resales	40,000	.05	2,000
Sheep, Rail	2,000,000	.06½	130,000
Truck-ins	60,000	.08	6,400
Resales	85,000	.03	2,550
Horses and mules.....	6,000	.35	2,100
Total yardage			\$327,170
FEED, BEDDING, ETC.:			
Hay, cwt. on fence....	160,000	.50	80,000
Hay, cwt. fed.....	40,000	.60	24,000
Corn, bu.	20,000	.45	9,000
Straw, bales	25,000	.40	10,000
Misc. feed, lbs.....	150,000	....	1,000
Total profit on feed, etc.....			124,000
MISCELLANEOUS REVENUE			80,823
Total revenue procurable.....			\$531,993

Petitioner's Note [49]—Omitted from final report.

Petitioner's Note [50]—Items of "resales" are materially changed in the similar tabulation (par. 211) of final report. Item of "Directs" added under Hogs. Total revenue procurable per final report is \$530,117.00.

As hereinbefore pointed out, the revenues necessary to meet all reasonable operating expenses including repairs and provision for depreciation and to pay a fair return upon the fair value of respondent's property found to be used and useful are \$521,387. The revenues produced by the schedule of rates found to be reasonable exceed this amount by \$10,606 which is approximately .35 of one per cent on the rate base heretofore found. This .35 of one per cent added to the 6.75 heretofore found to be the reasonable rate of return results in a rate of return procurable by the rates of 7.1 per cent. [51]

ORDER

IT IS, THEREFORE, ORDERED that respondent, the Denver Union Stock Yard Company, on and after thirty days from the date of this order, cease and desist from demanding or collecting for yardage, feed, and bedding the rate or rates shown therefor in the schedule of rates and charges filed with the Secretary of Agriculture to become effective July 5, 1931, and designated and known as the Denver Union Stock Yard Company Tariff No. 3, and all supplements and amendments thereto.

IT IS FURTHER ORDERED that respondent, on and after thirty days from the date of this order, shall not publish, demand, or collect any rate or charge for the furnishing of any stockyard services in excess of the rates and charges hereinbefore found and determined to be just and reasonable for the furnishing of such service.

IT IS FURTHER ORDERED that at least ten days prior to the thirtieth day from the date of this order respondent publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act of 1921 and the regulations of the Secretary of Agriculture thereunder, a schedule effective on the thirtieth day from the date of this order showing all rates and charges for the stockyard services furnished by respondent at the Denver Union Stockyards, Denver, Colorado, and all rules and regulations changing, affecting, or determining such rates or charges and that no rate or charge so shown for any such stockyard service be in excess of the rate or charge hereinbefore determined to be just and reasonable for such service.

IT IS FURTHER ORDERED that a copy of this order be transmitted by registered mail to respondent.

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EXHIBIT B

UNITED STATES OF AMERICA

Before the **Secretary of Agriculture**

BUREAU OF ANIMAL INDUSTRY

SECRETARY OF AGRICULTURE,

v.

B. A. I.

THE DENVER UNION STOCK YARD
COMPANY,

DOCKET 450

Respondent.

EXCEPTIONS OF RESPONDENT TO PROPOSED,
TENTATIVE FINDINGS AND TENTATIVE ORDER
OF THE EXAMINER, AND BRIEF IN SUPPORT
OF SAID EXCEPTIONS.

ROBERT G. BOSWORTH,
Solicitor for Respondent.

PERSHING, NYE, BOSWORTH AND DICK,
Denver, Colorado,
Of Counsel.

Dated, December 2, 1936.

(This document is Exhibit B attached to petition in cause No. 10913 in the District Court of the United States for the District of Colorado, entitled "The Denver Union Stockyard Company vs. United States of America and the Secretary of Agriculture.")

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UNITED STATES OF AMERICA

Before the **Secretary of Agriculture**

BUREAU OF ANIMAL INDUSTRY

SECRETARY OF AGRICULTURE,

v.

THE DENVER UNION STOCK YARD
COMPANY,*Respondent.*

B. A. I.

DOCKET 450

The Denver Union Stock Yard Company, the respondent above named, excepts to the proposed report, tentative findings and tentative order of the Examiner in the above entitled cause upon the following grounds and in the following particulars:

I.

Respondent excepts to the language and finding contained in paragraph 20 on page 9 of the proposed report for the reason that the Examiner limits the services for which a charge is made to certain enumerated physical services and excludes or disregards the main reason for a charge, namely, the use of the market. It is a misnomer to call the charge a "yardage charge." It should be recognized as a "marketing charge."

II.

Respondent excepts to the finding proposed by the Examiner on page 133 of the report wherein prospective hay sales for the future are estimated at 200,000 cwt. or ten thousand tons annually. This estimate is contrary to the actual five year average hay sales and is contrary to the manifest trend of hay sales. Respondent further excepts in this connection to the findings contained in para-

graph 206 on page 132 of said report, being the finding upon which *said estimate* is based, and to the rate factor and prospective income from hay sales contained in paragraph 213 of said report.

III.

Respondent excepts to the finding of the Examiner as contained in the tabulations on pages 120 and 121 of the proposed report (paragraph 184) insofar as the same includes in the computations of livestock "Resold and Reweighed for Purposes of Sale," livestock sold on order and livestock slaughtered at Denver. Even though a charge in some amount were proper in cases of resales and reweighs for purposes of sale, which we deny, the two classifications above referred to have nothing to do with any such charge and are erroneously included. The same error appears in paragraph 199 on page 129 of said report and in the third column of the tabulations contained in paragraph 208 on page 133 of said report, to all of which respondent excepts.

IV.

Respondent excepts to paragraphs 179 and 180 insofar as no allowance is made for Federal capital stock tax payments.

V.

Respondent excepts to the finding of the Examiner in paragraph 181 on page 118 of the proposed report excluding any allowance on account of the tax on undistributed profits levied by the Revenue Act of 1936.

VI.

Respondent excepts, under the manifest theory of Examiner and the findings and conclusions elsewhere based thereon in the proposed report to the inclusion in miscellaneous revenues on page 135 of \$3705.81 average "Drayage" revenue and \$2875.65 for "Services on through hogs (watering, etc.)." For the same reasons, respondent excepts to the inclusion on page 123, under the amount of bedding sold at a profit, of 6500 bales annual average. This

latter error is also carried over into the estimate of future bedding sales on page 133 of the report and results in an overstatement of estimated future revenues on account of bedding sales to be covered into the rates of \$2600.

VII.

Respondent excepts to the finding contained in paragraph 163 on page 108 of the proposed report that the sum of \$100.00 a month or \$1200 annually is a reasonable sum to be allowed in the future and covered into rates for the purpose of defraying the costs of hearings before the Interstate Commerce Commission.

VIII.

Respondent excepts to the finding contained in paragraph 164 on page 108 of the proposed report that the sum of \$100.00 a month or \$1200.00 annually should be allowed on account of Packers & Stockyards Administration expense. Respondent insists that the allowance is too low and should be increased.

IX.

Respondent excepts to the findings of the Examiner contained in paragraphs 40, 41, 42, 46, 51, 58, 65, 75, 93, 97, 102, 104, 107 and 115, insofar as the Examiner in said paragraphs finds that certain land with the structures thereon are not used and useful for the reason that the same consist of railroad trackage and land, loading and unloading chutes and pens with the land on which they are situate, a railroad tool house, and yardmaster's office, all of which though owned and used by respondent are found by the Examiner to be transportation facilities as distinguished from stockyard facilities, and hence the value thereof is excluded by the Examiner from respondent's rate base.

X.

Respondent excepts to the findings of the Examiner, summarized and tabulated in paragraph 115 of the proposed report wherein the value of the land of respondent

is found to be \$772,428.00 and the value of that portion thereof found used and useful by the Examiner is fixed at \$571,134.00. Respondent insists that these findings are contrary to the weight of the evidence, are without support in the evidence, and are arbitrary.

XI.

Respondent excepts to the finding of the Examiner contained in paragraph 211 and underlined in the following quoted portion thereof:

"Moreover, respondent has not assessed a yardage charge against traders' livestock resold or reweighed for purposes of sale except that resold in the commission division. It is, therefore, found that respondents tariff schedule now in effect contains rates and charges which are unreasonable and discriminatory."

And in this connection respondent excepts to the findings or statements made in paragraphs 192, 196, 198, 199, 200 and 201 wherein the Examiner states his conclusions that the yard trader does not contribute to the support of the market except by way of the profit paid on feed consumed; that the traders pay no yardage charge (implying a difference in treatment from other buyers) and thereby increases the yardage charges paid by shippers; that it is speculative to say the operations of the trader result in higher prices on the market; that trader shipments to other markets tend to lower prices at Denver; that free service in any manner or to any extent is furnished the trader with the result that discrimination exists or that another class of patrons, i. e., the shipper, is charged an increased or excessive cost for the rendition of the service to that class; that the evidence of record does not warrant the rate-maker in relieving the traders of any yardage charge whatsoever and implying that other buyers share the cost of the conduct of the market and implying that any part of the livestock "sold on order" and "sold for slaughter locally" would be subject to a reweigh charge on traders. Respondent submits that these findings, statements and conclusions are not sup-

ported by the evidence, are contrary to fact, contrary to law; result in a discriminatory and confiscatory rate schedule. Respondent further excepts to the inclusion in the rate schedule, paragraph 212 on page 137 of the proposed report, of the schedule of charges under the heading "Resold and/or Reweighed for purposes of sale."

XII.

Respondent excepts to the finding of the Examiner in the proposed report that the property in Zone 9 devoted to the Stock Show is not used and useful in the rendition of services for which are charged rates, the reasonableness of which is being determined in this proceeding and the exclusion of the value of said property from respondent's rate base. Respondent further excepts to the findings that the show is a community enterprise; that the stadium was built by the stock show association out of donations procured and that respondent absorbs the deficits of that association. Respondent further excepts to the proposed report because the Examiner has not excluded the income directly traceable to and derived from the show although he has excluded the value of the land and structures from the rate base; it being axiomatic that when property is excluded, the income derived from or on account of that property must also be excluded in determining the reasonableness or unreasonableness of existing rates and the justness of proposed rates. The findings to which exception is here taken are contained chiefly in paragraphs 68, 70, 71, 113 and are reflected in the estimates of future receipts, in the rate factors used, in the proposed schedule of rates and in the finding that existing rates produce more than a reasonable rate of return, all of which findings should be eliminated by the Examiner.

XIII.

Respondent excepts to the disallowance by the Examiner of the going concern value of respondent's plant and the exclusion of any such value from the rate base. In this

connection, respondent specifically excepts to the following findings contained in paragraph 138 of the proposed report:

"The testimony shows that the various witnesses arrived at their valuations having in mind that the property was a part of a going concern and that their values were arrived at with this element in mind. In adopting the cost of reproduction new less depreciation of the structures and the value of the land as found consideration has been given to the element of going-concern value and the values so found include the value of the property as a going concern. To include an additional specific amount in the rate base would be a duplication and no separate allowance is, therefore, made on account of going-concern value."

Respondent submits that these findings are contrary to fact and to the evidence of record, and that unless a fair going concern value be allowed in the final findings and order, the same will be confiscatory.

XIV.

Respondent excepts to the finding made in paragraph 165 of the proposed report excluding from the expenses of respondent all dues, donations and subscriptions except \$325.00, which amount the Examiner finds reasonable.

XV.

Respondent excepts to the elimination from the expense account on page 106 of the proposed report of the items of "Traffic—Solicitor's Salaries," "Traffic—Soliciting Expense" and "Advertising" in the five-year average amount of \$472.86, \$433.36 and \$513.17, respectively, such exclusion, so far as respondent can ascertain, being wholly unsupported by any evidence.

XVI.

Respondent excepts to the proposed report of the Examiner in that it fails to make allowance for certain necessary expenditures in the future all of which have arisen

or the necessity therefor become fixed since the hearing of this cause and all of which are of such nature that the Secretary can take judicial notice thereof if he will.

XVII.

Respondent excepts to the proposed rate schedule contained in paragraph 212 of the proposed report for the reason that it is so low as to be confiscatory and for the further reasons that it provides for the assessment of charges on a class of traffic for which no rate or charge can be properly assessed or imposed, is discriminatory and is based on rate factors which are themselves erroneously determined.

Respondent requests an oral hearing before the Secretary of Agriculture upon the exceptions herein taken.

BRIEF AND ARGUMENT IN SUPPORT OF EXCEPTIONS.

In presenting the argument upon these exceptions, respondent will necessarily discuss many facts not of record. We believe that we are entitled to do so, however, for several reasons. One reason is that the Examiner himself in reaching several of his findings, takes judicial notice of Acts passed subsequent to the hearing. He also treats as part of the record, and very properly, the monthly reports filed by the respondent with the Secretary showing receipts. This is expressly permitted by the stipulation of the parties entered in this cause, and executed by Mr. White and Mr. Miles, as solicitors for the plaintiff on or about February 15, 1936. The real intent and purpose of that stipulation, as expressed to Mr. Miles and the Department was to obviate the necessity for petitions for rehearing or motions to reopen the case, and to prevent the record from becoming stale, resulting possibly in an injunction obtained against the order on that technical ground, as was done in the Atchison, Topeka and Santa Fe case with which the Department is, of course, familiar. It has never been the intent of respondent needlessly to prolong this litigation, and we do not wish to claim that at the time the matter comes up for final hearing before the Secretary that the record is stale in any particular. We were gratified by the statement of Mr. Miles, the government counsel, at the conclusion of the hearing as follows:

"I just want to make one statement. I have been informed by the field representative of the Department that from the beginning of the field studies, the stockyard officials have extended every courtesy to the Government employees and supplied all possible information. During the trial of this case the learned counsel for the Respondent has extended to the Government employees every courtesy and consideration. In my opinion, no information has been withheld that was pertinent to this inquiry either by the counselor or by any of the respondent's representatives. This attitude has made this one of the most agreeable hearings in our history. In my

opinion the case has been fully and fairly presented by the Respondent without friction. For this attitude I want to express my heartfelt appreciation."

We desired the Secretary then to have the fullest possible information, and we desire it now.

Furthermore, we believe that the practice recently adopted by the Department and contained in the rules of practice effective September 28, 1936, providing for a proposed report and tentative findings is particularly designed, and properly so, for the presentation of matters which affect the decision of the administrative body, even though those matters may not be strictly matters of record. We believe this procedure is sound, and in the years to come will do away with the necessity for petitions for rehearing and motions to reopen the case.

It is for the reasons above stated that we have not hesitated in these exceptions in certain particulars to bring to the attention of the Examiner matters which have occurred subsequent to the date of the hearing. If the Examiner or the Secretary desires substantiation by direct examination of books of account and records of respondent, that can be easily and speedily obtained, and we pledge ourselves to co-operate fully with the government in this regard.

We do not wish to leave the impression from these opening remarks that all of our exceptions are based on matters occurring subsequent to the closing of the hearing. That is not the fact. It is true only in connection with Exceptions V and XV. In certain other exceptions it has been necessary to discuss facts which, while of record in the broad sense, do not appear as segregated therein. This is particularly true in the case our Exception VI concerned with the failure to exclude certain income of the so-called railroad department. There was no indication at the hearing that the government position went so far as to attempt to exclude the loading and unloading chutes and pens. The situation is similar to that presented in the West Ohio Gas Company case cited infra, where the Public Utilities Com-

mission in that case had given no indication of a different division of territory and an attack on the decision permitted on that ground. Such omissions at the hearing should and must give the opposite party the right to present any and all arguments to the Examiner pertinent thereto, before the proposed order becomes final.

With these explanations, we proceed to a discussion of our exceptions.

EXCEPTION I.

Respondent excepts to the language and finding contained in paragraph 20 on page 9 of the proposed report for the reason that the Examiner limits the services for which a charge is made to certain enumerated physical services and excludes or disregards the main reason for a charge, namely, the use of the market. It is a misnomer to call the charge a "yardage charge." It should be recognized as a "marketing charge."

It is not an academic question which respondent raises in this exception. It is fundamental and without a recognition of it, there is a complete misconception of a stockyard and stockyard activities.

The report in preliminary paragraphs states the fact that it is only when livestock is sold is any "yardage charge" assessed. This is the established practice at the stockyards in Omaha, St. Paul, Kansas City, St. Joseph, Sioux City, Sioux Falls, Fort Worth, Oklahoma City, Wichita, and in fact at all stockyards with the possible exception of Chicago, which deems itself so much "at the end of the road" that it need not be bound by practices of other yards.

To explain this situation more fully, suppose two shipments of cattle arriving on the same day, for the same market session, by the same train, from the same place and from the same or different owners.

The Examiner says in paragraph 20, that for its services (1) in driving the livestock from the unloading chutes to the pens; (2) counting; (3) checking; (4) and keeping a record of each consignment; (5) the furnishing

of water; (6) the weighing; and (7) the use of the physical facilities necessary in performing these services, the Yard Company charges the shipper a "yardage charge."

The Examiner is correct in stating that each shipment which forms part of the receipts at respondent's yard received one or more of the services above itemized. Not all of these physical services are received by each shipment, nor are all or any of the services received to the same extent by all shipments. The shipment which does not sell or which stops merely for feed, water and rest is not weighed nor does it use pens subsequent to sale, nor is the same responsibility assumed by respondent as to those shipments which is assumed with regard to a shipment which does sell. Likewise a shipment which merely stops for feed, water and rest is or may be handled differently from one the owner of which avails himself of the privilege of trying the market,—a privilege which the producing and marketing sides of the livestock industry have fought for years to obtain and keep and which means thousands of dollars annually to the producer. The Secretary would not wish to lessen the effective scope of this privilege, yet here again, no charge is paid unless the livestock is sold.

The imposition of a charge only when livestock is sold on the market is, we repeat, the established, recognized and proper practice at all yards and has been such ever since livestock marketing at livestock markets commenced. *It is based upon the fact that the charge is made primarily for the use of the market.* The charge made is not a yardage charge. There is no mention in respondent's tariff of a yardage charge. It is a *marketing charge*. The charge is the same per head whether a car of cattle is weighed in one draft or in thirty drafts, and the same whether one pen or ten pens for different classes is or are used prior to weighing. This makes it apparent that the charge is for the use of the market together with the equipment necessary or incident to such use, rather than for the use of equipment and labor alone.

We do not mean to imply that no different use of

facilities is made by the shipment which sells than by that which does not sell, but we do insist that such differences as do exist are part of the machinery of marketing, i. e., are incident to the use of the market. Consider for a moment shipments which merely stop for feed, water and rest—i. e., through shipments and those which sell on the market. A through car of cattle arrives for feed, water and rest. It is unloaded and moved as a unit to one pen large enough to accomodate it. The cattle are fed, watered and rested and from that pen are moved back to the loading chutes in time to be loaded into the outgoing train. Of course they are counted and checked and a record kept of these receipts.

A shipment received for sale is unloaded, delivered to the commission firm consignee and by him sorted and graded. As was demonstrated to the satisfaction of the Interstate Commerce Commission in Docket 25123, we have a very different condition at Denver from that existing at a majority of the other markets in that, being on the edge of the producing territory as distinguished from the feeding and fattening territory, our shipments usually require sorting for grade, sex and condition. The Commission man, therefore, sorts the shipment into as many pens as are needed to show and sell the shipment to the best advantage of the grower. Frequently as many as five pens are used in such case for a single carload of cattle. Respondent has striven successfully in the fifty-two years of its existence to build up a buying demand for all classes of livestock. There are local packer buyers and order buyers for outside packers, who want primarily the fat stuff and in some instances the "two-way" cattle. There are bull buyers, feeder buyers, traders and dealers. These absorb the shipment in normal course. When sold, each lot sold is carefully weighed on specially equipped scales by licensed weighmasters and an accurate count and weight record kept in quadruplicate for the protection of the seller, the purchaser, the Yard Company and the Railroad. One lot may be sold to one order buyer or purchaser but weighed in several drafts. From the scales, the livestock is yarded in as many pens as there

are drafts, hence frequently more pens are used after sale than before. This is the only way the sale of cattle can be conducted, i. e., all incident to the use of the market. The charge, however, we insist is for the *use of the market* with the privileges incidental to that use.

This is not an academic discussion. It has definite bearing upon Respondent's Exception XI. Too many people, and among them we reluctantly class the Examiner, regard a stockyard as an hotel for cattle, calves, sheep and hogs, by reason of the fact that the livestock is lodged in pens with a number on the gate or door, with ice cold drinking water and toilet facilities, and frequently meals are served in the rooms! The correct analogy is to the New York Stock Exchange or any other central market. Livestock is a commodity which, because of differences in weight, age and condition, must be physically present and subject to inspection when sold. If the Examiner can conceive of the New York Stock Exchange with rooms lined with safety deposit boxes where the stock certificates or bonds of every seller must be placed in a separate deposit box before sale and subject to inspection by any prospective purchaser, the analogy would be complete. The only purpose for the securities being there in such case would be for sale, i. e., the use of the market. The same is true of livestock consigned to and using the facilities of a stockyard. It is there for sale, i. e., to use the market, and unless it uses the market and is sold, no charge is made.

We request that paragraph 20 be changed to read:

"20. For the use of the market, including the use of physical facilities incident thereto, respondent charges the owner or shipper of livestock brought to market, the following *marketing charges*:". We also request the Examiner to make appropriate changes elsewhere in the report wherever the term "yard charge" or "yardage charges" is used.

EXCEPTION II.

Respondent excepts to the finding proposed by the Examiner on page 133 of the report wherein prospective

hay sales for the future are estimated at 200,000 cwt. or ten thousand tons annually. This estimate is contrary to the actual five year average hay sales and is contrary to the manifest trend of hay sales. Respondent further excepts in this connection to the findings contained in paragraph 206 on page 132 of said report, being the finding upon which said estimate is based, and to the rate factor and prospective income from hay sales, contained in paragraph 213 of said report.

On page 123 of the proposed report is set forth the actual experience of respondent as to the amount of hay and grain fed during each year of the five year period 1930 to 1934, inclusive. For the purpose of determining the income to be produced from the proposed rates, the Examiner has eliminated the hay and grain fed to company horses and to government drouth livestock. This is correct. Presumably hay fed to company horses is at cost, and hay fed to drouth cattle is a non-recurring item, we hope, and should not be included in determining the reasonable product of the rates for the future. With these eliminations, we submit that the average actual experience during a reasonable period should be the basis of the estimate of future sales during a like reasonable period, adjusted to give effect to any established trends.

The Examiner's estimate for the future is given on page 133 of the proposed report and is 200,000 cwt. or ten thousand tons annually. He bases this upon the receipts of livestock as shown by the monthly reports of respondent filed with the Secretary and admissible under the stipulation of the parties, executed on or about February 15, 1936. The Examiner either overlooks or has not ascertained the hay sales during the same period and we submit that to take the receipts for the year 1935 and the first seven months of 1936 without determining the hay sales during the same period is unfair, and has led the Examiner into error. There has been a definite downward trend in the amount of hay fed to cattle, calves and sheep.

Our position is that the Secretary must predicate or

forecast the product of his schedule of rates for the future either upon some average of the hay sold during a reasonable period prior to the hearing or if he uses 1935 and 1936 figures on receipts in conjunction with those of prior years for the purpose of determining a trend, he must also take into account the amount of hay sold those receipts during that period, or else the purported trend may be, and in this case is, erroneous.

The hay sold during the five calendar years prior to the hearing is shown on page 123 of the proposed report, and after elimination of sales to drouth cattle of the government and to company horses, the figures are as follows:

1930	221,667 cwt.
1931	211,067 "
1932	161,521 "
1933	155,439 "
1934	160,322 "
Total	910,016 cwt.
5 year average	182,003 cwt.
Tons of 2000 lbs.	9,100 tons.

If the Examiner adopts in this instance a three year period as he did in determining the trend of local taxation, the average for the three years immediately preceding the hearing is 159,094 cwt. or 7,951 tons.

But the Examiner argues that receipts of cattle and sheep have increased in 1935 and 1936 over 1934 and therefore forecasts an upward trend in hay sales.

If we estimate the hay sales during November and December, 1936, upon the basis of past experience, and take the actual sales for the year 1935 and the first ten months of 1936, the figures are:

1935	188,312 cwt. or 9415.6 tons
1936:	
10 months actual.....	129,800 cwt. or 6490 tons
2 months estimated.....	30,000 cwt. or 1500 tons

If these figures be added to the five year figures of record, or if the Examiner take a five year period including 1935 and 1936, we find the following averages.

1930	221,667 cwt.	
1931	211,067	
1932	161,521	161,521 cwt.
1933	155,439	155,439
1934	160,322	160,322
1935	188,312	188,312
1936 (Est)	159,800	159,800
Totals	1,258,128 cwt.	825,394 cwt..
7 year average	176,304 cwt.	
5 year average		165,079 cwt.
Tons of 2000 lbs.	8,815	8,254

In every instance, the average thus determined is less than the Examiner's finding of ten thousand tons annual hay sales. There is no fact or set of facts appearing of record or otherwise that justifies a higher estimated return in the future from hay sales than any or all of these averages would indicate.

That this is material, we point to the fact that under the proposed rate schedule, the permissible profit on hay is fifty cents a cwt. or ten dollars a ton of two thousand pounds. By finding a ten thousand ton annual sale of hay, the Examiner has overstated the estimated product of the rates as follows:

1. If five year average 1930-1934, inclusive, be used:

Average	9,100 tons
Difference	900 tons
Overestimate of revenue	\$9,000.00

2. If three year average 1932 to 1934, inclusive, be used, as was used by Examiner in determining the trend of local taxation:

Average	7,953 tons
Difference	2,146 tons
Overestimate of revenue	\$21,460.00

3. If seven year average 1930-1936, inclusive, be used:

Average	8,815 tons
Difference	1,185 tons
Overestimate of revenue	\$11,850.00

4. If five year average 1932-1936, inclusive, be used:

Average	8,254 tons
Difference	1,746 tons
Overestimate of revenue	\$17,460.00

It is to be noted that although the receipts of cattle in the year 1935 (see p. 125 of Report) are larger than in any of the preceding five years (see p. 120 of Report), there is a marked decrease in the per capita consumption of hay as shown by the hay sold. This is further emphasized by the experience of 1936.

Taking the figures for total receipts of cattle, calves and sheep (exclusive of government drouth livestock of these species) for the years 1930 to 1936, inclusive, as shown at pages 120, 121 and 125 of the proposed report and dividing the total receipts of these hay eating animals into the total hay sales, (also exclusive of sales to government drouth livestock and company horses) for the same years, the following is apparent:

Year	Total receipts cattle, calves and sheep	Hay sold in cwt.	Pounds per animal
1930	1,867,214	221,667	11.87
1931	2,292,075	211,067	9.2
1932	2,573,713	161,521	6.3
1933	2,397,435	155,439	6.5
1934	2,688,788	160,322	5.96
1935	3,464,055	188,312	5.4
1936	3,261,093*	159,800**	4.9

If we reduce sheep to a cattle basis by adopting the recognized rule that five sheep equal in hay consumption one head of cattle, the average amount of hay consumed per animal during the period 1930 to 1935 and the first ten months of 1936 is as follows:

Year	Cattle and Calf Receipts	Sheep Receipts on Cattle Basis	Pounds of Hay Fed	Average Per Head
1930	592,895	412,377	22,166,000	22.0
1931	503,916	499,777	21,108,000	21.0
1932	434,634	566,764	16,250,000	16.2
1933	418,220	580,463	15,544,000	15.5
1934***	468,162	591,218	16,032,000	15.1
1935	559,945	580,671	18,830,000	16.5
1936	417,027	531,827	12,980,000	13.6

(10 mo. actual)

* Government estimate see report p. 125.

** Ten months actual, two months estimated.

*** Government drouth livestock and hay fed to them deducted.

By reducing receipts of sheep to the cattle basis as above indicated, all possible criticism that our tabulation on the preceding page does not take care of the fact that one species may increase while the other decreases, is obviated. It is to be noted here also that with the exception of 1935 (which year is hereinafter explained), the trend has been decidedly downward. From 1930 to 1936 the decrease in head consumption on a cattle basis is 38%. The Examiner has estimated an increase for the future, which we submit is erroneous. If 38% decrease be applied to the five year average 1930 to 1934 or to the amount of hay fed in any year during the period 1930 to 1936, inclusive, a result would be obtained less than any of the five year averages given in the above tables.

We do not mean to say that every animal of these species received at the Denver yards was fed hay, but we do insist that the tabulations demonstrate the trend. We respectfully submit that the Examiner in predicating his finding of increased annual hay sales for the future merely upon increased receipts is violating an established axiom of the livestock industry, namely, that feed sales do not follow receipts.

There are several reasons why less hay is fed today at the Denver yards than formerly. Chief among these is the increase in trucked-in livestock. Figures on this are also shown in the tabulations on pages 120 and 121 of the proposed report. We have only added here the percentage figure.

TRUCKED INTO THE DENVER MARKET

Year	Cattle	%	Calves	%
1930	41,285	9.5	21,454	29.39
1931	62,086	16.2	24,548	42.1
1932	79,245	23.9	26,460	56.9
1933	88,160	27.3	27,655	51.8
1934	111,445	30.16	37,447	62.66

Sheep is a species which still moves chiefly by rail in our western territory, but even in that species the truck-ins have increased during the five year period from 2% to 3.5%—an increase of 75%.

No one conversant with the livestock industry doubts that the increase in trucked-in livestock demonstrated in the above table will continue. This is particularly true at Denver, where the improvement both in trucks and in mountain highways, has brought the mountain and plain ranches within an economic motor distance of the market. Livestock arriving by truck and moving out either by rail or truck is in the yard a much shorter time than was the case with rail shipments, and hence less hay is fed. A trucker leaves the farm in the early morning, arrives in time for the market session, and in the great majority of such instances no hay or grain whatever is fed. Truck-outs leave on no set schedule and hence there is less necessity for feeding livestock before it is moved by the purchaser to his farm destination. The increase in the trucking of livestock has definitely decreased the amount of feed sold.

Another factor which has the same effect is the speeding up of rail transportation. This affects all classes of livestock both into and out of Denver by rail. It results in shipments moving out of the market much sooner with less hay consumption due to the shorter stay. Many shipments arriving in the morning are now out of the yard by 2 P.M. It is now usual under established schedules of the D.&R.G.W. RR. for example, for sheep to be shipped from the Alamosa territory to a feeder in Northern Colorado without stopping for water, rest and feed at Denver enroute. This was not formerly possible. Now the railroad maintains a regular twenty hour schedule from Salida or Alamosa to Denver, leaving sixteen hours under the thirty-six hour law to move them the fifty or seventy-five miles on to the Northern Colorado feed lots. These sheep are not unloaded and are not fed at Denver. Take the month of October, 1936, for example. This is a month of heavy feeder sheep movement. Sales of sheep exceeded those of October, 1935, yet there was a decrease in hay fed of five hundred tons. This was studied and was found primarily to be due to the large number of feeder sheep which went through to Northern Colorado feed lots without stopping for feed at Denver.

The third factor in the decrease in hay sales is the effort

which is being made to prevent excessive fills. This is being done both to protect our market and to protect the interests of the shippers. It has been the misguided practice of commission men at all markets to attempt to attract business on the basis of giving a "better fill" than their competitor. These fills are, however, loss to the slaughterer and more and more the packer has been watching the percentage at which the livestock dresses out. In 1935, nearly all the increase in hay sales at Denver went to slaughter sheep and the condition became so serious that lambs bought on the Denver market were dressing out two per cent. less than at Ogden. The packers transferred much of their buying operations to Ogden to the detriment both of respondent and the growers in its normal territory. In short, the market was injured and it was necessary to take a firm stand. The result has been numerous meetings with the commission men on our market and a campaign of education to reduce fills. It has been largely successful and must be continued if our growers are to get a fair break and a fair market. Sales of hay have correspondingly decreased.

It is impossible to state with definiteness the amount of decrease to be expected in hay sales by reason of each or all of these factors, but we submit that there can be no justification for increasing the estimate over the experience average of a reasonable period in the past. We submit that the five year average 1932 to 1936, inclusive, is the fair basis for estimating future hay sales because it more accurately gives effect to the established trend. This results in an overstatement of expected revenues from the proposed rates of \$17,460.00. But whatever average is used by the Examiner, there is an overstatement of expected income which must be corrected.

We request the Examiner to modify his finding contained in paragraph 208 of estimated future hay sales of 200,000 cwt. to 165,000 cwt. or eight thousand two hundred fifty tons, and to amend his rate schedule accordingly. We submit that confiscation will result unless this be done. Respondent also requests that the finding made in paragraph 206 on p. 132 of said order that it is a reasonable conclusion

that the amount of hay sold at a profit during the five years following the hearing will exceed the amount sold during the five years previous be stricken for the reasons hereinabove stated.

EXCEPTION III.

Respondent excepts to the finding of the Examiner as contained in the tabulations on pages 120, 121 and 141 of the proposed report (paragraphs 184 and 213) insofar as the same includes in the computations of livestock "Resold and Reweighed for Purposes of Sale," livestock sold on order and livestock slaughtered at Denver. Even though a charge in some amount were proper in cases of resales and reweighs for purposes of sale, which we deny, the two classifications above referred to have nothing to do with any such charge and are erroneously included. The same error appears in paragraph 199 on page 129 of said report and in the third column of the tabulations contained in paragraph 208 on page 133 of said report, to all of which respondent excepts.

By bringing this exception, respondent does not waive its position in Exception XI. This exception III assumes for purposes of argument the government theory concerning reweigh charges and points out errors which must be corrected even if that theory be incorporated in the final report.

The errors noted in this exception are due to a misinterpretation by the Examiner of government exhibit 43 and results in an overstatement of prospective income to be derived from the proposed rates of \$9321.48 on cattle, \$2173.85 on hogs and \$666.15 on sheep, or a total of \$12,161.48. These figures are based on the five year average for these two items shown in the last column of the tabulations on pages 120 and 121 of said order. If these figures are modified to conform to the estimates on page 133, the overstatement of income is \$10,841.03. Whichever figure is taken, it more than offsets the claimed "cushion" of \$10,606.00 (see page 141) and is confiscatory.

The facts and figures shown on government exhibit 43 were prepared for the most part by respondent for govern-

ment counsel but the exhibit was only offered by the government for the purpose of avoiding any implication that the respondent admitted the propriety of a proposed charge to traders.

At the close of the 1930 investigation the Secretary ordered a half yardage charge on all trader sales and among the reasons why this charge was disapproved by the court and the order enjoined was the fact that this portion of the order was based on inaccurate or unsupported evidence. Therefore with full knowledge of the fact that the Secretary would again attempt to impose this charge, the respondent kept accurate account of all trader and dealer transactions for the five year period 1930-1934, inclusive. These figures were adopted by the government and appear in government exhibit 43. They are correct.

The trouble now is that the Examiner has overlooked the fact that the exhibit covers all trader transactions and has assumed that it covers only cases of resales or reweighs for purposes of resale. Hence he has incorporated certain items erroneously in computing the estimated product of of the rates.

The fourth classification in government exhibit 43 is the number of head of livestock bought on order. The five year average of these is 54,836 cattle, 17,125 hogs and 20,259 sheep. These are neither resold by the trader nor reweighed for purposes of resale, yet the Examiner has put these into his tabulation on pages 120 and 121 under the heading "*Sold on Order.*" This is absolutely contrary to what the exhibit shows and to what actually happens. These must be eliminated from any estimate of prospective income on account of a charge on resales or reweighs.

The same is true of the number of livestock shown in the heading "*Slaughtered at Denver.*" These must likewise be excluded in computing prospective income from the proposed charge on resales and reweighs. Apparently this error of the Examiner lies in his belief that this livestock is purchased by dealers and then resold to packers for slaughter. This is not the case.

The facts, as shown by the evidence and by exhibit 43 are as follows: We have one cattle dealer at Denver, Joe Pepper, who operates both as a trader and a packer, the latter being the Pepper Packing and Provision Company located at the south end of the yards. This operator purchases daily both as a packer and as a trader, all being weighed in the same way, viz, to Joe Pepper. Part of his purchases are immediately taken to the packing plant and part are resold. It being impossible to tell from the scale tickets whether they were slaughtered or resold, his books were checked for five years to ascertain exactly what happened. This disposition together with that of all other traders is shown under heading VI of government exhibit 43. The Examiner estimates average revenue for the future on 11,746 head annually from this source. Obviously, as these cattle are immediately driven to the packing plant and slaughtered, the same as any other packer purchase at Denver, no additional service is performed and no additional revenue is obtainable. The numbers he resells on the market are included in items I and II.

The same condition is true with reference to the 26,352 hogs and 1,946 sheep slaughtered at Denver on which the Examiner estimates revenue for the future. This is livestock purchased by parties registered as dealers for local or outside packers. It is immediately taken out of circulation and not reoffered for sale, resold or reweighed. It is in the same category with the cattle of the Pepper company mentioned above. No additional service is performed and no additional revenue can be collected for the mere use of alleys in moving off of the property. Again, to collect a charge in this instance would be to collect from both the seller and the purchaser in the same transaction.

The point is that when a packer or a countryman buys on the market any kind of livestock either for local slaughter or for movement to outside destinations, there is no resale or reweigh and the only charge is paid by the seller. No additional charge is or could be made. At Denver, as the record in this case shows abundantly and without contradiction, traders also operate as order buyers and dealers.

When acting in the latter capacity, they are the same as any other buyer and there is no resale. We submit that the Examiner must eliminate the livestock shown under the heading "Sold on Order" and "Slaughtered in Denver" from the tabulations on pages 120 and 121 of the report and must exclude them from any estimate of prospective income under the proposed rates.

We request the Examiner to make the eliminations specified above, to correct his tabulation of prospective receipts accordingly in paragraph 213 and to revise his proposed schedule of rates to cover the resultant decrease in the estimated product of the rates.

EXCEPTION IV.

Respondent excepts to paragraphs 179 and 180 insofar as no allowance is made for Federal capital stock tax payments.

The Examiner in paragraphs 179 and 180 of the proposed report computes an allowance on account of Federal income taxes of \$25,099.00 under the Revenue Act of 1936, of which the Examiner takes judicial notice. Basing his computation upon his estimate of the product of the rates less allowable deductions for operating expense, interest on bonds, depreciation, etc., the allowance is exact.

No allowance, however, is made for any portion of the capital stock tax. It is no answer, we respectfully submit, to say that since respondent is permitted by law to declare any value it sees fit upon its capital stock, no allowance should be made therefor in determining whether or not the schedule of rates gives a fair return upon the fair value of the property. The ratepayer must expect to pay a charge sufficiently large to pay all proper expenses and in addition a fair rate of return to the owners.

The amount of capital stock tax to be paid is a matter which the law itself expressly leaves to the discretion of the management. To interfere with that discretion so long as it is exercised reasonably and in good faith is an unwarranted invasion of the management function. See Den-

ver Union Stock Yard Co. v. United States, 57 Fed. (2nd) 735, and cases there cited.

The government audit (government Ex. 38) shows that in 1933 and 1934, a capital stock tax of \$3212.00 annually was paid. If we adopt the Examiner's percentage of 82% used and useful property and take that percentage of the capital stock tax actually paid, the result is \$2535.00 which sum is the minimum allowance to be included in the proposed report for this item.

We designate this figure as the minimum allowance because if the Examiner takes into account the capital stock tax paid in the years 1935 and 1936, the four year average will exceed \$3212.00. We believe the Examiner is permitted to do this under the spirit of the stipulation of the parties above referred to, but if he chooses to limit himself in this instance closely to the record, the sum of \$2534.00 is the allowance to be made.

We request the Examiner to include in his order an allowance of at least \$2534.00 on account of the capital stock tax and to revise the rate schedule accordingly. We submit that unless such proper allowance be made, any order issued by the Secretary upon the basis of the proposed report will be confiscatory.

EXCEPTION V.

Respondent excepts to the finding of the Examiner in paragraph 181 on page 118 of the proposed report excluding any allowance on account of the tax on undistributed profits levied by the Revenue Act of 1936.

On page 118 of the proposed report the Examiner finds that nothing should be covered into rates on account of this tax on undistributed profits. The Examiner states as the reason for this finding that if the respondent continues its present dividend policy no tax under this section of the Revenue Act of 1936 will be assessed.

This is not the fact.

The Examiner forecasts the gross product of the rates

and deductions, before Federal income tax to be as follows (paragraphs 179 and 180):

Gross revenue	\$531993.
Total deductions, including bond interest and depreciation	356932.
Taxable net income	\$175061.
Federal Income tax as found by Examiner	25099.
Balance	\$149962.

The respondent has outstanding a certain bond issue in the aggregate principal amount of \$1,500,000. Under the terms of which the Company must deposit annually in the sinking fund for the retirement of bonds of this issue \$30,000.00. This is an absolute obligation, nevertheless both because the mortgage does not specifically pledge the earnings of the fiscal year to the reduction of the indebtedness, and because the mortgage is dated June 1, 1936 the Commissioner of Internal Revenue in the regulation recently published (TD 4674) has ruled, as we are reliably informed, that such sinking fund payment is not a credit allowed by the Act in determining the undistributed net income subject to the tax in question. This being so, we have and will have only the credit on account of dividends paid. If we use the Examiner's percentage figure of 82% used and useful property and apply this to the sinking fund obligation, we have \$24,600.00 as that part of the sinking fund requirement for which the tax is fairly chargeable to the rate payer. Hence, the utmost respondent can do, will result in a tax as follows:

Adjusted net income	\$149,962.
Less:	
Pfd. stock dividend	\$50,875.
Div. on Common—31200 sh.	
@ 2.25	70,200.
	121,075.
	\$ 28,887.
Tax on \$28,885 of undistributed profits	2,716.63

Presumptively, if the schedule of rates is correct we will average over the next few years this amount of adjusted net income and this tax. We submit that an allowance there-

for should be made in the order and the tariffs increased accordingly.

We further submit that respondent is entitled to withhold out of profits a reasonable amount for the purpose of expansion of business or expansion of facilities or both.

West Ohio Gas Co. v. Public Utilities Commission,
294 U. S. 63, 55 Sup. Ct. Rep. 316 at 321.

As stated in the above case:

"A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others. When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service."

In the West Ohio case just cited, the rate making authority disallowed \$7,000 out of an item of \$12,000 of expense for procuring new business. The Supreme Court required the reinstatement in the rate base of the full \$12,000 both upon the grounds stated above and because its denial was an unwarranted interference with the rights of management.

The Examiner has excluded certain advertising expense and certain solicitor's expense, no evidence authorizing such exclusions appearing of record. Exception to this action is taken in Exception XV. The Examiner has also excluded the stock show property, which he admits is at least "good advertisement" for the Denver market and attracts much business. We insist it is much more than mere advertisement, but however that may be, the attitude of the Examiner is clear that it is his intention to exclude all items designated or which may be designated as for the expansion of business. Exception to the exclusion of stock show property is taken in Exception XII. Here we insist that the management has the right to reserve a reasonable amount for the expansion of facilities or business or both and that, therefore, the tax which will now be imposed upon such a reserve must be allowed as an expense in computing whether or not the rates proposed result in a fair return upon respondent's property.

Of course, this does not appear of record. The Act in question was not passed at the time of the hearing, yet the Examiner himself has taken judicial notice of it and is using the Revenue Act of 1936 to test the fairness of the proposed rates. We not only have the right, but it is our duty to call to the attention of the Examiner matters which might render his final order nugatory or bad.

The Examiner finds no need for an allowance for the tax on undistributed profits. We are within our rights to insist that there is ~~and~~ that within such an allowance must be included the amount of such tax upon a reserve for expansion of facilities, although the amount of such needed reserve is not in evidence in this case.

The management feels that a reserve of approximately \$15,000.00 annually out of profits to be added to surplus is not an unreasonable amount for the purpose indicated. This, however, with the sinking fund obligation will necessarily result in the withholding out of profits of the current fiscal year \$45,000.00.

If this be done, the resultant tax will be as follows, applying same percentage figure of 82% to this reserve:

Adjusted net income.....	\$149,962	
Less		
Dividend Credit		
Pfd.	\$50,875	
Common		
31,200 sh. @ \$2.00.....	62,400	113,275
		<hr/>
Bal. subject to tax	\$ 36,687	
Tax on \$36,687 of undistributed profits is \$3,987.35.		

We request the Examiner to change the finding contained in paragraph 181 so as to allow the sum of \$3,987.35 on account of the tax on undistributed profits; that the finding and tabulation contained in paragraph 182 be likewise changed, for the reasons hereinabove stated; and that the schedule of rates be increased accordingly.

EXCEPTION VI.

Respondent excepts, under the manifest theory of Examiner and the findings and conclusions elsewhere based thereon in the proposed report, to the inclusion in miscellaneous revenues on page 135 of \$3705.81 average "Drayage" revenue and \$2875.65 for "Services on through hogs (watering, etc.)." For the same reasons, respondent excepts to the inclusion on page 123, under the amount of bedding sold at a profit, of 6500 bales annual average. This latter error is also carried over into the estimate of future bedding sales on page 133 of the report and results in an overstatement of estimated future revenues on account of bedding sales to be covered into the rates of \$2600.

In presenting this exception we are not waiving our Exception IX. We do not agree with the Examiner in his exclusion of the railroad trackage, the loading and unloading chutes and pens and the segregation and exclusion of all labor incident thereto on the ground that each of these items is a transportation facility as distinguished from stockyard facilities. We do insist, however, that the Examiner must logically pursue his theory and exclude all income and expense of the "transportation" branch if he excludes any thereof.

Much of what we shall point out here does not appear clearly of record, although the government auditor and certainly government witness Christensen well knew the facts. We had no inkling that the chutes and the loading and unloading facilities would be excluded and we suspect that neither the government auditor nor Mr. Christensen held any such view. Hence, the figures, although appearing in the totals, are not segregated of record. They are susceptible of easy segregation and proof.

The account "Drayage Revenue" is now a misnomer. The entire amount, with the possible exception of not over \$125.00 actual haulage charges during Stock Show, is received for the service of bedding railroad cars and is paid entirely by the railroads.

Historically, over thirty years ago when the account

was first opened and due to a lack of convenient loading and unloading facilities and for other reasons, there was a certain amount of drayage for patrons and the revenue from this source was put into this account quite logically. The bedding of railroad cars with straw was practically unheard of. In fact the railroads would not permit it because of what they thought to be the added hazard of fire from engine sparks. If the cars were bedded at all, it was with cinders, sand or dirt, and this was generally done by the shipper or the railroad at the loading point and lasted through to destination. The cars were not cleaned at the yards at first and hence when livestock after sale was loaded into empty stock cars, there was generally at least a thin coating of cinders, sand or gravel left on the bottom of the car. Soon, however, this practice changed and respondent was called upon to haul cinders and sand for the stock cars loaded at its yard. The charge for and the revenues from this service, being still thought of as primarily haulage, was put into this account. Gradually the use of straw bedding increased and with the introduction of double deck cars became universal. Small houses for the convenient storage and handling of straw bedding were erected near the loading chutes, and our loading gangs took over the work of bedding the cars for which the railroad pays \$1.00 per car in addition to the charge per bale for the straw. For no other reason than custom, the revenue derived from the service of spreading the straw is carried under the same account, i. e., "Drayage Revenue." It is a railroad service exactly to the same extent as the loading and unloading of stock cars, and is performed by the same men who load and unload the livestock, the wages of whom are excluded by the Examiner.

The Examiner has excluded the revenue received from the loading and unloading charge and has excluded from our rate base the value of the chutes, the land on which they are located and all other land and structures which he finds are part of the transportation service. As above stated, he has likewise segregated from respondent's yard labor account all wages and expense of the loading and unloading

gangs and has excluded those items. We submit that this so-called "Drayage Revenue" is in the same class and if the above items be excluded, this must be also. It results in the elimination of \$3705.81 from the estimate of miscellaneous revenues to compensate for which a corresponding revision of the rate schedule must be made.

We estimate that an annual average of 6500 bales of straw is thus used by the "railroad department" of respondent's business. This can be more accurately checked if the Examiner desires. Our estimate is based upon the following: The great majority of the cars thus bedded for the five year period 1930-1934, inclusive, has been double deck cars for sheep and hogs. The straw is spread one bale to each deck. The "Drayage Revenue" is slightly in excess of \$3700.00. Making an allowance of \$125.00 for actual haulage revenue during Stock Show, leaves \$3575.00. Our experience indicates that as an average 20% of the cars bedded by our loading gang are single deck. Using rounded figures, therefore, this means 700 bales for single deck cars and 5800 bales for double deck cars or a total of 6500 bales.

At forty cents per bale profit allowed by the Examiner in his proposed rates, this means \$2600.00 profit, which should be eliminated from the estimate of future revenues to be paid by the shippers under the proposed rate schedule. We repeat that this profit on straw as well as the charge for bedding the cars is paid by the railroads and if all income derived from the railroads for the use of what the Examiner calls railroad facilities be excluded, these items must in fairness and in logic be likewise excluded.

The third item to which we take exception under this heading is the inclusion, under miscellaneous revenue on page 135 of the report of "Service on through hogs (watering, etc.) \$2875.65," which figure he uses in his estimates of future income. The "etcetera" must be the service of spreading the corn in the cars after the hogs are unloaded for water and rest.

The nature of this charge is also not clear in the record because we had no indication that the government at the time of the hearing would attempt to exclude the loading and unloading chutes and income and expense incident thereto. We were warned of the government view concerning our railroad trackage because a similar attempt was made as to that item in the 1930 hearing and was disapproved by the court. The facts which we here state are easily susceptible of proof if the Examiner doubts any statement made.

Through hogs are handled almost exclusively at our river docks where equipment for watering is in the chute or unloading pens. These pens the Examiner has excluded. Hog cars on through shipments contain corn for feeding enroute either tied to the side of the car or partitioned off at one end. After unloading and while the hogs are watering, our loading crews go into the cars, spread the corn on the floor and then reload. The entire amount of \$2875.65 was received by respondent for this service of spreading the corn on the car floor by our loading gangs and for the watering in chute pens by labor, the wages and expense of which the Examiner has excluded.

We submit that if the Examiner excludes the so-called railroad income, i. e., the loading and unloading charges and excludes from expense the wages paid the loading and unloading gangs, he must likewise exclude this revenue of \$2875.00 which is no less and no more of a "railroad income" than the other items excluded.

To summarize, under this exception, we request the Examiner to make following adjustments in the proposed report:

1. Exclude from "miscellaneous income" of \$80,823 found in paragraph 211 to be reasonably expected for the future and on the receipt of which the Examiner bases his finding of the reasonableness of the proposed rates:

Drayage Revenue	\$3575.
Service on Through hogs	2875.

2. Eliminate 6500 bales from the Examiner's finding of 25,000 bales reasonably to be expected to be sold annually in the future (Report page 133, par 208) and exclude the profit thereon at 40¢ per bale from his finding of the procurable profit of \$124,000 on sales of hay, grain and bedding in the future.

(Par 211)	2690.
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Total	\$9050.
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3. Adjust the proposed rate schedule to allow for these exclusions.

EXCEPTION VII.

Respondent excepts to the finding contained in paragraph 163 on page 108 of the proposed report that the sum of \$100.00 a month or \$1200 annually is a reasonable sum to be allowed in the future and covered into rates for the purpose of defraying the costs of hearings before the Interstate Commerce Commission.

The five year average expense for this purpose as shown by the evidence and covering the period 1930-1934, inclusive, is \$3936.99. The Examiner states that after "giving due consideration to respondent's expenditures in the past and to the testimony as a whole," he finds the reasonable amount to be \$1200 annually. We ask the Examiner to point to any testimony which warrants such a reduction below the five year average.

A stock yard without an efficient traffic department is not properly serving either its patrons or its stockholders. It has been proven in the past that eternal vigilance is necessary to keep the rates at a fair rate level for the shipper and on a fair competitive base for the company. For the five year period of the report, that vigilance cost the respondent \$19,684.95, or an average annual expenditure of \$3936.99. There is nothing in the future to indicate that this vigilance can be relaxed.

In the past five year period, we fought for and pro-

tected the sale-in-transit privilege at Denver which means about \$50.00 per car of fat cattle savings to the producer and shipper and corresponding savings on other types of livestock. In the future we must attack the present excessive differential between the rates on livestock and meat, between certain long haul and short haul rates particularly affecting our territory and also certain rates now in effect around the market. These are but some of the problems. *There are many others and we sincerely believe that there is no justification whatever from the evidence of record or otherwise that traffic protection expense will be less. If any mere estimate is to be made, we submit that there will be increased expense for this purpose.*

We request the Examiner to allow an annual item of at least \$4000.00 on account of Interstate Commerce Commission expense.

EXCEPTION VIII.

Respondent excepts to the finding contained in paragraph 164 on page 108 of the proposed report that the sum of \$100.00 a month or \$1200.00 annually should be allowed on account of Packers & Stockyards Administration expense. Respondent insists that the allowance is too low and should be increased.

The five year average expense for this purpose, as shown by the report is \$8786.76, or a total of \$43,933.80. Practically this entire expense was incurred in connection with the previous rate hearing. The present rate hearing has also been more expensive and the expense paid and incurred has far exceeded the allowance of the Examiner for the next five years.

An allowance of \$1200.00 per year is entirely too small. Two trips from Denver to Washington and return by no more than two officials of the company will exhaust more than half of that allowance, leaving little or no excess for preparation of exhibits and possible rate investigations. It was pointed out in *Denver Union Stock Yard Co. v. United States*, 57 Fed (2nd) 735 at 753, that much as the parties may desire to avoid litigation, it cannot be avoided. Hence

it is the duty of the Secretary in the first instance to fix a reasonable sum on account of these rate hearing expenses, which sum should be amortized over the reasonable period of five years.

We urge and request the Examiner to fix an allowance of \$5000.00 per year as a reasonable amount to be covered into rates on account of Packers and Stockyards Administration expense. In the light of history, the amount is not excessive.

EXCEPTION IX.

Respondent excepts to the findings of the Examiner contained in paragraphs 40, 41, 42, 46, 51, 58, 65, 75, 93, 97, 102, 104, 107 and 115, insofar as the Examiner in said paragraphs finds that certain land and the structures thereon are not used and useful for the reason that the same consist of railroad trackage and land, loading and unloading chutes and pens with the land on which they are situate, a railroad tool house, and yardmaster's office, all of which though owned and used by respondent are found by the Examiner to be transportation facilities as distinguished from stockyard facilities, and hence the value thereof is excluded by the Examiner from respondent's rate base.

Respondent does not deny that the land in question with the railroad trackage thereon, connects with the main line trackage owned by the railroads, and is leased to the carriers. Over this trackage live stock is delivered to and shipped from the loading and unloading chutes and pens which are situated adjacent to this trackage on land also excluded by the Examiner. We do deny, however, that any of these facts prevent these facilities from being used in the handling of livestock in commerce which is the definition of a stockyard facility under the Packers and Stockyards Act. We, therefore, deny the propriety of the finding which excludes them and excludes their value from the rate base.

That railroad switches, tracks and ample railroad connections are necessary to and part of a proper stockyards service cannot be denied.

Denver Union Stock Yard Co. v. United States, 57 Fed. (2nd) 735.

This same land and these same tracks and structures were found to be used and useful stockyard facilities in the case just cited. Nothing has happened since the decision of that case to change the situation. The mere fact that the railroad may be required under its tariffs to deliver livestock to the consignee unloaded from its cars, does not prevent the structures themselves from being a stockyards facility.

We submit that the value of all of this property should be restored to the rate base of respondent and the findings made in the paragraphs above listed be modified accordingly. We request the Examiner to make appropriate findings to this effect.

EXCEPTION X.

Respondent excepts to the findings of the Examiner, summarized and tabulated in paragraph 115 of the proposed report wherein the value of the land of respondent is found to be \$772,428.00 and the value of that portion thereof found used and useful by the Examiner is fixed at \$571,134.00. Respondent insists that these findings are contrary to the weight of the evidence, are without support in the evidence, and are arbitrary.

Respondent's witnesses placed a value on 131.045 acres of land owned by the respondent of \$1,645,522.50, while the government witness valued the same acreage at \$728,284.00. As the Examiner states, this discrepancy is too great to be accounted for upon the basis of a difference of opinion. He therefore ascribes it to the consideration of different factors. We ascribe it to an admitted difference in experience.

A glance at the two appraisals shows that there is a remarkably close similarity between the factors or elements of value considered by all the land witnesses. The discrepancy cannot be satisfactorily explained on that basis. Before his appraisal work in Denver for this hearing, the government witness had never appraised any Denver property; (Tr. 540, Abs. 165) had never assembled a large tract for industrial uses (Tr. 452 Abs. 140) and made no special

study of other large industrial tracts in Denver. He came to Denver January 7, 1935, and stayed a month. He states that he spent about half that time on land valuation and half on the valuation of structures.

Respondent's witnesses had been continuously familiar with Denver property for many years, all actively engaged in the buying and selling of real estate, and particularly versed in the valuation of industrial property. If market value is a fair test of actual value, and we submit it is, their testimony was unequivocal and emphatic that the land could be sold for the price they had placed upon the property.

When government witness Zelinski's lack of familiarity with Denver conditions and Denver market is compared with the fact that respondent's witnesses Eppich and Newcomb had appraised the land four times, the first time before the Packers and Stockyards Act had been enacted, it is not difficult to determine the cause for the discrepancy.

We agree with the Examiner where he states that the government witness did not give proper weight to certain sales and other factors. This occurred, according to the Examiner, in the case of Zones 1 and 9. We assert it happened in the case of all zones, except possibly zone 7. In fixing the value of zone 4, he gave no weight to the Local Beef and Mutton Sales, where that company paid in 1920 and 1922 more for land lacking in accessibility and subject to overflow than he allowed for Zone 4, which is an integral part of the industrial tract for any purpose. He paid no attention to the Burkhardt sale and Burkhardt written offer in fixing the value of Zone 6. No attack is made on the bona fides of that offer which is two and one-half times greater than the value fixed by the government witness and the Examiner. These examples could be multiplied. Suffice it to say that they are typical.

With the exception of the values in Zones 1, 2 and 9, the Examiner has adopted the values of the government witness, who—excellent man and thoroughly fine fellow that he is—is admittedly without experience. No value fixed by respondent's experienced witnesses—equally excellent men

and fine fellows—has even been remotely approached by the Examiner. Yet the Examiner says that as to Zones 1 and 2, in the exercise of his judgment, he finds the Examiner was too low to the extent of \$500 per acre in Zone 1 and \$1000 per acre in Zone 2. Thankful for small favors, we are nevertheless at a loss to find any logical basis for this difference in the amount of increase. Respondent's witnesses place a value of \$17,000.00 per acre on the bulk of Zone 1 while the government witness found the value to be \$8500.00 per acre. The Examiner finds \$9,000.00 per acre. In Zone 2, respondent's value is \$15,000.00 per acre while the government witness found \$5000.00. The Examiner finds \$6000.00 per acre. In Zone 9, respondent's witnesses found the value to be \$20,000.00 per acre while the government witness found the value to be \$15,246.00 per acre. The Examiner finds \$16,000.00 per acre, but decrees that only half the land is used and useful. We submit that there is no basis in the record for the values selected by the Examiner.

The Examiner states that respondent's witnesses valued the property as a stockyards and culls out a bit of the cross-examination of Witness Ivins that if and when pens are placed on Zone 3, the topography and location is such that Zone 3 would then more nearly approach the value of Zone 2. The important bit of testimony of all respondent's witnesses goes without mention, namely that the tract could be sold within a reasonable time for a price equal to the value as appraised by them.

All witnesses agreed that the highest and best use of the tract is the stockyard use. We deny that our witnesses valued it on any different basis, but assuming for purposes of argument that they did err in this regard, was the error less in Zone 2 than in Zone 1? If not, why only an increase of \$500.00 in Zone 1? Is an Examiner who claims no qualifications as an appraiser of land, qualified to determine the value by the exercise of that elusive faculty called judgment? The answer to this last question is that it is only when his judgment is supported by the facts of record. We deny that these values are supported by competent and substantial evidence.

We request the Examiner to substitute the values as found by respondent's witness for the used and useful land, including the so-called railroad land erroneously excluded (See Exception IX) in lieu of the values of such property contained in the proposed report.

EXCEPTION XI.

Respondent excepts to the finding of the Examiner contained in paragraph 211 and emphasized in the following quoted portion thereof:

"Moreover, respondent has not assessed a yardage charge against traders' livestock resold or reweighed for purposes of sale except that resold in the commission division. It is, therefore, found that respondents tariff schedule now in effect contains rates and charges which are unreasonable and discriminatory."

And in this connection respondent excepts to the findings or statements made in paragraphs 192, 196, 198, 199, 200 and 201 wherein the Examiner states his conclusions that the yard trader does not contribute to the support of the market except by way of the profit paid on feed consumed; that the traders pay no yardage charge (implying a difference in treatment from other buyers) and thereby increases the yardage charges paid by shippers; that it is speculative to say the operations of the trader result in higher prices on the market; that trader shipments to other markets tend to lower prices at Denver; that free service in any manner or to any extent is furnished the trader with the result that discrimination exists or that another class of patrons, i. e., the shipper is charged an increased or excessive cost for the rendition of the service to that class; that the evidence of record does not warrant the rate-maker in relieving the traders of any yardage charge whatsoever and implying that other buyers share the cost of the conduct of the market and implying that any part of the livestock "sold on order" and "sold for slaughter locally" would be subject to a reweigh charge on traders. Respondent submits that these findings, statements and conclusions are not supported

by the evidence, are contrary to fact, contrary to law; and result in a discriminatory and confiscatory rate schedule. Respondent further excepts to the inclusion in the rate schedule, paragraph 212 on page 137 of the proposed report, of the schedule of charges under the heading "Resold and/or Reweighed for purposes of sale."

We have heretofore pointed out in Exception Number 3 that the computations made and the factors used in determining the estimated amount of income from the so-called charges on reweighs and resales are erroneous, and grossly in excess of the facts, due to the misconception of the Examiner that livestock "sold on order" and "slaughtered at Denver," and carried over into paragraph 213 under the heading "resales" are transactions which would come within the proposed reweigh charge. We have also pointed out in Exception Number 1, that there is manifestly a fundamental misconception in the Examiner's mind that the charge imposed by the respondent is for yardage, whereas in truth and in fact it is a marketing charge.

The present exception, however, deals directly with the propriety of any reweigh charge, asserts that the conclusions of the Examiner are without foundation in the record, and denies that the failure to assess and collect a marketing charge against the traders in the case of reweighs is discriminatory or unreasonable. As a matter of fact we assert that the imposition of a charge equal to one-half of the regular charge for the use of the market in and of itself creates an unreasonable and discriminatory rate schedule.

There is no denial by the Examiner that the trader is an important part of the buying power on the market. This is amply supported by the record. Government witness Christensen testified (Ab. page 57) that it is to the interest of the shipper to have dealers on the market, and a few pages previously thereto the same witness had testified that the shipper is greatly interested in preventing anything that would hamper sales.

The government did not apparently care to call any livestock producer or shipper and examine him directly on

this point. Respondent did call not only three producer witnesses, but also called a yard trader, and one, who in addition to that activity is a large producer and shipper of live stock from his own ranch. There was complete unanimity of opinion on the part of all of these, and it was not in any manner changed by the extended and searching cross-examination of government counsel. We ask the Examiner to read again the testimony of witnesses Pace, Jamison, Mitchell and Wolf, and thereafter to read again the pertinent testimony of Mr. Pexton who, government counsel would be among the first to admit, is an expert in the stock-yards industry, and one who has kept closely in touch with both the shippers and buyers of livestock. Witnesses Pace, Jamison and Mitchell are not connected in any manner with respondent and an accurate summary of their combined testimony would be about as follows: The producer of livestock is interested in the outlet at the market, and of course that means the buying outlet. It is almost axiomatic that the more buyers there are, the better the price because one buyer competes with another for livestock of the type, kind and grade in which he is interested. The trader is not only an important part of this buying outlet, but is often at certain seasons of the year, the only market, and therefore anything that would hamper the trader and hinder the market, would hinder the producer. Ordinarily, and perhaps for the most part, traders are not interested in the buying of fat cattle, or slaughter stuff, unless they are buying on order for some outside packer, that is to say, for some packer whose plant is not at Denver. Whenever, as sometimes happens, packer buyers "lay off the market" and the trader believes the fat stuff is going at too low a price, he will jump into the market and attempt to buy in the hope of subsequent profit. As two of these witnesses stated, this has a definite effect of stabilizing and raising the price on fat cattle. The big function of the trader, however, is to absorb the odd lot stuff, and the amount of small shipments to be thus absorbed is increasing, due to the increase in truck-ins. Mr. Wolf stated that it was only such large operators as his firm of Wolf Bros. which could

bid on and take rail carload shipments; that the bulk of the traders were small operators and were becoming specialists in handling the two, three and sometimes eight animals which come in by truck, and that they are chiefly responsible for the truck-outs at the market. Mr. Pace stated that the trader is a benefit to the shipper and producer, because he buys anything that comes in—livestock the packer would not touch, and that somebody has to do that. (Abs. 341). Mr. Mitchell testified that it is as important to have traders on the market as it is to have packer buyers from the producers' standpoint, and that he would not ship to a market that did not have trader buyers.

We repeat that there is absolutely no testimony in the record to the contrary, and I doubt if government counsel will deny this statement.

The position of the Examiner is apparently the same as that indicated by government counsel at the hearing, namely that in spite of this fact, the trader uses the facilities in some different manner than the ordinary buyer, and therefore should be charged for that use. We respectfully submit that there is no essentially different use, and that in any event no charge should be made.

A and B, two producers with cattle on the forest reserves near Minturn, load three cars each and ship them to Denver. The cattle are mostly feeder cattle of varying age, weight and condition, but there are some fat and some two-way cattle among them. Suppose A ships to John Clay and Company, and B to Drinkert and Emmert, two commission men at the yards, to whom the cattle are consigned for sale on the Denver market. Out of the eighty-five or ninety head in *each shipment*, suppose that about twenty are slaughter livestock and the rest feeders, out of which a car of fairly reasonably well matched cattle can be sold. By "well matched", we mean cattle of about the same age, weight and condition, so that under feeding they will put on about the same weight and mature about the same time. That is the way the cattle feeder insists on buying his feeder stock.

A packer buyer or packer buyers buy the fat stuff out of each shipment, while a Nebraska and an Iowa farmer buy the two carloads of feeders,—one car from A and one car from B. John Clay and Company and Drinkert and Emmert are each left with the equivalent of one full car of nondescript cattle. If they try to find buyers for a few head of matched stock out of the lot, they not only lose the benefit of the freight, but run the risk of being stuck with the rest and ultimately taking a low price, to the detriment of the shipper. The commission man's sole object is to get the highest price possible for his shipper, and it is expensive for the shipper to have the commission man forced to hold cattle.

Consequently, an effort is made to sell such cattle to traders. Let us suppose that a trader buys the balance of the two loads. He can do what the commission men are not equipped to do. He mingles the two shipments, and then sorts them. He may even buy more head of odd lot cattle from a place which sorts with Minturn, and out of his purchases can sort out three cars of matched cattle, perhaps two cars of light-weight, or long feeders, and one car of heavy or short feeders. He sells these to country buyers and is able to do so with the benefit of the freight. The producer is definitely helped, because his cattle are promptly sold and absorbed by the market.

So far as the shipper and the respondent are concerned, is the trader in any different position than the Nebraska and Iowa farmers in the above illustration? We submit that he is not. When the cattle are sold they are weighed out to the purchaser,—in one case the farmer; in the other, the trader. Both are buyers, and this weighing determines the price per head each buyer is to pay. The respondent provides a pen for the farmer-buyer without extra charge. It drives the cattle to it and he is permitted to use that pen for such time as he desires. Frequently the farmer keeps the cattle there for twenty-four hours or more before moving them out, because of branding, dipping, dehorning, etc., and only these special services and the cost of feed are paid by the farmer-buyer. The respondent provides a pen for the

trader buyer after his purchase, also without extra charge, and he is also permitted to use such pen for such time as he desires. Not merely frequently, but generally, the trader buyer moves the cattle out in less than twenty-four hours, a quick turn-over being his best assurance of profit. Witness Wolf testified (and there is no testimony of record to the contrary) that eighty per cent of the twenty-six thousand cattle he purchased on the Denver yards as a trader in 1934 and 1935 moved out within twenty-four hours. Of course, the trader, like the farmer, pays for the cost of any hay or grain fed to the livestock while in the yards after purchase.

But the government's position at the hearing, and the Examiner's position now, seems to be that the trader is in the position of buying and selling, and hence is in a different position from the farmer-buyer. This is likewise an unsound distinction. The farmer is in the position of buying and selling livestock for a profit. One is a constant patron of the market, and the other, the farmer, is an intermittent patron. If a buyer, as such, is to be charged his proportionate share of the cost or support of the market, then on any principle of public utility ratemaking, the intermittent patron should be charged more than the steady day-in-and-day-out patron. The fact of the matter is, however, that in the livestock industry the buyer never before has been and never should be charged for the privilege of coming into the market and buying.

The Examiner finds that the trader sells or reweighs for purposes of sale on the market. Let us examine the record on that. The only testimony of record is that of Mr. Wolf and the only exhibit is government exhibit 43, which, as we have stated before was in fact prepared by respondent, adopted by the government and introduced as a government exhibit. Mr. Wolf testified that he handled on an average thirty thousand cattle through the Denver yards; that during 1934 and 1935 he had handled approximately twenty-six thousand cattle through the Denver yards, only 17% of which were reweighed, the 83% selling on original weights. Of this 83%, 80% was sold to his

regular clientele, who look to Wolf Brothers to supply their needs and who are not on the market otherwise as buyers. The exhibit shows a slightly different percentage, namely 21% because all traders do not do the carload volume of Wolf Bros., and naturally the percentage of reweighs in odd lots and truck-in purchases is greater than in carload purchases, but the principle is the same,—namely, that on a very large percentage of trader purchases, the trader is in no different position, so far as the market is concerned, than the farmer or feeder or packer buyer, and uses no other or additional facilities. He receives no other or different service, except perhaps, as Mr. Wolf testified, less service than the ordinary buyer. The farmer, the feeder and the packer buyer is not charged a "half yardage", or any other charge for the privilege of buying on the market. Certainly as to this percentage the trader should not be charged, and we submit that is a matter of fact no charge can be collected from him in such case. Yet the Examiner includes in paragraph 212 a schedule of charges for livestock resold, whether or not reweighed. This we submit is erroneous.

If the Examiner means by the heading "Resold and/or Reweighed for Purposes of Sale" that the schedule is only to apply to those cattle resold on the Denver market or reweighed for the purposes of sale on the Denver market, then his entire schedule must be revised because the volume used in paragraph 213 to test the result of his proposed rates reflects livestock in the 83% classification of Wolf Brothers, none of which is either resold or reweighed on the Denver market.

What about the 17% of reweighs? There is one additional use made by the trader buyer in such case, namely a second use of the scale, but that certainly would not warrant a half yardage charge. The Examiner would not contend that of the 28¢ a head to be charged the shipper under his proposed schedule on cattle, one-half thereof is the weighing, and yet that is the only additional use made by the trader buyer even in the case of the 17% of reweighed cattle, except as to such cattle as are resold for traders by

the commission men on the Denver market, i. e., plants, and these amount only to approximately 3% of trader purchases. The charge is not supported by the record nor is it justified.

The fact of the matter is that no free service whatever is rendered the trader. Our position is that so long as his operations are part of the buying power of the market, he is there like any other buyer for the benefit of the producer and buyer, and all service is included in the one and only charge made for the use of the market, that is the marketing charge, which is erroneously called a "yardage charge" by the Examiner. That the producer well recognizes that the marketing charge made is fair and reasonable is emphatically shown by the testimony of witnesses Jamison and Mitchell (Tr. 1446, 1450 and 1478; AB. 458, 459 and 469). Mr. Jamison and Mr. Mitchell are both producers of livestock of long experience.

The Examiner states that the claim of respondent that the operations of the trader result in higher prices to the shipper is speculative. The evidence is uncontradicted—in fact it is admitted by the Examiner,—that the trader performs a useful function on the market in buying livestock which would not otherwise be absorbed. A market which cannot absorb the supply of the commodity is glutted, and a glut on any market is followed by decreased prices as surely as night follows day. There is nothing speculative about that at all. Every producer witness testified that traders do stabilize and tend to increase the prices paid for livestock. One witness stated that because of this fact he would not patronize a market that did not have plenty of trader buyers. (Witness Mitchell Tr. 1478; Ab. 469.)

The Examiner also finds that the competition of trader livestock with fresh arrivals on the market is a depressing influence on price. This also is not supported by any evidence of record. We respectfully call the attention of the Examiner to the testimony of Witness Pace, a producer (Tr. 1074; Ab. 348) where he states that the small amount of competition with fresh arrivals does not hurt the shipper

in the long run, and to the testimony of Witness Jamison, also a producer (Tr. 1462; Ab. 463) that he did not believe the competition with fresh arrivals tends to decrease the price. We ask the Examiner to point to any contradictory evidence.

The Examiner finds that our failure to charge the yard trader some additional rate is discriminatory and unreasonable with respect to the shipper. This finding is not supported by the evidence. We have demonstrated above that the trader buyer, with the single exception of planted livestock, is in exactly the same position as any other buyer, that is to say, is part of the buying outlet of the market, for which the producer pays, and intends to pay, his marketing fee or charge. We respectfully submit that the practice has been in effect since the commencement of the stockyards industry, and so far as Denver is concerned, since 1886 no charge has been assessed against the buyer on the market, whether the buyer be a trader, or a farmer, or a packer. The presumption is therefore in favor of the reasonableness of the present practice. It should and must take strong evidence to warrant the ratemaker in overthrowing a long settled practice, and thus invade the managerial function.

We stated at the outset of the argument in support of this exception that the schedule proposed by the Examiner on livestock "Resold and/or Reweighed for Purposes of Sale" creates a discriminatory rate schedule. As we have pointed out above so long as the trader operates as an integral part of the buying outlet of the market, he is in the position of any other buyer and should bear no charge except that borne by any other buyer, namely the liability to pay for feed which his livestock consume as long as they remain in the yard. It is equally true that in the case of "plants" he occupies the position of any other seller, and should pay the full marketing charge. That this is what the trader in such case does now is shown by our tariffs on file with the Secretary. There is no ground in the evidence or in fact to charge the trader any different rate per head in such case than is charged the producer or the shipper, be-

cause the trader then uses the market in identically the same way that the producer uses it in the case of producer sales. To give the trader the right to consign his livestock to commission men, avail himself of the privilege of the market and sell through the machinery of the market for 14¢ a head, whereas the producer who does the same thing and uses the same facilities is charged 28¢ a head, is unjust, unreasonable and discriminatory. We submit that the present practice of the respondent is the sound, reasonable and non-discriminatory practice, which must be approved by the Examiner and included in the proposed report.

The conclusion of the Examiner that a charge on the trader will not hamper sales, will not tend to drive traders off the market and will not react to the detriment of the shipper is contrary to the testimony of every producer witness who testified on the subject. We ask the Examiner to read again the testimony of Witnesses Pace, Jamison and Mitchell commencing at pages 1039, 1143 and 1467 of the transcript, and summarized at page 335 A, 457 and 465 of the abstract. *Witness Pace testified in substance that anything which would hamper the trader would hurt the market, and that the yard company should do everything in its power to increase the demand, including the trader demand. He stated that oftentimes the trader is the only market, and that the shippers figure that the trader makes the market at all times on certain classes of cattle. He testified that he had talked with traders, all of whom said that they could not stand a charge and would quit the market if the charge were imposed.*

On cross-examination government counsel repeatedly asked these witnesses the question as to whether they really thought that a charge of ten or fifteen cents on a thousand pound steer which might sell for \$150.00 would really affect the situation. Witness Jamison gave the complete answer to this when he said that any charge would lessen competition; that the charge must not be judged by the individual case, and that if the reweigh charges amounted in total to \$15,000.00 or \$20,000.00 a year, of course such charge would lessen competition and hurt the market. Witness Mitchell

also testified that any charge on the traders would hurt the market in his opinion. We repeat, there is no contrary testimony.

Government counsel in each case also asked these witnesses if they were familiar with the fact that a yardage charge is assessed against the traders at the Chicago market. The witnesses replied that while they did not know this fact definitely, nevertheless Chicago was in a different situation. Dan Casement, producer and shipper, when testifying at the 1930 rate investigation used the phrase that "Chicago is the end of the road" and that cattle must sell there. It is a recognized fact that conditions at Chicago are totally different than at any other central market. Government counsel then asked these witnesses if they were familiar with the fact that in recent hearings the Secretary had ordered yardage charges in various amounts to be assessed against the traders at Omaha, St. Joe and Sioux City. One of the witnesses replied that he knew it had been ordered, but that it was not being enforced; and we respectfully submit that the record of these other yards on this point is within the knowledge of the Examiner in this case and should be considered by him. That record is that at Sioux City, as of November 6, 1936, the yard company is not collecting a reweigh charge on any reweighs except on plants, and as to them it is collecting only the half yardage charge fixed by the Secretary. This practice, we submit, is discriminatory. It is a matter of common knowledge that Sioux City was in such dire need of revenue that it requested and was granted on August 15, 1935, an increase in rates over the Secretary's schedule theretofore in effect, and we submit that had Sioux City not felt that the imposition of a charge upon all reweighs was adverse to the best interests of their market, they would have collected whatever revenue might have been obtained therefrom.

At Omaha, in spite of the Secretary's order, no reweigh charge is being collected on shipments resold to move back to the country. Even at Omaha this constitutes a major portion of the trader sales. At Denver, which is primarily a transit or feeder market, such shipments constitute prac-

tically all of the trader traffic. We submit, therefore, that a reweigh charge similar to that now proposed to be ordered by the Secretary is not in force at Omaha.

At St. Joseph, although the yard company has been badly in need of revenue and was granted an increase of rates by the Secretary on August 17, 1936, the yard company has seen fit to reduce the reweigh charge on cattle from $17\frac{1}{2}\text{¢}$ permitted by the Secretary, to 9¢ ; on calves from 11¢ as permitted by the Secretary to 6¢ ; on hogs from 6¢ as permitted by the Secretary to 3¢ and on sheep from 4¢ as permitted by the Secretary to 2¢ . This reduction was made because the yard company at St. Joseph recognized that the higher rates were hampering sales and hurting the feeder market, and that whatever hurt the market hurt the producer.

Discrimination either exists or it does not exist. If it exists, it is not cured by the collection of less than the fair charge for the service rendered. If, as the Secretary has found at all of the above markets, and is proposing to find at the Denver market, it is discriminatory to fail to charge the traders on all resales and on all livestock reweighed for purposes of sale, that discrimination is not cured by imposing a charge only on such traffic as does not move to the country, or by waiving it on all except certain classes of that trader traffic, or by charging 9¢ for example, where the Secretary has found $17\frac{1}{2}\text{¢}$ to be a non-discriminatory rate. This is a matter which cannot be left to the discretion of the yard companies. It was openly said in the arguments before the court following the Secretary's 1930 rate investigation at Denver, that there was nothing in the Secretary's order which required respondent to impose the charge if it did not care to collect the money. Such a statement is incompatible with the theory of discrimination.

We request the Examiner to eliminate the findings, statements and conclusions above excepted to, to find that the failure to assess against the traders a rate or charge on livestock resold or reweighed for purposes of resale otherwise than through commission firms, is not discrimi-

natory, but, on the contrary, is just, reasonable and non-discriminatory, and to eliminate from the *rate schedule* the charges therein provided for on account of resales and re-weighs for purposes of resale. We also request the Examiner to exclude from the rate schedule and from his computations for the purpose of determining the fairness of the proposed rates, all items incident to such resales and re-weighs.

EXCEPTION NUMBER XII.

Respondent excepts to the finding of the Examiner in the proposed report that the property in Zone 9 devoted to the Stock Show is not used and useful in the rendition of services for which are charged rates, the reasonableness of which is being determined in this proceeding and the exclusion of the value of said property from respondent's rate base. Respondent further excepts to the findings that the show is a community enterprise; that the stadium was built by the stock show association out of donations procured and that respondent absorbs the deficits of that association. Respondent further excepts to the proposed report because the Examiner has not excluded the income directly traceable to and derived from the show although he has excluded the value of the land and structures from the rate base; it being axiomatic that when property is excluded, the income derived from or on account of that property must also be excluded in determining the reasonableness or unreasonableness of existing rates and the justness of proposed rates. The findings to which exception is here taken are contained chiefly in paragraphs 68, 70, 71, 113 and are reflected in the estimates of future receipts, in the rate factors used, in the proposed schedule of rates and in the finding that existing rates produce more than a reasonable rate of return, all of which findings should be eliminated by the Examiner.

A stockyard facility is one which has to do with the handling of livestock in commerce. The late Chief Justice Taft stated in *Stafford v. Wallace*, 258 U. S. 495, that the stockyard was but a throat through which the livestock passed from the great producing areas of the West to the

consuming centers in the East. We submit that land and buildings, owned by the respondent stockyard company, where any and every producer may ship his livestock, offer the same for sale and sell it at prices which, as the Examiner admits, are from \$1.00 to \$1.50 a hundred more than ordinarily received for like livestock are used and useful in the handling of livestock in commerce and must be included in the rate base.

This question was decided in *The Denver Union Stock Yard Co. v. United States*, 57 Fed. (2nd) 735, and that decision is final so far as this market is concerned, unless new evidence warranting a different decision has been presented. ~~There is no different evidence.~~ Every witness interrogated upon the point, and this includes government witness Christensen testified that the stock show had undoubtedly improved the quality of the livestock produced, had attracted buyers, had advertised the market, had increased the outlet for western grass fed cattle and sheep, and that these benefits spread throughout the entire industry whether or not the shipper availed himself of his opportunity to ship to and sell at the show. The Examiner recognizes all this (Proposed Order par. 30), but because of an erroneous belief both as to the testimony of record and as to the intent and purpose of the Act, says all these uncontradicted facts are beside the point. Dr. John R. Mohler, Chief of the Bureau conducting this investigation, not only recognizes the importance of such shows, but urges that every effort be made to stimulate them. We quote in part from Respondent's Exhibit 2 containing the authoritative statement of Dr. Mohler:

"In the industrial world a firm which expects to prosper and produce dividends does not use obsolete methods and equipment. Junking old machinery and remodeling old factories takes both courage and capital. But in the end such a course is the wisest and most economical. . . ."

"How is the livestock industry meeting this same situation? Is there a readiness to admit the obsolescence of types of livestock that no longer meet

production needs and market requirements? Is there a willingness to discard former methods for newer ones that are better? Is the livestock industry as progressive as it might be? . . . There is evident need also for a closer relation between our standards for breeding stock and the utility value of the product. . . .

"Naturally we look to the great stock shows as the supreme authority on animal conformation. Hence every means of stimulating entries by the best breeders adds to the value of such shows."

We submit that in view of the decision of the United States District Court for the District of Colorado in the case above cited, and in view of the uncontradicted and unanimous testimony of record in this case, the stock show property is a stockyard facility and service within the meaning of the Packers and Stockyards Act, 1921, and the Examiner is without justification in excluding the value thereof from the rate base.

Frankly, we cannot understand the attitude of the government in this case in again excluding the stock show property. In view of the utter lack of supporting evidence, we are justified in stating that the Examiner has adopted the views of government counsel and is not basing his findings in this regard upon the testimony and exhibits as an impartial examiner is duty bound to do. There is no evidence that the stadium, or other buildings were built as the result of public solicitation of donations, yet the Examiner asserts that as a fact. The respondent owns all of the land involved and without donations or the solicitation of donations built all of the buildings to house the show, except the tile-barn, small sales pavilion and lunch room and those buildings it now has acquired. In addition to this, it vacates surrounding buildings during two weeks in January so as to have room for the show, which now ranks as one of the four most important livestock shows in the United States and in some branches of the industry as the most important. The Examiner correctly recognizes that the creation of the Western Stock Show Association, a non-profit corporation under Colorado law, was "a clever move" of respondent

to free itself of some burdens, which burdens are defined in the evidence as the demand for favors and favoritism.

There is no denial of the benefits of the show and that those benefits spread throughout the entire industry. The only contrary sentiment was expressed by Witness Collins who said that though he knew he felt differently from many others, he didn't like shows or any other activity which was aimed to teach people how to produce livestock and improve herds because it put a lot of people into the business who would fail otherwise and he felt it was better to let "the devil take the hindmost." This is a narrow and selfish view with which we have no sympathy.

There is no denial that the show is a great advertising medium. Witnesses Jamison and Mitchell testified to this. Government Witness Christensen also testified but thought that the expense was too great to be admissible under that heading. The producer witnesses testified that this advertising had greatly extended the sales territory for range livestock to the benefit of the producer. Respondent presented facts, figures and exhibits supporting this fact. Respondent takes the position that in view of the benefits, the expense is reasonable. It also takes the position, that even though the main object of the show were for the expansion of the business of the Yard Company, respondent is entitled to have this property included in its rate base on the theory that whatever expense is incident thereto less any and all income derived from the use of the property is a reasonable expenditure for the expansion of its business. See *West Ohio Gas Co. v. Public Utility Commission*, 55 Sup. Ct. Rep. 316 at 321.

We further point out in this exception that the Examiner has not followed the equitable practice of eliminating income from "not used and useful property" when the property itself or the expense incident thereto is eliminated. He does throw out of the direct earnings of respondent \$3547.50, which is the ten year average rent received from the stadium and show buildings. Respondent's Exhibit 13 shows additional earnings in the yards directly due to the

show averaging \$11,592.14 per year for the past six years, but this sum is not eliminated from earnings either in determining the reasonableness of the existing rates or the reasonableness of the proposed rates. The unrefuted testimony of record given by representatives of the management and by producer witnesses supports this exhibit. There is no contrary testimony. We submit that either the property must be restored to the rate base or the earnings derived therefrom must be also excluded.

We submit that unless the findings of the Examiner be changed, the proposed order and the rate schedule thereby decreed, will confiscate a large and substantial portion of respondent's property contrary to law. We adhere to the principle stated by Mr. Justice Cordozo in the West Ohio Gas case (*supra*) that without supporting evidence of record, there is an absence of due process as required by the Constitution of the United States. There is no evidence of record which supports the finding that the Stock Show and the property devoted thereto is not a stockyard facility and service within the meaning of the Packers and Stockyard Act of 1921 under which this investigation is held.

We request the Examiner to amend and alter the report so as to find that the entire property in Zone 9 is used and useful property, to include in the rate base the fair value of such land and of the structures thereon and to amend his rate schedule accordingly. In default of this, we insist that the earnings due to the stock show must be eliminated from the Examiner's computations and the rate schedule correspondingly increased.

EXCEPTION XIII.

Respondent excepts to the disallowance by the Examiner of the going concern value of respondent's plant and the exclusion of any such value from the rate base. In this connection, respondent specifically excepts to the following findings contained in paragraph 138 of the proposed report:

"The testimony shows that the various witnesses arrived at their valuations having in mind that

the property was a part of a going concern and that their values were arrived at with this element in mind. In adopting the cost of reproduction new less depreciation of the structures and the value of the land as found consideration has been given to the element of going-concern value and the values so found include the value of the property as a going concern. To include an additional specific amount in the rate base would be a duplication and no separate allowance is, therefore, made on account of going-concern value."

Respondent submits that these findings are contrary to fact and to the evidence of record, and that unless a fair going concern value be allowed in the final findings and order, the same will be confiscatory.

We are at a loss to understand how or on what basis the Examiner makes the finding that the property of respondent was valued as a going concern. Certainly government witness Zelinski, whose reproduction new value was accepted by respondent and adopted by the Examiner, did not value either the structures or the land upon any basis which the Examiner can remotely deem to include any element of going concern value. This is manifest from the record.

Witness Zelinski found the reproduction new value of the structures, i. e., what the actual cost would be today to reconstruct the pens, paving, buildings, equipment, etc., of the respondent. He testified (Tr. 561, Abs. 171) that he did this by ascertaining the January 1, 1935 scale of wages for all classes of labor and the unit price as of the same date of materials. He testified that his unit prices were determined by writing lumber, concrete and brick men in this locality, determining what their bids would be for the material delivered on the ground and from data in his own office. He introduced his unit prices for materials as one of the government exhibits in the case. He then testified in minute detail how he and his staff of engineers and assistants had inspected each part of the structural property capable of actual inspection, such as the paving, pens, sheep barn, exchange building, etc., to determine the actual con-

dition of these structures compared with new and in this manner determined a per cent condition. As to such items *not capable of exact detailed inspection throughout*, such as the water system and sewage system, he testified that he took into consideration soil conditions, that is to say the lack of corrosive or destructive elements in our soil and verified that as best he could by actual inspection in man-holes, sewer outlets and hydrants. On this basis, also, he determined for these items the condition per cent compared with new. By applying these percentages to actual January 1, 1935 reproduction cost, he fixed the reproduction cost less depreciation. We submit that this method does not include any extra allowance for going concern value.

As to the land, the testimony of the government witness absolutely negatives the possibility of the allowance in his valuation of any going concern value. The following brief reference to the summary of pertinent portions of Mr. Zelinski's testimony is sufficient to demonstrate this.

Tr. Abs.

364 107 He valued the land as naked, unimproved land.

121 He testified that in valuing the land, he stripped it of roadways and sewers as constructed by the yard company, and hence in viewing the tract from an appraisal standpoint "it is necessary to take into account the absence of dedicated public streets and alleys to serve so large an area." Later on in his testimony, he states that this influenced his appraisal downward. We quote this later testimony verbatim:

390 127 "Yes, I made the statement on page 13 of my report that it is necessary to take into consideration the lack of dedicated streets and alleys. I took that fact into consideration because in going on the concept that these lands are stripped of all improvements that are upon them, naturally the roadways which we have inventoried in our engineering report are considered stripped off the property, so that the area becomes a very large area without any access shown. Stripped of these improvements that area has its access only through what one would call stub end

Tr. Abs.

streets, except as far as Race Court is concerned."

448 138 "Where I spoke of the absence of highways in the tract, I meant an absence of dedicated public streets. The absence of dedicated streets under certain circumstances can be an advantage in connection with the tract for a large industry but is not always so. *You must remember in this case I am valuing this property not for the special use and in the special way that the Stock Yard Company is using it.*" (Italics ours.)

524 159 "With regard to the difference in value between Zone 1 and Zone 2, to begin with I am not considering the market activity that is on those zones at the present time as a gauge of values because stripped of its improvements I don't know whether the stockyard arrangement would be rebuilt the way it has been even though I am valuing the property from the standpoint of the highest and best use. *In other words, my shading down of the values from Zone 1 to Zone 2 is not on the basis of the actual use which is made of that property.*" (Italics ours.)

607 182 "Yes, I testified that I had appraised this property in accordance with my interpretation of the Minnesota rate case, which is with all the packing houses and other related industries in place, *but with the stockyards and the improvements which themselves constitute the underground and superficial structures of the stockyards removed.*" (Italics ours.)

We submit that it is impossible to say from the record that the Examiner included any element of going value in his valuations of the land.

It may well be that respondent's land appraisers considered the earning potentialities of the tract in fixing their values, and if this be interpreted as an element of going value, then it may explain a substantial portion of the difference in land valuation of \$917,268.50 between government witness Zelinski's "bare-land" appraisal and the appraisal of respondent's witnesses. But the Examiner does not include respondent's land witnesses among those

who testified on going concern value. He lists the government witness Zelinski, respondent's engineer Hyder and respondent's assistant general manager Pexton. Neither Hyder nor Pexton testified as to the value of the land or structures. Of these three witnesses, only the government witness did so and we submit that in the light of his recorded testimony, the finding of the Examiner that the property was appraised as a going concern is clearly erroneous.

In paragraph 135, the Examiner states that "the assistant general manager of respondent testified that respondent had donated to packing companies and railroad companies land" to induce them to locate near respondent's stockyard. This is true, but the subsidies were not only of land, but of cash, machinery and even capital stock as well as land. Respondent's exhibit number 15 is the detail of these subsidies as shown by respondent's books. To the total original sum thus used for these, there is added the carrying charges to date of the gift, not as the Examiner implies in paragraph 136 to the date of the hearing, hence these carrying charges could not reach infinity.

That part of the statement shows the complete misconception by the Examiner of our position. The only possible going concern value which a public livestock market can have is that value which, over and above the value of the physical plant, is inherent in the market itself. The Examiner persists in regarding a stockyard as a conglomeration of pens, sheep sheds and barns. His error is fundamental. A public livestock market, such as the Denver Union Stockyard is not a feed yard such as at Laramie, Wyoming, or Pueblo, Colorado. At such railroad or feed-in-transit yards, it may well be that the only going concern value is inseparably linked with their strategic location from the transportation standpoint and hence when the land is valued for its "highest and best use," every necessary element of value is inevitably included. That, we emphatically state, is not the fact in the case of a public stockyards market. There this added element of value, called going concern value, arises by reason of the existence and the

laborious creation over a period of years of a buying outlet capable of absorbing the supply. Nor is this static, for when the buying power exceeds the supply, new sources of supply are tapped, requiring in turn increases in buying power. It is this cycle of progression which makes a healthy market and compels recognition of going concern value, as a separate element.

The Examiner states in paragraph 136 that "original cost of land which is given away plus carrying charge neither indicates the presence of going concern (value) or measures its amount though present." We take issue with that statement. It is not universally true and most certainly is not true in this case. We do not contend that the total amount of such subsidies is necessarily the "dollar-and-cents" value of going concern value. It may be the same or it may be more or less than that amount. In certain types of industry, it may be no indication whatever of the existence of this element of value. But in an industry where going concern value is chiefly dependent upon the existence of a market, i. e., the ability to obtain and steadily absorb the commodity, we insist that the amount of these subsidies determines or at least is strongly indicative of the *cost* of that element of value. If the market has progressed, present value should be recognized as being in excess of cost. The Denver market today ranks as the largest sheep market in the nation. It is the largest pure-bred bull market. It is the fourth largest feeder cattle market. There is no protected franchise monopoly in the case of a stockyard—no certificate of convenience and necessity required before construction of a competing plant. If a great livestock market were a matter of easy construction and success, Denver would not be the largest and practically the only general livestock market between the Missouri River and the Pacific coast, drawing its supplies from as far west as Oregon and Washington and with a buying outlet stretching in large volume to the Atlantic coast. It is the product of these years of effort, coupled with the expenditure of large sums of money in subsidies and other intangibles which we term the going concern value of respondent and

for which a separate allowance must be made in the rate base.

The Examiner impliedly admits that going concern value does exist in this case but excuses his disallowance thereof as a separate element on the basis (1) that it is included in the valuation of the land and structures, and (2) that the record is not sufficiently definite to permit the fixing of a separate allowance. We have already demonstrated from the record that the method followed for fixing the value of land and structures excludes any element of going value. On the second excuse of the Examiner, we insist that with the progressive history of the Denver market and the success of respondent in building that market, the cost of the acquisition of that dependable day-in-and-day-out buying demand is the minimum value of this element which must be included in the rate base. There is no contrary testimony on this. We do not have a case where because of conflicting testimony, the Examiner and the Secretary is permitted to choose between two different estimates of value. In the absence of proof to the contrary, the minimum figure at least must be found by the Secretary.

Westinghouse Electric Co. v. Denver Tramway Co.,
3 Fed. (2nd) 285 at 298.

The finding of an administrative board not supported by evidence is arbitrary and violates the constitutional guaranty of due process.

West Ohio Gas Co. v. Public Utilities Commission,
55 Sup. Ct. Rep. 316 at 319.

Absolute definiteness is not essential. In the 1930 hearing, the Secretary allowed ten per cent. of the physical values as the going concern value of respondent's plant. There was no definite evidence to support this and respondent attacked this finding in court on that ground. The three-judge court, speaking through McDermott, Jr., said:

(The Denver Union Stock Yard Co. v. United States,
57 Fed. 2nd, 735 at 743, 744):

"The government introduced no witness who gave his opinion as to going concern value; but the history and value of the stockyards were before the Secretary, and from them he could form a judgment as to that value. He was not bound to accept the opinion evidence offered. The Secretary recognized that there is a value to a going concern that is not reflected in the physical structures, and allowed approximately 10 per cent. of the physical values. That such a value exists, which should be recognized, is abundantly settled. * * * (Citing cases)

"There may be businesses in which it is possible to compute with some degree of accuracy this element of value; but, even if accurate computation is not possible, a value which actually exists should not be ignored because of the difficulty of its measurement. There is no rule by which the value of a leg or an arm can be accurately measured in dollars and cents, nor by which pain and suffering can be computed; yet triers of fact do evaluate such things. By the same token, difficulty of measurement should not amount to a denial of right."

We request the Examiner to eliminate the findings complained of in this exception and to substitute therefor a finding of going concern value of such amount as he deems proper not, however, less than the minimum amount of \$325,500.00, and to make appropriate increases in the proposed rate schedule.

EXCEPTION XIV.

Respondent excepts to the finding made in paragraph 165 of the proposed report excluding from the expenses of respondent all dues, donations and subscriptions except \$325.00, which amount the Examiner finds reasonable.

The Examiner has adopted and now proposes that the Secretary adopt the throw-out schedule of the government auditor, government exhibit number 41. That exhibit shows that in the opinion of the auditor only \$223.25 of the dues, donations and subscriptions out of a total of \$3823.84 is allowable. His five year average is \$318.13, which the

Examiner graciously stretches to \$325.00. Of the \$223.25 allowed in 1934, he included:

I. C. C. Traffic reports	\$25.25
Traffic Service (a publication)	10.00
Tax Payers Review	5.00
Traffic Red Book	8.00
Federal Income Tax Service	66.00
Drovers Year Book	1.00

totaling \$115.25, all of which are expenditures for doing business and should not be deemed donations, subscriptions or dues. Of the balance of \$108.00, there are lunches during the feeder auction, explained in the testimony to be coffee and sandwiches for the sellers and buyers, and 4-H club lunches, totaling \$89.00. These lunches have a direct connection with the business of the respondent and should not be classified under this head. This leaves as actual donations and subscriptions allowed \$4.00 for flowers for sick employes, \$3.00 for pop or other miscellaneous entertainment of employees during a hay-ride and a \$12.00 subscription to the Denver Post.

The Examiner has excluded such items as the memberships in the Denver Chamber of Commerce which has a livestock division, in the United States Chamber of Commerce, in the Junior Chamber of Commerce, in the American Stockyards Association, in the Denver Traffic Club, in the Denver Commercial Traffic Club and in the Denver Live Stock Exchange. These memberships in strictly business organizations total \$1269.09. These are not charitable donations but in the view of the management absolutely necessary business expenses, as the record shows. Irrespective of what the Examiner's view may be as to the right of a regulated industry to make charitable contributions, he is in error to exclude these business expenses. These are just as much business expenses as those allowed by the Examiner and tabulated on the preceding page.

We take issue with the Examiner on charitable contributions. The total of these items amounts to \$1491.00—a truly trivial amount for a corporation the size of respondent. In this \$1491.00 is a subscription of \$1,000.00 to the Com-

munity Chest, a combined community effort to care for necessary charities.

To draw the line, as the Examiner attempts to do, "at those contributions which are of peculiar benefit to employees and patrons," is too narrow and arbitrary. The patron derives decided benefit from a market which has the respect and support of the community.

The government put on only one producer witness and questioned him on this point. He was Mr. Collins, President of the American National Livestock Association. We quote from the summary of his testimony, appearing at the pages indicated:

Tr. Abs.

621 186 "As to expense of \$135 for entertainment of the American National at its annual meeting, which was made by the stockyards company, my version of that is the same as any kind of business,— I don't care whether it is the stockyards business or my business, I feel that anybody ought to have the right to donate or contribute a little if they want to or feel like it. I know I have a business out here at the stockyards, the Blackleg Company, and we make quite a few contributions to different things, and strictly speaking maybe we shouldn't do it, but we feel as public-spirited people we ought to kind of go along with those things in a way. Yes it figures in our cost of doing business, and people ought to have that right if they don't abuse it."

645 193 "As to the whole question of donations and as to whether or not the total amount spent by the Stock Yard Company is only 3/10 of one per cent of the income, I would say that if it is not abused, practices of that kind would not be items of great importance, but I don't think the charge would be so heavy that it would particularly affect anybody. Yes, I think the regulatory power should go to the question of abuse rather than to the particular item."

The Court held the same view in *The Denver Union Stock Yard Co. v. United States*, 57 Fed. (2nd) 735 at 753.

"The Secretary finds that 'it is customary for corporations to make donations for such purposes.' This is, of course, true, for community chests, funds for the relief of unemployment, welfare associations, chambers of commerce, and other such by-products of civilized society must be supported by the business interests of the community. The Secretary excised \$81.75 from the expense account of petitioner, because, in his judgment, the shippers and employees received no benefit from such donations. The amount involved is insignificant, and the items excluded are not readily identifiable. The test applied by the Secretary is rather narrow. If the stockholders or directors of a corporation are willing that their corporation do its part, in a reasonable way, in carrying the public load of the community the prosperity of which is closely interwoven with its own, it would seem to be an exercise of managerial power not subject to the veto of a public official concerned only with the protection of the public against extortion."

The Examiner implies that the finding is made in accordance with the decision of the Supreme Court in the St. Joseph case. So far as the reported decision is concerned, this question was never passed upon by that court.

We agree with government witness Collins that in a question of this sort, the government should confine itself to the question of abuse of the managerial function, rather than to the particular item. Like Mr. Collins, we "feel that anybody, whether it is the stockyards business or any business, ought to have the right to donate or contribute a little if they feel like it" and even though, as he says, such donations figure in the cost of doing business, "we feel as public-spirited people we ought to kind of go along with those things."

We request the Examiner to alter and amend his finding contained in paragraph 165 so as to include an annual allowance on account of dues, donations and subscriptions of \$3250.00 and make appropriate increase in the schedule of rates.

EXCEPTION XV.

Respondent excepts to the elimination from the expense account on page 106 of the proposed report of the items of "Traffic—Solicitor's Salaries," "Traffic—Soliciting Expense" and "Advertising" in a five year average amount of \$472.86, \$433.36 and \$513.17, respectively, such exclusion, so far as respondent can ascertain, being wholly unsupported by any evidence.

At page 106 of the proposed report, which is the tabulation of the expenses of the respondent for the five year period 1930 to 1934, the Examiner shows for each of those years under certain bulk headings the total expense, the amount excluded and the amount considered, and reference is made to schedules contained in government exhibit 38 which is the comprehensive audit of government witness Bufkin. Where the exclusions are equal to the total expense, it is, of course, possible from the reference to government exhibit 38 to determine the nature of the exclusions, but in the instances above pointed out, this is absolutely impossible.

For example, schedule 66 on page 171 of government exhibit 38 shows for the year 1934 total "Traffic—Solicitor's Salaries" of \$6929.83 which matches with the figure in the first column of page 106 of the report. The Examiner, however, has excluded for that year \$491.52 of such expense. We submit that it is wholly impossible to carve that amount out of the figures given in government exhibit 38.

Nor does the government exhibit 41, which is commonly referred to as Witness Bufkin's throw-out schedule, enlighten us in any manner whatsoever. Page 3 of the last mentioned exhibit, which contains the schedule of expense eliminations, contains no elimination for solicitor's salaries, nor for soliciting expense nor for advertising. The only advertisements excluded anywhere is excluded under the heading of "Dues, donations and subscriptions" and all such items have been excluded there. The expense elimination complained of in this exception, therefore, is

something different, and we submit that no segregation of any of the amounts listed above appears in any government exhibit and was not brought forward by the government at the hearing, does not appear of record and no opportunity whatsoever has been given respondent then or now to explain or testify concerning these proposed eliminations.

Promptly after receipt of the proposed order we wrote the Department of Agriculture requesting information concerning these items and an explanation of how the segregations were made and of what they consist. We again wrote on November 17th. We again wrote the Solicitor on November 24th. No explanation has been received. We have been repeatedly advised that the department is working on the matter and that as soon as the data is available, it will be forwarded to us. It strikes us that if these segregations are so difficult to ascertain and explain, that is proof positive that they were not the subject of any testimony at the hearing and do not appear of record.

We submit that these eliminations are improper, being wholly unsupported by the evidence, and the sums therein involved must be restored to the expense account of respondent and reflected in the Examiner's computation of proper expenses in the future. Although the items themselves are small, their restoration to the expense schedule together with other items required to be restored by these exceptions will render an appropriate increase of the proposed rate schedule essential.

We request the Examiner to restore the above items to the expense account of respondent and to make the appropriate changes in the rate schedule.

EXCEPTION XVI.

Respondent excepts to the proposed report of the Examiner in that it fails to make allowance for certain necessary expenditures in the future all of which have arisen or the necessity therefor become fixed since the hearing of this cause and all of which are of such nature that the Secretary can take judicial notice thereof if he will.

The Examiner took judicial notice of the Revenue Act of 1936. He should also take judicial notice of the Social Security Act and the correlated Colorado act just passed for the purpose of making the Federal Act applicable to Colorado. He should also take into account the Colorado state income tax provision for which was made at the last election.

1. The Federal Social Security Act imposes a tax determined by a certain percentage of the gross payroll. The rate during 1937 is 2% and during 1938 and each year thereafter 3%. This is to be paid by the company the same as any other tax and is in fact a direct governmental impost. The earliest date at which the order of the Secretary, if entered, can take effect is 1937, and hence in any forecast of the product of the proposed rates for the purpose of determining whether or not the net return is equal to the fair rate of return as found by the Examiner, the year 1937 is the first year to be considered.

We point out in Exception XVII, that respondent has increased the salaries and wages of its employes on the average of 8% over the 1935 wage scale. If, then, we take the 1935 payroll of \$212,395.00 as a base, there being no contention on the part of the government that we employ too many men, increase that by 8% as the estimate of the 1937 payroll, and deduct salaries in excess of \$3,000.00 per year, this leaves a net payroll subject to the Social Security Act of \$216,986.00 in all departments. Computing the tax on that figure, we find that during the next five years respondent will pay a tax annually on account of the Federal Social Security Act as follows:

Year	Per Cent.	Amount
1937	2%	\$ 4,239.72
1938	3%	6,409.58
1939	3%	6,409.58
1940	3%	6,409.58
1941	3%	6,409.58
Total		\$29,878.04
Five year average		5,975.60

The act recently passed by the Colorado legislature in special session levies a tax on the gross amount of payrolls as follows:

Year	Per Cent	Amount
1937	1.8%	\$ 3,905.75
1938	2.7%	5,858.62
1939	2.7%	5,858.62
1940	2.7%	5,858.62
1941	2.7%	5,858.62
Total		\$27,340.33
Five Year Average		5,468.06

These two items result in a combined social security tax of \$11,443.66 average for the next five years. We recognize that the amount of the above tax to be covered into rates will be decreased if the Secretary adopts the proposed exclusion of expense incident to the so-called railroad properties of respondent. To this proposed exclusion we have already taken exception. Our position in this exception is clear, namely, that the Social Security tax, both state and federal, is and will be a necessary expense of doing business and allowance therefor should be made in the rate schedule if confiscation is to be avoided. We submit it stands on identically the same basis as the Federal Income tax for which allowance is made by the Examiner.

2. Colorado State Income Tax. The exact amount of this tax cannot now be determined. A constitutional amendment was adopted at the last general election authorizing the enactment of an income tax act for the State of Colorado. At the same time a constitutional amendment was adopted authorizing the adoption of an old age pension act with the minimum of \$45.00 per month. It is conservatively estimated that this alone will necessitate a tax of 8%. On this basis an annual tax of \$15,660.00 would be assessed against a return of \$195,750.00 which the Examiner finds as reasonable. (Paragraph 182)

If the Examiner deems this too uncertain at this time, we respectfully suggest the withholding of the order in this case until the passage of the act by the incoming legislature

which will convene January 8, 1937. The passage of such an act is regarded as a mandate from the electorate and will not be delayed.

Respondent requests the Examiner to make appropriate findings and allowances to meet the expenditures above indicated. Respondent requests an allowance of \$11,443.66 to cover the operating charge due to the Social Security program and not less than \$15,660.00 on account of the Colorado income tax. To fail to make due allowance for these expenditures will inevitably result in confiscation of respondent's property.

EXCEPTION XVII.

Respondent excepts to the proposed rate schedule contained in paragraph 212 of the proposed report for the reason that it is so low as to be confiscatory and for the further reasons it provides for the assessment of charges on a class of traffic for which no rate or charge can be properly assessed or imposed, is discriminatory and is based on rate factors which are themselves erroneously determined.

Except for the one factor hereinafter mentioned, this exception incorporates all previous exceptions and the arguments in support thereof. Each exception noted with the exception of Exception I calls for an increase in the proposed rate schedule. We submit that unless they be granted and the appropriate upward revision of the rates made, respondent will not receive a fair return upon the value of its property and confiscation will result. The discriminatory nature of the proposed rate schedule is pointed out in Exception XI.

The additional factor which renders the proposed rate schedule too low is the 8% increase in wages granted all employes of respondent except the four executive officers. The Examiner and the Secretary can and should take judicial notice of a fact universally known and shown by government bulletins, namely that the cost of living has increased. It is but fair and proper that this fact be recog-

nized by the management. The increase is in line with increases recently granted similar classes of labor in the packing industry and cannot in fairness be delayed. The increase will add to operating expense during the year 1937 and thereafter a minimum of \$14,700.00. If the loading and unloading labor be excluded, which we submit is improper (see Exception IX) the annual increase in operating expense is reduced to \$12,621.00. Both the above figures are based on the 1935 payroll which is used because a portion of the 1936 payroll will have these increases included therein and is therefore not an accurate check.

The Examiner has available to him the facts and figures necessary for checking this statement if he so desires. Or if he prefers we will certify present payrolls as of December 1, 1936, and will show thereon the total to which this increase would have amounted for the first eleven months of 1936.

We request the Examiner to make this appropriate revision of the proposed rate schedule required by Exceptions II to XVII inclusive.

CONCLUSION

Respondent requests the Examiner to adopt each and all of the exceptions above taken and to amend his order and the rate schedule accordingly. This may sound presumptuous, but we respectfully submit that there is no escape from the fact that confiscation will result unless the modifications requested above and shown in the following tabulations are made, irrespective of what the Examiner's position may be upon the question of reweighs or trader yardage or upon the question of railroad facilities. These items alone total \$65,270.14 which far exceeds any so-called cushion of \$10,606.00 referred to in paragraph 213 of the proposed order.

Exception II:

Overstatement of prospective hay sales
used in determining the product of the
proposed rates\$17,460.00

Exception III:

Overstatement of prospective income from the so-called reweigh charge, attempted to be imposed upon livestock "Sold on Order" and "Sold for Local Slaughter", which is neither resold nor reweighed 12,161.48

Exception IV:

Capital stock tax 2,534.00

Exception VI:

Revenue of the railroad department, now carried under the account heading of "Drayage Revenue" and "Service on through hogs (water, etc.)" and profit on bedding of railroad cars 9,050.00

Exception XVI:

Social Security taxes both state and federal 11,443.66

Exception XVII:

Increase in operating expense, due to 8% wage increase (minimum) 12,621.00

Total annual increase needed in rates
to cover above items \$65,270.14

None of the above, we submit, present any controversy. They are omissions by the Examiner, and stand upon the same basis as other items allowed by the Examiner in the proposed report. In Exceptions III and VI we are even assuming for purposes of argument the government position on the questions of the reweigh charge and the railroad or transportation property.

In addition to the above, we submit that certain items must be restored to the rate base and that no controversy, in any proper sense exists as to them. The Examiner's findings are wholly unsupported by the record in regard thereto:

Exception XIII:

Allowance as a separate item of a minimum of \$325,500.00 going concern value. The return thereon at the rate of $6\frac{3}{4}\%$ found fair by the Examiner is\$21,971.25

Exception XII:

The Stock Show. The value of the excluded land plus 84% of the reproduction new value of the structures thereon, also excluded is \$276,720.00. At $6\frac{3}{4}\%$, less excluded rental of \$3547.50 to be returned to income (Carrying Costs, taxes, depreciation should also be added) 15,127.04

Additional items to be covered by rates on account of the above increases in the rate base\$37,098.29

We recognize that the Department, and apparently the Examiner, tenaciously clings to the theory that because all growers do not patronize the show and because, as the government seems to think, the show caters to pure-bred livestock, it is not a stockyard facility or service the cost or value of which is to be covered into rates. The Department, and the Examiner are prejudging the matter and permitting their personal views to override the express evidence of record. To the above figure of \$15,127.04 on the stock show property should be added taxes, insurance and all the other carrying charges, the expense of which is shown in government exhibit 41, and excluded by the Examiner. We cannot state the exact amount of these items, but they can be computed easily by the government auditor from his "throw-out" schedules and the other government exhibits of record.

We do insist, however, that if the Examiner adheres to the government theory of exclusion of the stock show and everything that goes with it, he must be consistent. We submit in such case that he must then exclude from income past, present and future \$11,592.14 of earnings of respondent directly due to the show. This is the five year average

in the past for this item, and the safest and best guide for estimating the future.

There should likewise be no controversy concerning the allowance of at least \$2716.63 of the tax on undistributed profits. We admit that the balance of the amount claimed in Exception Number V is controversial. The Examiner states that if we continue our dividend policy, we will satisfy the requirements of Section 14 of the Revenue Act of 1936, and have no such tax. *That is not the fact and our dividend policy cannot be changed to make it a fact.* We have a contractual obligation to retain and pay out otherwise than as dividends \$30,000.00 annually, but that contractual obligation is not one for which the government permits a credit against "adjusted net income." A further income tax, therefore, of \$2716.63 is imposed. The Examiner has made allowance for the balance of the Federal income tax imposed by the Revenue Act of 1936. He cannot properly exclude the remaining portion of the same tax imposed by the same Act.

As to the tax on the requested annual reserve of \$15,000.00 for expansion of business, that is doubtful because we believe such a reserve can be allowed in such way as to avoid the tax. That a proper allowance to a regulated industry for the expansion of its business must be made is not open to controversy. See *West Ohio Gas Company v. Commission*, 55 Sup. Ct. Rep. 316 at 321, cited supra. This item of \$15,000.00 can properly be allowed by the Examiner for this purpose.

We believe the exclusion of the railroad trackage and land and particularly the exclusion of the loading and unloading chutes and pens is erroneous, and for that reason we take Exception Number IX. So far as the practical effects on this case is concerned, we admit that it presents an academic question. That, however, is not the case with Exceptions X and XI concerning the value of respondent's land and the imposition of the reweigh charge. These go to the very heart of the case, and their denial further

stamps the proposed rate schedule and order as confiscatory. We sincerely believe that the land values proposed to be found by the Secretary are unsupported by any evidence of record which can be deemed substantial. We do not attack Mr. Zelinski personally,—he is as fine a man as ever “scuttled a ship,” but we do submit that his admitted unfamiliarity with Denver property values renders his testimony unsubstantial.

There is no justification for the proposed reweigh charge. From 79% to 83% of the trader transactions is shown by the evidence not to be subject to any such charge, yet the Examiner does not eliminate this from his computations. His estimates of future revenues from the proposed rates are therefore grossly overstated. We insist, apart from this, however, that no free service or free use of facilities is given the trader for any part of his business. The trader is admittedly an integral part of the buying outlet on this market and necessary to the producer. The marketing charge knowingly paid by the producer includes the cost, if any there be, incident to the absorption of his product. We insist that the proposed charge on trader operations stamps the rate schedule as discriminatory.

All of the matters raised by each and all of the exceptions are material and substantial. We have not attempted to summarize them all. We submit that they are all well taken. In the light of history and the known necessities for future rate protection, the allowance for Packer and Stockyards Administration expenses and for Interstate Commerce expense is far too low. The disallowance of approximately \$1400. of traffic expense and of \$2925. Dues and Donations (Exceptions XIV and XV) is not only not justified by the record but also is an unwarranted invasion of the rights of management. We repeat, the points raised by each exception are material. We maintain that the denial of these exceptions will result in confiscation of the property of the respondent.

In view of the importance of the questions presented, respondent requests an oral hearing before the Secretary at some time convenient to him, upon reasonable notice in advance to respondent and its counsel.

Respectfully submitted,

ROBERT G. BOSWORTH.

PERSHING, NYE, BOSWORTH AND DICK,

Of Counsel.

Denver, Colorado.
December 2, 1936.

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EXHIBIT C**UNITED STATES OF AMERICA****Before the Secretary of Agriculture****BUREAU OF ANIMAL INDUSTRY****SECRETARY OF AGRICULTURE**

v.

**DENVER UNION STOCK YARD
COMPANY,****Respondent.****B.A.I.****DOCKET 450****FINDINGS, CONCLUSION AND ORDER.**

(This document is Exhibit C, attached to Petition in Cause No. 10912 in the District Court of the United States for the District of Colorado, entitled "Denver Union Stock Yard Company vs. United States of America and the Secretary of Agriculture".)

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UNITED STATES OF AMERICA

Before the **Secretary of Agriculture**

BUREAU OF ANIMAL INDUSTRY

DOCKET NO. 450

SECRETARY OF AGRICULTURE

vs.

DENVER UNION STOCK YARD
COMPANY,

Respondent.

Findings,
Conclusion, and
Order.

I

PROCEEDINGS

1. This proceeding is a general inquiry under the Packers and Stockyards Act, 1921, as amended, into the lawfulness of the rates and charges of respondent for the stockyard services rendered by it at its stockyard at Denver, Colorado.

2. The proceeding was initiated by an order of inquiry and notice of hearing issued by the Acting Secretary of Agriculture on November 8, 1934. In said order and notice it was alleged that the respondent is engaged in the business of conducting and operating a stockyard at Denver, Colorado, which has been ascertained by the Secretary of Agriculture to be a "stockyard" within the definition thereof as used in Title III of the Packers and Stockyards Act, 1921, as amended, and which has been posted as such; that in accordance with the requirements of said Act respondent

had theretofore filed and put into effect schedules of rates and charges for its services as a stockyard owner; and that a proceeding under Title III of the Packers and Stockyards Act, 1921, as amended, should be had for the purpose of determining the reasonableness and lawfulness of said schedules of rates and charges. The charges for the various services of respondent are set out in Tariff No. 3, which became effective on July 6, 1931, to which ten supplements have been filed from time to time. The last of these was Supplement No. 10, which was filed to become effective on December 1, 1934.

3. It was ordered that a hearing be had for the purpose of determining the lawfulness of any and all rates and charges of respondent and of any rule, regulation or practice affecting said rates and charges, or whereby any stockyard service is rendered by respondent without making a lawful charge therefor. The order of inquiry and notice of hearing fixed the time and place of hearing and notice of the hearing was given to respondent by serving upon it a copy of said order and notice.

4. Pursuant to the aforesaid order and notice a hearing was held at Denver, Colorado, before an Examiner designated by the Secretary of Agriculture, beginning at 10:18 a. m., on June 3, 1935. The hearing was concluded at 3:00 p. m. on July 3, 1935. Respondent was present by counsel throughout the hearing. During the course of the hearing, oral testimony was taken which covered over 2300 pages of transcript. This, when reduced to narrative form, covered 1000 legal cap pages. There were introduced 118 exhibits, 68 by the Government and 50 by respondent, containing 4,000 pages, including more than 40 maps and photographs relative to respondent's property. A tentative order was served upon respondent and exceptions filed. Some of these were well founded. By direction of the Secretary of Agriculture, oral argument was had on January 7, 1937, before Assistant Secretary of Agriculture Harry L. Brown. A transcript of the oral argument was

made. At that time respondent asked and was given permission to file certain facts. These have been considered. Subsequently, respondent upon request furnished certain information. The case is now before me for decision.

5. At the outset of the hearing respondent's counsel objected to the proceeding and to the introduction of any evidence on the ground that the Packers and Stockyards Act of 1921 is an unwarranted delegation of legislative authority to the Secretary of Agriculture, contrary to the Constitution of the United States, and therefore void, in that it attempts to regulate the rates and charges for respondent's business, which is intra state business affecting interstate commerce only indirectly. The Examiner overruled the objection. The ruling is approved.

II

FINDINGS OF FACT

6. On the basis of the whole record, including the oral testimony of witnesses, exhibits, and official publications introduced in evidence, I make the following findings:

A. LOCATION AND GENERAL DESCRIPTION OF RESPONDENT'S PROPERTY

7. The Denver Union Stock Yard is located within the City and County of Denver, Colorado, approximately three miles northeast of the center of the city. It is near paved highways which connect with good roads diverging in all directions. The stockyards is served on the east, west, and longitudinally through the center by railroad trackage facilities connecting with all trunk line railroads entering the city.

8. The stockyard area consists of several distinct divisions. The cattle division consists of a series of open pens, alleys, and appurtenances such as feed racks, water troughs, and yard offices or booths. This division is served on the east by the Chicago, Burlington & Quincy Railroad and the loading and unloading facilities known about the

yards as the Burlington dock, and on the west by the Union Pacific-Colorado & Southern joint tracks, and the loading and unloading facilities known as the Union Pacific docks. The cattle division extends from the southerly portion of the yards to a public street known as Race Court. It is a long, narrow strip equipped with pens and other facilities, most of which are not under cover.

9. The hog yarding facilities are in *five hog barns* and in portions of sheep barns Nos. 1 and 2, hereinafter described. Hog shed No. 1 was designed for receiving hogs trucked into the market, but it is used also for initial yarding of cattle and sheep received by truck. It is a one-story, open, frame shed adjoining the general truck-in loading and unloading facilities, and is generally referred to as the truck division. Its facilities consist of pens and adjacent service alleys, corn bunkers, and water troughs. The other hog sheds are of the same type of construction and in general have the same equipment as hog shed No. 1. These hog sheds are not, however, all of the same size.

10. The sheep yarding facilities are located on the first and second floors of sheep barns Nos. 1 and 2 and on the roof of barn No. 2. These facilities consist of pens and alleys in which sheep are yarded, reyarded, fed, watered, sold, and stored. The first floors, except that portion of barn No. 2 used for hogs are occupied principally by holding and storage pens and alleys. The principal commission sections are located on the second floors. Sheep barn No. 1 is a two-story, reinforced concrete structure covering an area of approximately 320 x 422 feet. The building has a saw-toothed roof and light wells. It is equipped also with concrete ramps or inclines leading to the second floor. Sheep barn No. 2 is a three-floor, reinforced concrete structure covering an area of approximately 254 x 420 feet.

11. Adequate facilities are provided for the handling of each class of livestock in its respective division. The general arrangement of the facilities is conducive to prompt and efficient handling of livestock. The facilities now avail-

able afford ample accommodation for the current flow of livestock through the yard.

12. Trunk line railroads serve the stockyard. Not all of these have trackage into the yard. Those which do not have arranged with those which do, or with the respondent, for the use of trackage into the yard. Railroad trackage serving the yard is owned by the Chicago, Burlington & Quincy Railroad, Colorado & Southern Railroad, Union Pacific Railroad, Northwestern Terminal Railway Company, and respondent. In accordance with contracts with respondent, the railroads entering Denver serve the yards and other industries in the district over the trackage and right-of-way owned by respondent.

**B. SERVICES AND FACILITIES FURNISHED BY
RESPONDENT AND THE RATES CHARGED THEREFOR**

13. Respondent operates its stockyard at Denver, Colorado. On its premises is conducted a public market where producers and others may send their livestock, either by rail or by truck, to be sold to such buyers as may resort there to purchase livestock to meet their requirements. Any person complying with reasonable rules and regulations maintained by respondent may buy or sell livestock at its stockyards. Producers and others who ship their livestock to market for sale seldom sell it themselves. It is customary for them to employ the services of commission firms, which operate on the market and hold themselves out as salesmen of livestock on a commission basis.

14. Respondent provides the physical facilities on which the livestock market is conducted, and renders certain services in connection with livestock coming to the stockyard to be marketed, livestock shipped direct to packers, livestock stopped in transit and handled for the railroads, and livestock handled for traders. Some of the facilities of respondent are used in connection with receiving, marketing, feeding, watering, holding, delivery, shipment,

weighing, or handling of livestock at its stockyard. For these services respondent charges certain rates.

15. The transportation of livestock to the Denver market includes the unloading of it into suitable pens. The railroad companies, instead of constructing the necessary unloading facilities and doing the work in connection with unloading, employ respondent to perform this service for them. Respondent also loads onto cars that livestock which is shipped by rail away from the market. For this service respondent charges the railroads \$1.00 per car. In addition to furnishing the services described above, respondent also provides facilities and renders services for the use and convenience of persons conducting private business or furnishing public service at the stockyard for their own compensation or profit. Respondent renders a number of other miscellaneous services such as dipping and spraying and dehorning.

16. Respondent assumes responsibility for driving livestock from the railroad chute pens to the sales pens assigned to respective consignees, and placing it therein. If the consignee is a person who has no regularly assigned pens, his livestock is placed in convenient holding pens where it awaits later disposition by the consignee. Livestock arriving by truck is unloaded at convenient docks provided by respondent in the hog division. Hogs so arriving are delivered by respondent to the sales pens of consignees in the drive-in division where they are usually fed, watered, and sold. Cattle and sheep arriving by truck are yarded in suitable pens in the truck division where they are delivered to consignees, who drive them to their pens in the divisions in which rail receipts are handled.

17. Appropriate records are prepared by respondent and made available to consignees. These records give information relative to the origin of shipments, names of consignors, number of head and kinds of livestock, and the

number of the pens in which it is yarded. Suitable watering facilities are maintained in the pens by respondent. Respondent furnishes all feed fed in the cattle, hog, and sheep divisions, and maintains certain storage facilities from which feed is distributed. It is optional with a commission firm or owner of livestock whether respondent shall put the hay on the platforms, on the fences, or distribute it in the mangers. Corn is distributed to bins at convenient locations in the hog yards, and the feeding operations are performed by respondent.

18. The commission firms assume responsibility for the livestock upon its delivery to them. They see to it that the livestock is watered and properly fed. When necessary, they sort and grade the livestock so as to show it to the best advantage to prospective buyers. After livestock has been sold, it is driven to the scales by the employees of consignee. Respondent provides the weighing facilities. The scale crew, which does the weighing, consists of a weighmaster, a gate man at the entrance to the scale platform, and a counter-off at the exit gate. The weighmaster enters the names of the owner, seller, and purchaser of the livestock on the scale ticket on which the weight is registered. As the livestock is driven from the scales, he enters on the scale ticket the number and kind of livestock. The counter-off keeps a record of each draft weighed and directs the yarding operations.

19. Respondent conducts the yard-cleaning operations in the cattle and sheep divisions. In the sale section of the hog division the cleaning is done by an independent operator under contract in consideration of the corn he salvages from refuse left in the pen. All other yard facilities are cleaned by respondent except when it permits purchasers to enter its yards and remove refuse. The Colorado Horse & Mule Company cleans the premises in which it operates, and disposes of the refuse for its own account.

20. For its services in driving the livestock from the unloading chutes to pens, counting, checking, and keeping a record of each consignment, the furnishing of water, the weighing, and the use of the physical facilities necessary in performing these services, respondent charges the owner or shipper of livestock brought to market the following rates known as yardage charges:

21. On livestock received and sold, including livestock resold through commission firms, that sold or contracted in the country to weigh and/or deliver at the stockyards, and that consigned direct to packers and slaughterers:

Cattle	\$.35 per head
Calves (Under 1 year old)	.25 " "
Hogs	.12 " "
Sheep or Goats	.08 " "
Horses or Mules	.35 " "
Pure Bred Bulls	1.00 " "

Besides these charges, which apply to all livestock except that hereafter noted, additional charges are made on livestock arriving by vehicles other than rail as follows:

Cattle	\$.05 per head
Calves (Under 1 year old)	.02 " "
Hogs	.02 " "
Sheep or Goats	.02 " "

With one exception the charges stated above are assessed only once upon an animal during the time it is in the yard, regardless of the time it remains there, or the number of changes of ownership which occur. On that livestock resold through commission firms, however, the regular rates are charged. When livestock is consigned to the Denver market, offered for sale, and forwarded unsold, respondent assesses no yardage charge. A considerable amount of these "through shipments" arrive at Denver and are stopped for feed, water, and rest. The services rendered by respondent in connection with these "through shipments" consist in unloading, feed and watering, and reloading the livestock as directed by the railroad company in whose custody the

stock is. The same classes of facilities are used for "through shipments" as for livestock consigned for sale at the market. The livestock is counted, yarded, fed, and watered. Inasmuch as no yardage charge is assessed against this class of business, the only revenues derived by respondent for handling it are the unloading and reloading charges and the profit on such feed as the animals in these "through shipments" consume.

22. The charges for feeding, bedding, etc., as set out in Supplement 10 to Tariff No. 3, are as follows:

Prairie hay or alfalfa (on fence)	\$1.40 per cwt.
Prairie hay or alfalfa (fed out)	1.50 " "
Bedding straw	.65 per bale
Corn	1.50 per bushel measure

These charges are varied from time to time in accordance with fluctuations in the market price of feed. When livestock is fed or bedded or watered while in cars, a charge of \$1.00 per deck is made in addition to the regular charge for feed or other material used. When empty stock or box cars are bedded with hay or straw, a charge of 50c per deck is made in addition to the charge for hay or straw used. On "through shipments" of hogs, ordered fed in car with feed furnished by shipper and already in car, a charge of \$1.00 per car is made: A charge of \$1.00 per car is made for livestock watered but not fed.

23. The barns and corrals composing the horse and mule division are operated by a commission company upon a consideration of a stated monthly rental of \$200 and the payment of the regular yardage charge. Respondent reserves the right to use these premises whenever necessary, and does avail itself of this privilege during the stock show.

24. Practically all livestock is sold by weight and delivered to purchasers when driven off the scales. It is seldom practicable or convenient for purchasers to receive their livestock direct from the vendors and to remove the animals from the yards immediately after they are driven off the

scales. Respondent reyards such livestock in what is known as purchasers' holding pens or catch pens. The reyarding service is practically a duplication of the initial yarding services except for the fact that the bunches of livestock are smaller and more numerous. In most cases different pens and yarding facilities are used for reyarding that livestock bought by packers, traders, or by those who ship it from the market.

25. There is a separate division within the cattle division known as the "traders' division". No such separate trader division exists either in the hog division or in the sheep division. Cattle purchased by a dealer are driven, for the most part, by respondent to the traders' division. The physical characteristics of this division are substantially similar to those of the commission department. The services rendered by respondent with respect to livestock held in each do not differ materially. A large percentage of the cattle handled at the Denver market is of the stocker and feeder class, and is destined eventually to go to country feeders and growers. The dealer purchases numerous groups of animals and grades and sorts these into classes which he thinks will best meet the demands of buyers. Respondent makes no yardage charge for facilities and services furnished in the traders' division. The regular charge is made for feed in this division. Most of the livestock purchased by traders is resold by themselves, but occasionally traders move their livestock into the commission department and employ the services of a commission firm in making the sale. This process is known as "planting". Respondent collects the regular yardage charge on "planted" livestock.

26. If the purchaser of livestock be one who desires to ship it from the market, respondent drives it to pens convenient to the loading docks and holds it there until it is ready to be loaded out. Respondent performs the loading service for which it receives \$1.00 per car from the carrier. No yardage charge is made to the purchaser for such livestock.

27. For convenience of operation the stockyard is

divided into divisions, and definite pens are assigned for the preferred use of commission firms and other individuals engaged in business at the market. Not all pens are so assigned. During periods of heavy runs, and as other circumstances may require, respondent may change an assignment to meet current needs of business.

28. As heretofore stated, the length of time during which an animal remains in the stockyard is not a factor in determining the amount of yardage charged. Inasmuch, however, as livestock consumes feed throughout its entire stay in the yard, the profit made on the sale of feed for such livestock tends in a degree to compensate for the time element.

29. The Exchange Building is an office building maintained by respondent for its own use and the use of those having their business locations at the market. Respondent's tariff does not set out the charges made by it for rent. Respondent's tariff sets out rates and charges covering such services as branding, dehorning, dipping, disinfecting, testing, immunizing, vaccinating, boarding horses, and special weighing. Exceptional services are rendered under special agreements. Minor items of income other than that from services hereinbefore mentioned are realized from activities for which no rates or charges are listed in the tariff.

C. CRITERION OF REASONABLE STOCKYARD RATES

30. It is the law that all rates and charges made for any stockyard service furnished at a stockyard by a stockyard owner shall be just, reasonable, and non-discriminatory, and that any unjust, unreasonable, or discriminatory rate or charge is prohibited. Respondent is entitled to charge rates for the stockyard services rendered by it which are reasonable and non-discriminatory. Such a schedule of rates assesses charges equitably among the various users of its services. Respondent is entitled also to charge rates of such altitude that they will produce gross revenues enough to pay all reasonable operating expenses, including taxes

and an adequate amount to compensate it for the depreciation in its plant and equipment, and in addition a net operating income equal to a fair return upon the fair value of its property. In the application of this standard of reasonableness an analysis of the testimony has been made to determine the fair value of respondent's land and physical structures, an examination has been made of its operating expenses over a period of years and a fair rate of return has been determined.

**D. USED AND USEFUL CHARACTER OF RESPONDENT'S
PROPERTY**

LAND

General Statement:

31. The land owned by respondent is located some three miles northeast of the central portion of the City of Denver. The buildings, pens, chutes, scales, railroad tracks, and other facilities occupy portions of 130.57 acres of land lying along the South Platte River, most of it on the eastern side. At the date of the appraisal of the land respondent owned 131.045 acres, but between the date of the appraisal and that of the beginning of the hearing it sold .475 acre to Armour & Company under an option of long standing.

32. Within the immediate vicinity of respondent's stockyards and contiguous to its land are the plants of Swift & Company and Armour & Company. Somewhat more remote, but within easy access of the yards, are a number of the smaller packing plants, a rendering plant, and a number of other industries such as are usually found in and around a packing center. In the vicinity of respondent's plant and on land owned by it are some commercial feed lots. Not far removed from respondent's land are to be found retail stores, garages, an industrial district developed by a railroad, in which are mills, a by-products company, lumber yards, fuel yards, gasoline stations, and the like. In the neighborhood also are feed mills, elevators, iron foundries, and metal works.

33. The premises of the stockyard company are reached by means of improved public highways from all directions and are served within by a system of roadways built by the company on its own land or on leased land. Respondent's plant and facilities are amply served by railroads and by a system of railroad trackage of its own which runs through various sections of its yards.

34. The City of Denver is served by the Chicago, Burlington & Quincy Railroad, the Union Pacific Railroad, the Colorado & Southern Railway, the Denver & Salt Lake Railway, which leases the Northwestern Terminal Railway, the Denver & Rio Grande Western Railroad, the Chicago, Rock Island & Pacific Railroad, and the Atchison, Topeka & Santa Fe Railway. Respondent's land and facilities are a suitable place for conducting its business and for rendering a high type of service.

35. Preparatory to the appraisal of respondent's land it was divided by agreement into ten zones. All appraisers employed these zones in setting a value upon respondent's land, which is described more particularly by zones in the paragraphs which follow:

Zone 1: Description, area of used and useful and of non-used and useful portions.

36. The land on which the greater portion of the cattle commission division and the hog and sheep divisions have been constructed has been designated for purposes of appraisal as "Zone 1". This zone is made up of two parcels. One is triangular in shape and lies between the Union Pacific Railroad right-of-way on the west, and the Chicago, Burlington & Quincy right-of-way on the east; the other parcel is rectangular in shape and lies between the packing plants of Swift and Armour and is west of the Union Pacific Railroad right-of-way. This land is generally level and well situated for stockyard purposes.

37. At the time the land of respondent was appraised there were in Zone 1 38.534 acres, or 1,678,543 square feet.

Of the land sold to Armour & Company (see paragraph 31) .266 acre or 11,587 square feet were in this zone. On the land in this zone the greater portion of the physical facilities of respondent are located. Among the service units in the zone are the Exchange Building, the commission section of the cattle division, the hog barns, the sheep barns, the railroad chutes, the loading and unloading docks and pens, the general truck dock, the general alleys and passageways, hay barns, corn tanks, scales, immunizing facilities, roadways, the bulletin office commonly known as the chute house, an auto repair shop, a filling station, railroad tracks belonging to respondent, a few other minor service units, and several parcels of vacant land. The service units lying wholly within this zone occupy 1,126,261 square feet. Some of the facilities mentioned, such as pens and alleyways, extend over on to Zone 2. Of the facilities which are located on both zones those portions lying in Zone 1 occupy 488,158 square feet.

38. The question as to the used and useful character of the land in this zone arises with respect to certain parcels of vacant land; the land on which is located the garage and the auto repair shop and the filling station; that occupied by the unloading and loading facilities; and the land occupied by the railroad tracks belonging to respondent.

39. With respect to the vacant land, it is sufficient to state that in the construction of a plant of the character of that belonging to respondent it would be impracticable to construct physical facilities on every square foot of land owned by it. These small parcels of land may so lie with respect to the physical facilities that in due course service units may be constructed on some of them, while certain other parcels may be so situated that they will remain vacant. A consideration of these small parcels gives rise to the question of the used and useful character of small portions of land interspersed among the various service units. Interspersed land is so closely related to the other land and the physical facilities that no doubt arises as to its used and

useful character. Inasmuch as all the unoccupied parcels of land in Zone 1 are of this character, it is found that all the vacant land in Zone 1 is used and useful. The land on which is situated the garage, the auto repair shop, and the filling station is so situated with respect to the other facilities of respondent that it falls into the class of interspersed land. The land on which these units are located is found to be used and useful.

40. The unloading and loading facilities of respondent consist of unloading platforms, chutes into pens suitable for holding livestock temporarily, and sufficient alley space to give ingress and egress into and out of the holding pens and the land upon which these super-structures rest. There are four railroad docks in Zone 1. The Burlington dock occupies 55,452 square feet; the Union Pacific, 54,788 square feet; the Colorado & Southern docks, 27,026 square feet; and the river dock, 24,966 square feet. The railroad companies themselves do not unload and load the livestock handled by them. They employ respondent to do this and pay it \$1.00 per car for each car loaded or unloaded. The railroad companies do not own livestock depot facilities of their own, but use the unloading and loading facilities of respondent. The Interstate Commerce Commission has decided that the service of unloading and loading livestock from and into cars is a common-carrier service subject to the provisions of the Interstate Commerce Act. (See I.C.C. Investigation and Suspension Docket No. 4109, page 342, of which judicial notice is here taken.)

"We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago."

The Supreme Court has ruled that the loading and unloading of livestock is a transportation service (295 U. S. 193). The Packers and Stockyards Act provides that nothing therein should affect the jurisdiction of the Inter-

state Commerce Commission or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission (Packers and Stockyards Act, 1921, Section 406). Inasmuch as the unloading and loading of livestock from and into cars is a railroad service, the charge therefor is for a railroad service and not a stockyard service. If an expense incident to loading and unloading of livestock from and into cars is passed to the shipping public through the assessment of railroad rates, it is obvious that it should not be passed on again as a stockyard expense covered in the stockyard rates. To include in respondent's used and useful property the land and facilities used by it in the unloading and loading of livestock and allow a return on the value of such land and facilities would be to compel the shipping public to pay as a stockyard expense an amount which it had already paid in the form of railroad rates. It is found, therefore, that the land on which are situated respondent's railroad unloading and loading facilities is not used and useful in the rendition of a service for which are charged rates, the reasonableness of which is being determined herein.

41. Respondent owns and keeps in repair a system of railroad trackage throughout the yards covering an area of about $5\frac{1}{2}$ acres. The land in Zone 1 occupied by these railroad tracks covered an area of 58,124 square feet when respondent's land was appraised. Between that date and the date of the hearing respondent sold to Armour & Company a parcel of land, 11,587 square feet of which were in Zone 1, leaving 46,537 square feet in this zone occupied by railroad tracks at the date of hearing. These railroad tracks were constructed at the expense of respondent and are maintained and repaired by it. It leases its railroad tracks to various railroad companies under a contract according to which they pay respondent as rental 6% of an agreed valuation of \$121,984.49. In addition the railroads reimburse respondent for maintenance, repairs, and taxes. The amount of taxes is determined by applying the cur-

rent local tax rates against an amount equal to one-half of the agreed valuation. The railroads use the tracks leased from respondent and the right-of-way to get to and from the unloading and loading docks owned by respondent and also to and from the various industries located in the packing district. If transportation does not cease until livestock shipped by rail is unloaded into suitable pens, as has been determined by the Supreme Court, transportation has not ended when livestock is being brought to those facilities over tracks owned by railroad companies or leased by them. It is found, therefore, that the land on which are located railroad tracks owned by respondent, but leased to the railroads, is not used and useful in the rendition of a service, the reasonableness of the rates for which is being determined herein. The land on which is situated the yardmaster's office is used in connection with the transporting by rail and the unloading and loading of livestock and is used for a transportation service. It is found also that the land occupied in Zone 1 by the yardmaster's office and grounds is not used and useful in the rendition of a service for which are charged rates, the reasonableness of which is being determined herein. It is found that all land in Zone 1 not specifically found to be not used and useful, is used and useful.

42. The following table sets forth the land in Zone 1 found to be used and useful in the rendition of services for which are charged rates, the reasonableness of which is determined herein and the land found to be not used and useful in the rendition of such services:

<u>Used and Useful</u>	<u>Square Feet</u>
Land on which are:	
General Truck Dock	8,540
Cattle Division-Commission Section	399,070
Hog Division-General Utility Section-Hog Barns	
1, 2, & 3	42,062
Hog Division-General Utility Section-Sheep Barn	
# 2	11,513
Hog Div.-Commission Section Sheep Barn # 2	33,553

" Div.-Purch. Temp. Hold. Sec. Hog Barns 4 and 5	28,655
" " -Traders Sec. Sheep Barn # 1, 1st Floor	2,137
" " -Purch. Temp. Hold. Sec. Sheep Barn # 1, 1st Floor	18,613
" " -General Alleys	18,349
Sheep Div.-Gen. Util. Sec. 1st Floor Barns 1 & 2	142,110
" " -General Alleys, 1st Floor	26,363
" " -Entrance to Sheep Barn # 2	1,369
Hay Barn No. 2 and Scale	9,500
Corn Tank	1,250
Sheep Dipping Facilities	14,320
Hog Dipping Facilities	5,085
Hog Immunizing and Vaccinating Facilities	5,204
Cattle Inspection Chute and Pen 2,537	513
Cattle Scales, 2, 4, 5, 10 and 11	73,363
Hog Scales 3, 9, 13, 14	13,553
Sheep Scale No. 7	1,808
Stock Viaduct	1,093
Pedestrian Viaduct over Cattle Division	120
Armour & Co. Stock Drive	1,520
Livestock Subway	703
Truck Washing & Cleaning Facilities	1,160
R/W.N.E. of Intersection C.B.&Q. and U. P. R/W.	1,375
Exchange Building	50,845
Bulletin Office Building (Chute House)	16,622
Garage	11,171
Auto Repair Shop	1,582
Filling Station	2,859
Vacant Land South of Hay Barn No. 2	4,875
Vacant Land East of Cattle Pens 1,000 etc.	2,408
Vacant Land along West side Cattle Division	5,791
Cattle Div.-Commission Section)
" " -Purch. Temp. Hold. Section)
" " -General Utility Section	) 488,158
" " -General Alleys)
Armour & Co. Roadway	6,000
Total Used and Useful	1,453,212
	Sq. Ft. or
	33.360 Acres

Non-Used and Non-UsefulSquare Feet

Land on which are:

Yardmaster's Office and Grounds

4,975

Burlington Dock

55,452

Union Pacific Dock	54,788
Colorado and Southern Dock	27,026
River Dock	24,966
Railroad Right-of-way (Owned at date of hearing)	46,537

Total Non-Used and Non-Useful	213,744
	Sq. Ft. or 4.907 Acres
Total land in Zone 1	1,666,956 Sq. Ft. or 38.267 Acres

Zone 2: Description, area of used and useful and of non-used and useful portions.

43. At the time the land of respondent was appraised Zone 2 contained 23.19 acres or 1,010,197 square feet. Between the date of appraisal and the date of the hearing 9,104 square feet of land lying in this zone was sold to Armour & Company. On Zone 2 are located the truck cattle-loading facilities, the tuberculosis pens in the cattle division, hay barns, some branding chutes, the cattle-dipping facilities, scales, manure dump frame, a large pen used at times for *holding manure*, the material yard, the shop and construction yard, roadways and lunch room, the truck-loading dock, some vacant land east of the manure dump and other vacant land adjacent to the Chicago, Burlington & Quincy right-of-way, portions of general alleys and pens, a roadway referred to as the Armour roadway, and railroad tracks belonging to respondent and used jointly by the railroads. This zone lies in the northern section of the yard just south of a street known as Race Court and between the Chicago, Burlington & Quincy right-of-way on the east, and Franklin Street, and the Northwestern Terminal Railway on the west. The only land in Zone 2 as to the used and useful character of which a doubt arises is the vacant land and the land on which are located the railroad tracks owned by respondent, and that occupied by a large pen known as No. 4212 in which manure is sometimes dumped.

44. With respect to the pen the evidence shows that, while it is used for purposes of dumping manure at certain seasons of the year, it is required and used at other seasons

in handling cattle arriving at the stockyard. Its use for manure-dumping purposes depends upon whether it is needed for yarding purposes. Whenever it is needed for yarding the manure is removed and livestock is yarded therein. The area of the land occupied by this pen is 34,661 square feet. The lunch room on this zone is let to an independent operator on a monthly basis. Its patrons are employees of the stockyard company, the commission firms and the traders, who operate in that section. The area occupied by this lunch room and the grounds which surround it is 1,952 square feet. If the lunch room were non-existent the land on which it is located would not be excluded from the used and useful land because of the fact that it is a small parcel interspersed with other used and useful land.

45. There are two vacant areas of considerable size in this zone. One is a parcel of 49,177 square feet lying east of the manure dump and hay barn No. 4 and its grounds; the other is a parcel of 35,675 square feet adjacent to the Chicago, Burlington & Quincy right-of-way and extending from the north end of the Burlington dock to the approach to the cattle truck chute. This land is east of and outside of the stockyard fences. The larger of these areas is so situated with respect to the hay barn and manure dump and sheds located in that section of the yard that it may be considered as an extension of the land used in connection with these. The smaller parcel serves as a clearance in connection with the operation of respondent's yard. These two parcels amounting together to approximately two acres of ground may be considered as interspersed land because of their use. Due to their use these two parcels should not be excluded from the used and useful land.

46. There was in Zone 2 at the date of the appraisal 45,669 square feet of railroad right-of-way belonging to respondent. In reconciling the area expressed in square feet and in acres, 213 square feet must be deducted from the 45,669 square feet, leaving 45,456 square feet. When 9,104 square feet, which is the portion of the Armour sale lying

in Zone 2, are deducted from 45,456 square feet, the remainder is 36,352 square feet, which is the railroad right-of-way lying in Zone 2. For reasons heretofore stated in those paragraphs wherein is discussed the used and useful character of the land on which are respondent's railroad tracks it is found that the 36,352 square feet occupied by respondent's railroad tracks are not used and useful in the rendition of services, the reasonableness of the rates for which is being determined herein. It is found that the remaining 964,741 square feet of Zone 2 are used and useful in the rendition of such services.

47. The following is a summary of the used and useful and the non-used and useful parcels of land in Zone 2:

<u>Used and Useful</u>	<u>Square Feet</u>
Land on which are:	
Truck Cattle-Loading Facilities	26,777
Cattle Division—T. B. Pens	11,709
Hay Barn No. 3 and scale	13,925
" " " 4	55,148
Branding Chutes 1-2-3, etc.	25,520
Cattle-Dipping Facilities	4,573
Cattle Scale No. 1	12,726
" " " 6	10,841
Manure Dump Frame, etc.	65,208
" " Pen 4212	34,661
Material Yard	9,200
Shop and Construction Yard	30,278
Roadway along Track No. 28	23,749
Roadway South of Hay Barn No. 4	7,800
Lunch Room and Grounds	1,952
Vacant Land East of Manure Dump	49,177
Vacant Land adjacent to C. B. & Q. R/W to Cattle Truck Loading Dock	35,675
Cattle Division-Traders Section)	
" " -Purch, Temp. Hold. Section)	
" " -General Utility Section)	528,472
" " -General Alleys.)	
Armour & Co. Roadway	17,350
Total Used and Useful	964,741 Sq. Ft. or 22.147 Acres

Non-Used and Non-UsefulSquare Feet

Land on which are:

Railroads belonging to respondent

(After Armour Sale) 36,352 Sq. Ft. or .835 Acre

Total land in Zone 2 1,001,093 Sq. Ft. or 22.982 Acres

Zone 3: Description, area of used and useful and of non-used and useful portions.

48. This zone is a parcel of land lying north of Race Court west of the Chicago, Burlington & Quincy right-of-way, and in a southerly direction from the Adams County line. It contains 863,574 square feet or 19.825 acres. Something over $5\frac{1}{4}$ acres in this zone have been leased by respondent to Swift & Company. This company several years ago constructed at its own expense pens, feed troughs, wells, water lines, sheds, platforms, and other equipment necessary in operating a feed lot. Some three years ago Swift & Company assigned its lease on this land to a private individual and at the same time leased to him its buildings and improvements. The plant is now privately operated by the lessee as a commercial feed lot. Another portion of Zone 3 has been leased by this same individual from respondent. He has constructed at his own expense pens and other facilities necessary in connection with the operation of a feed yard.

49. At the extreme west end of this zone is a small parcel of land containing 6,534 square feet, which respondent has deeded to the City and County of Denver for ingress and egress in connection with the improvements along the South Platte River. One of respondent's sewers empties into the river channel in this area. About $13\frac{1}{2}$ acres of the zone are similar in character to the land in Zone 2 and are practically on the same level. The remainder, something over 6 acres, is somewhat broken and lies higher than the rest of the zone. This portion contains gravel. The land in this zone can be reached from the east by way of Race Court and from the west by way of Franklin Street.

It is accessible from the Burlington Railroad on the east and the Northwestern Terminal Railway on the west. There are in this zone also the Union Pacific tracks which belong to respondent.

50. The land in this tract other than that occupied by the commercial feed lots is vacant. Respondent claims that this land is used and useful. The witness called by the Government, for the purpose of describing the facilities of respondent and stating the use to which the various service units are put, described the major portion of this zone as being unused land for the most part. His exception was a small area in the northwesterly corner where miscellaneous debris is dumped and the northerly corner where the stockyards obtains gravel. That portion of this zone not occupied by the feed lots, the railroad right-of-way, and the gravel deposit is not designed or permanently set aside for the primary purpose of dumping and storing manure, notwithstanding the fact that small deposits of manure and debris are scattered thereon. The assistant general manager of the stockyards is of the opinion that some portions of this zone may have greater utilization in the future than they have now, but he is of the opinion that the purposes for which this land is now being used would bring it within the classification of used and useful land in the handling of livestock in commerce at the Denver stockyards without any further utilization. He is of the opinion further that if the land were not now owned by the stockyard company it would be necessary for it to purchase this zone. One of the land appraisers of respondent was of the opinion that the land is used and useful for purposes of expansion. In placing a value upon this zone this witness designated about 10,000 square feet or approximately $\frac{1}{4}$ acre in the river channel as practically worthless. It is on this portion that the city now has an easement in connection with the river improvement. According to an agreement with the city, the street known as Race Court can be moved from its present location between Zone 1 and

Zone 2 to the northerly border of respondent's property along the Adams County line.

51. Portions of this land are used for the purposes of dumping refuse and manure and the procuring of sand and gravel by respondent. Portions of it, as has already been stated, have been leased to private individuals for the conducting of private feed yards. The testimony as to the present use to which some of this land is put warrants the conclusion that some of it should be found to be used and useful. If conditions develop in the future which require further expansion of the pen area this land will be available. The used and useful character of the railroad land owned by respondent has hereinbefore been discussed in connection with the land in Zone 1. It is found, therefore, that the 521,049 square feet of vacant land in Zone 3, the 6,534 square feet in the northwesterly corner, and 213 square feet necessary to bring into agreement the areas of Zones 2 and 3, when expressed in square feet and in acres, are used and useful. It is found also that the 325,493 square feet occupied by commercial feed lots and leased to a private party and the 10,285 square feet of railroad right-of-way are non-used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein. The number of square feet in Zone 3 found to be used and useful is 527,796. This is equivalent to 12.117 acres. The number of square feet found to be not used and useful is 335,778. This is equivalent to 7.708 acres, making the sum of these two areas expressed in acres 19.825.

52. The following summary gives the land found to be used and useful and that found not to be used and useful in Zone 3:

<u>Used and Useful</u>	<u>Square Feet</u>
Vacant Land in Tract No. 3B	521,049
Easement in northwesterly corner of Tract 3B	6,534
Adjustments necessary incident to decimal computations	213

527,796 Sq. Ft. or 12.117 Acres

<u>Non-Used and Useful</u>	<u>Square Feet</u>
Commercial Feed Lots	325,493
Railroad right-of-way, Track No. 28-B	10,285
Total Non-Used and Useful	335,778 Sq. Ft. or 7.708 Acres
Total Used and Useful	527,796
Total Non-Used and Useful	335,778
Total Area of Zone No. 3	863,574 Sq. Ft. or 19.825 Acres

Zone 4: Description, area of used and useful and of non-used and useful portions.

53. Zone 4 contains 18.722 acres or 815,510 square feet. This zone is a long circular and irregularly shaped piece of land extending from Franklin Street on the north to the Colorado & Southern right-of-way on the south. The western boundary of the zone is the eastern bank of the South Platte River, and the easterly boundary is the property of Swift and Armour and that land of respondent in Zone 1 occupied by the hog barns and the sheep barns. In this zone are located hay barns, a material shed, a roadway, an easement along the South Platte River, a railroad right-of-way, and a trackman's tool house. In addition to the land on which are located these service units, there are four separately described parcels of practically vacant land.

54. One of these parcels is south of the old Blayney-Murphy property and north of land owned by Swift & Company. In this parcel there are 177,739 square feet. Underneath this land there is a 21-inch sewer pipe extending from the cattle division across the stockyard railroad tracks, the Chicago, Burlington & Quincy right-of-way, and across other land now owned by respondent. There is also a 30-inch sewer pipe underneath this land which serves Armour & Company and receives also drainage from the cattle division thru a 12-inch sewer crossing the stockyard railroad tracks, the Union Pacific right-of-way, and passing through the Armour packing plant. Another sewer 18 inches in diameter extends from Armour & Company's

plant to the river. Underneath this land is a 12-inch water pipe which extends from a well to the Armour & Company plant.

55. Another parcel of vacant land contains 64,030 square feet. This parcel of land lies between the vacant land just described and the embankment constructed when the channel of the South Platte River was straightened. This land was formerly a part of the river bed. It, too, is traversed by sewers which serve Armour & Company's packing plant directly and the stockyards indirectly, and by an extension to the cattle division. Another parcel of this vacant land lies in the south portion of the yards and borders on the Colorado & Southern right-of-way. It is triangular in shape and lies between a strip of land owned by Swift & Company and the easement along the South Platte River. The area of this parcel is 136,178 square feet. A sewer underneath this land leads from Swift & Company's plant into the South Platte River. The rest of the land is filled and is in varying conditions of level. A fourth parcel used mainly by the employees of Swift & Company for parking purposes contains 63,318 square feet of land.

56. The railroad tracks belonging to respondent occupy in this zone a right-of-way of 127,544 square feet.

57. Between the parcels of vacant land heretofore described and the South Platte River, there is a 50-foot easement along the bank of the river. That portion of the easement which is in this zone contains 132,718 square feet. In this zone is an unimproved and winding roadway. This road is not a public thoroughfare, although it is very generally used, particularly by those industries which operate in that vicinity, and by the city in connection with repairs and work done on the South Platte River improvement. It furnishes an approach for fire apparatus to the structures and buildings of respondent and the other industries in that locality.

58. Respondent claims that all the land in this zone is used and useful. The witness called by the Government to describe respondent's facilities gave a detailed account of the use which is presently being made of this land. This zone furnishes a sewer outlet to respondent and others. Certain portions of the vacant land, particularly that lying toward the southern end of the yards, can be developed into a parking space for trucks. It is possible that pens for yarding livestock might be constructed on certain portions, but in view of the fact that the yards have expanded in a northerly direction it is not probable that the land will be so used at any time in the near future. In view of these facts, it does not seem reasonable to carry into the rate base the value of all the vacant land in this zone. Yet it is not practicable to determine just how much surface area is needed in connection with the structures which lie underneath this zone.

Some allowance should be made for the reason that access to sub-structures is necessary. It is not practicable, however, to determine mathematically the number of square feet which should be allowed for this purpose. It seems reasonable and just to include one-half of all the vacant land in this zone as used and useful, and it is so found. It is found that the land occupied by respondent's railroad tracks and the trackman's tool house is not used and useful. It is further found that the land occupied by the hay barns, the material shed, the roadway, and the easement along the South Platte River is used and useful. A summary of the land found to be used and useful and that found not to be used and useful is as follows:

<u>Used and Useful</u>	<u>Square Feet</u>
Land on which are:	
Hay Barn No. 5 and Scale	19,158
Hay Barn No. 6	40,750
Material Shed West of Hay Barn No. 6	5,148
Roadway (Swift & Co.)	3,956
Roadway	5,475

Roadway.	39,305
1/2 Vacant Land North and West of Track No. 27	88,869.5
1/2 Vacant Land in Tract No. 10	68,089
1/2 Vacant Land in Tract No. 6	32,015
1/2 Vacant Land in Tract No. 1	31,659
Easement along Platte River	132,718

Total Used and Useful 467,142.5 Sq. Ft. or 10.725 Acres

Non-Used and Useful

Square Feet

Land on which are:

Trackman's Tool House	191
Railroad right-of-way	127,544
1/2 Vacant Land North and West of Track No. 27	88,869.5
1/2 Vacant Land in Tract No. 10	68,089
1/2 Vacant Land in Tract No. 6	32,015
1/2 Vacant Land in Tract No. 1	31,659

Total Non-Used and Useful 348,367.5 Sq. Ft. or 7.997 Acres

Total Used and Useful 467,142.5

Total Non-Used and Useful 348,367.5

Total area Zone No. 4 815,510 Sq. Ft. or 18.722 Acres

Zone 5: Description.

59. This zone consists of a body of land containing 550,598 square feet of which 511,394 square feet are vacant and 39,204 square feet are an easement 50 feet wide along the bank of the South Platte River. The total area of this zone expressed in acres is 12.64. The land in this zone is no longer subject to overflow during periods of flood. The land is not now being used and any plans that may have been proposed at the time of the previous hearing looking toward the erection of pens or other improvements on this area have not been carried out. This land lies on the west bank of the South Platte River and across that river from the main body of respondent's property. There is no approach across the river between the main body of the stockyards and the vacant land on the west side of the river. Respondent claims that this land is used and useful and that it is

being held as land for expansion. Zone 4, a part of which is vacant, lies between the main body of the stockyards and the river and the river separates Zones 4 and 5. The growth of the yards has not been in the direction of Zone 5, but in a northerly direction toward Zone 3, the vacant lands in which are included as used and useful.

60. The easement along the river in this zone does not serve any facilities now operated by the respondent. It is found, therefore, that all the land in Zone 5 is not used and useful for any service, the reasonableness of the rates for which is being determined herein. The area and detailed description of Zone 5 is as follows: Zone 5 contains 12.640 acres of land.

<u>Non-Used and Useful</u>	<u>Square Feet</u>
Vacant land in Tract No. 2—West of River contains 550,598 sq. ft. However, there is an easement to the City and County of Denver, described as follows: "Parcel 2-C—0.90 acres (39,204 sq. ft.) located on Tract 2-A west of the river". Therefore, 550,598 sq. ft. less 39,204 sq. ft. equals:	511,394
Easement	39,204
Total	550,598 Sq. Ft. or 12.64 Acres

Zone 6: Description, area of used and useful and of non-used and useful portions.

61. Zone 6 is a 3.383-acre irregularly shaped area of land lying in the southerly portion of respondent's property. It lies between 46th Avenue on the south, the Colorado & Southern right-of-way on the north, the Chicago, Burlington & Quincy right-of-way on the east, and land owned now by the Pepper Packing Company. The area of this zone in square feet is 147,343. Of this area 133,905 square feet are vacant and not used except as a general city dump in which are found tin cans, automobile bodies, and general refuse. Much of this portion of the land lies below the grade level of adjacent land. In this zone also

there are the railroad tracks commonly known as the Chicago, Burlington & Quincy tracks, which belong to respondent. These tracks occupy 3,245 square feet. A roadway leads from 46th Avenue into the stockyards and to the Swift and Armour plants. This road is surfaced with asphalt or material of similar character and provides means of ingress and egress to and from respondent's premises and to the packing plants. The road in this zone is a portion of a roadway extending from 46th Avenue on the south to Franklin Street on the north and is used in common in the interests of respondent, Swift & Company, and Armour and Company. This roadway occupies 10,193 square feet in Zone 6.

62. Respondent contends that the whole of Zone 6 is used and useful. Respondent's assistant general manager states that this zone is being filled as rapidly as filling is available and that it is the plan of respondent to use this zone for parking empty trucks and for the storage of loaded trucks when truck arrivals come faster than they can be cared for. He states further that the City of Denver and the Chicago, Burlington & Quincy Railroad are now proposing to put a subway under the Burlington right-of-way on 46th Street and to close the road running along the Colorado & Southern right-of-way south of Zone 9 and that when this road is closed respondent will require a much wider approach and a wider road in Zone 6 than at present. A subway built under the Chicago, Burlington & Quincy tracks will be lower than the average level of Zone 6 and for this reason he claims the roadway in Zone 6 will have to have a turning radius as well as an incline and that a roadway will be required wider than that across Zone 6, which now connects the yards with 46th Avenue. This witness also states that respondent is now using by sufferance a portion of the Chicago, Burlington & Quincy right-of-way between the Exchange Building and the Colorado & Southern tracks as a road and that this roadway can be closed on short notice and undoubtedly will be closed when

the proposed subway is built unless other arrangements are made. He states that respondent's roads are narrow and that its location is such that it cannot permit long lines of trucks to extend over railroad tracks and on 46th Avenue for the reason that this would congest traffic and slow up all movements. He states that as the truck business grows respondent will be compelled to use all of Zone 6 for the parking of empty trucks or for the storage of loaded trucks, particularly when the new hog lay-out is built.

63. One of the witnesses who appraised respondent's land was of the opinion that Zone 6 is required for future railroad switching facilities. A witness called by the Government, who had made a careful analysis and given a minute description of the service units of respondent, was of the opinion that the railroad tracks in this zone are reasonably necessary in the course of commerce whereby livestock passes from the place of production or shipment to, from, or through the stockyards, to the place of its ultimate destination. This same witness was of the opinion that the roadway located in tract 6, commonly known as the Swift roadway, should be similarly classified.

64. For reasons already stated in discussing the used and useful character of the railroad land in Zone 1, the 3,245 square feet occupied by the railroad tracks in Zone 6 are found to be not used and useful in the rendition of any services, the reasonableness of the rates for which is being determined herein. The evidence shows that by far the greater portion of the land in Zone 6 is hardly more than a dump. One of the witnesses who appraised respondent's land looked upon Zone 6 as land for expansion in the extension of railroad facilities. If he were correct in his assumption that the land is being held for this purpose it would be found not to be used and useful for reasons heretofore set forth. Respondent's assistant general manager states that this land is being held in reserve largely as a parking lot for livestock trucks either before or after their unloading. He states that the land is gradually being

filled, but does not state the rate at which it is being filled or any date in the near future on which this land may be expected to be put to any use. The prospective use to which it may be put is, according to this witness, contingent somewhat upon the expansion of the hog facilities. Sufficient vacant land has already been included in Zone 4, which lies nearer respondent's main yarding area, to provide truck parking space for many years to come. The testimony with respect to the character of this land and with respect to its potential use and with respect to the date when it may be expected to come into use does not warrant including it in the used and useful land. It is found that the 133,905 square feet of vacant land in this zone are not used and useful in rendering any services, the reasonableness of the rates for which is determined herein.

65. The evidence cited above indicates that the roadway in Zone 6 is a portion of a private roadway leading through the yards and used in common by the various industries located near it. That portion of the roadway lying in this zone, while furnishing ingress and egress to Swift & Company, would be necessary in the operation of the stockyards even if it were not used by Swift, Armour, and others. The assistant general manager of the respondent states that a wider roadway will be necessary if a subway is built under the Chicago-Burlington right-of-way on 46th Avenue. No definite statement is made as to when such an underpass may be expected to be built. It is stated that the city and the Chicago, Burlington & Quincy are now proposing to put a subway under the Burlington right-of-way. No date is indicated as to when this improvement may be expected to be made. Whether and when this improvement will be made are matters of speculation. The probabilities of the need of a wider roadway than that now on Zone 6 are too remote to justify the allowance of an increased area for that purpose and the inclusion of the value thereof in the rate base for determining the rates for services, the reasonableness of which is being determined herein. As stated above, respondent needs a roadway

through Zone 6 for ingress and egress. It is, therefore, found that the 10,193 square feet, the area now occupied by the roadway crossing this zone, are used and useful in the rendition of the services, the reasonableness of the rates for which is being determined in this order. The following is a summary of the land in Zone 6 found to be used and useful and that found not to be used and useful:

<u>Used and Useful</u>	<u>Square Feet</u>
Land on which are:	
Roadway	10,193 Sq. Ft. or .235 Acre
<u>Non-Used and Useful</u>	
Land on which are:	
Railroad right-of-way	3,245
Vacant Land	133,905
	<hr/> 137,150 Sq. Ft. or 3.148 Acres
Total Used and Useful	10,193
Total Non-Used and Useful	137,150
	<hr/>
Total Area of Zone No. 6	147,343 Sq. Ft. or 3.383 Acres

Zone 7: Description.

66. Zone 7 contains 200,724 square feet or 4.608 acres. The land in this zone is vacant. There is a 50-foot strip along the South Platte River which is a part of the easement granted to the city by respondent. This zone is triangular in shape. It is bounded by 46th Avenue, the Chicago, Burlington & Quincy right-of-way, and the South Platte River, along which is the easement. The surface of the zone is considerably below the river embankment and the adjacent railroad tracks. The total area of the easement in this zone is 34,412 square feet or .79 acre. This zone lies across the Colorado & Southern Railroad, is south of Zone 6 and across 46th Avenue. It is the extreme southern portion of respondent's land and is vacant and unused.

As already pointed out the physical facilities of respondent are being extended in a northerly rather than in a southerly direction and there is no likelihood that pens or other stockyard facilities required by respondent will be constructed on this land at any time within the predictable future. Respondent claims that the land is being held for purposes of expansion. It is found that the 200,724 square feet or 4.608 acres are not used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein.

Zone 8: Description.

67. Zone 8 contains 33,062 square feet or .759 acre of land. This land is occupied by the truck manure dump under which runs a sewer belonging to the Union Pacific Railroad Company. This easement is a strip 6 feet wide. This zone is located in a triangle bordered by 46th Avenue, the Chicago, Burlington & Quincy right-of-way, and the Colorado & Southern right-of-way. The area in this zone is used by truckers for dumping manure from their trucks preparatory to taking on return loads of materials and commodities which they carry back with them to the country. These premises are furnished free of charge for truckers who do not choose to avail themselves of the cleaning and washing facilities adjacent to the truck chutes. It is found that the entire area in this zone, namely, 33,062 square feet or .759 acre, is used and useful in the rendition of services, the reasonableness of the rates for which is being determined in this order.

Zone 9: Description, area of used and useful and of non-used and useful portions.

68. Zone 9 contains 308,448 square feet or 7.081 acres of land. The land in this zone is occupied by the horse and mule division, operated by the Colorado Horse & Mule Company and the stock show facilities of the Western Stock Show Association, a voluntary organization of various per-

sons and businesses interested in the livestock industry. The horse and mule division consists of horse and mule barns, corrals, try-out lots, approaches and entrances, a blacksmith shop, roadways, and other smaller units. The Horse and Mule Company pays for the use of these facilities a rental of \$1200 a year and 35c per head for each horse and mule sold in the division. The Horse and Mule Company furnishes its own light and water for the barns and sheds and half the water for its offices. The Horse and Mule Company vacates its premises when they are needed in connection with the exhibitions of the Western Stock Show Association. The horse and mule division is operated in most respects as other portions of respondent's property which is devoted to rendering stockyard services. Such differences as exist for the most part can be accounted for by the difference in character between horses and mules, which are handled in this division, and other species of livestock handled elsewhere in the yard. There is nothing in the record which would justify the exclusion of respondent's land devoted to the horse and mule division from the used and useful land used in the rendition of services for which are charged rates, the reasonableness of which is determined herein. The situation with respect to that portion of respondent's land in Zone 9 devoted to stock-show purposes is not so clear. The association which operates the show is a non-profit corporation without shares of stock. It pays no dividend. Memberships in the association were sold originally as a clever way of getting money for the show and relieving the yard company of that expense. The livestock pavilion was built under the direction of the association which went down town and secured donations from various people for the building of this barn or sales pavilion, which respondent otherwise could not have built. (See agreed abstract p. 694 and 695.) The show association has had revenues left over in certain years after paying rent. With these revenues they built a tile barn. Some years later respondent paid a deficit of \$2,000 or \$3,000 and took title to the barn because no rent had been paid

in the past. Respondent feels that the sales pavilion belongs to it and it feels the same way about the tile barn. At various times it has absorbed deficits of the association. The evidence shows that the livestock show which is held in January tends to bring livestock to market during this month, which intervenes between two fairly heavy shipping seasons. It is claimed by respondent that the show tends to increase its receipts of livestock throughout the year. There is evidence to the effect that the livestock show has had a tendency to improve the quality of livestock in the Denver territory and that the auction sales promoted by the show bring to Denver, buyers from wide sections of the country. There is testimony also to the effect that the prices received from livestock during the show week are from \$1.00 to \$1.50 per hundred higher than they are at other seasons of the year.

69. Not only are the facilities in Zone 9 used in connection with the stock show, but also some 200 pens in the south end of the yard are used for handling bulls. Other pens north of the Exchange Building are used for the holding of fat cattle. Feeder cattle, of which there are usually over 100 loads entered in the show, are yarded north of the fat cattle up to about the alley which is numbered 22. The facilities so used are on land already found to be used and useful. Regular yardage is charged on the livestock yarded in the main division of the yards and the revenues go into those of respondent. The yardage charges on animals sold on the show property in Zone 9 accrue to the show association.

70. There is no doubt but that the stock show has increased the interest of stock growers in producing a better quality of livestock. The question of the wisdom of the livestock show cannot be doubted, but this is beside the point. The matter to be determined is whether or not respondent, who is a zealous member of the stock show association (which assesses entrance fees, grants concessions for a consideration, and solicits contributions from

various Denver businesses) should absorb deficits which occur in connection with the show and pass those deficits on to all those who use the regular facilities of the yards. While the character of the business conducted by respondent naturally causes it to be interested in the stock show, there seems to be no reason why it should be more zealous than certain other industries in the stockyard section. Respondent's officers render certain services to the Stock Show Association, some of its employees keep the Association's books, and others do certain work during the progress of the show. The expense incident to this work has been allowed to remain in respondent's stockyard expense account. The stock show is a community enterprise. In such an enterprise respondent may be expected to have a keen interest and to make a reasonable contribution towards its success. That it does make such a contribution in the form of services rendered without compensation is amply supported by the evidence. The expenses incident to such services automatically go into the rates paid by the general shipping public. But to assume that it is the responsibility of respondent to underwrite all deficits incurred by the Stock Show Association and to pass these on to shippers in the form of regular stockyard rates is to pass on to the public in rates an amount which in justice it ought not to pay. Moreover, to assume that the activities of the Stock Show Association are a stockyard service and to include the value of the Association's property in the rate base necessitates that the Secretary of Agriculture assume responsibility for determining the reasonableness of the general entrance fees, the price of reserved seat tickets, the charges made for concessions during show week, and the rentals for various activities held occasionally throughout the year. I cannot believe that Congress intended that regulation under the Packers and Stockyards Act should extend so far.

71. The area in Zone 9 devoted to the horse and mule division is 193,750 square feet. It is found that this num-

ber of square feet in Zone 9 is used and useful in the rendition of services, the reasonableness of the rates for which is being determined herein. The total number of square feet in Zone 9 devoted to stock show purposes is 114,698. It is found that this number of square feet is not used and useful in the rendition of services for which are charged rates, the reasonableness of which is being determined herein. The following summary gives the land found to be used and useful and that found not to be used and useful in Zone 9:

<u>Used and Useful</u>					<u>Square Feet</u>
Land on which are:					
Horse and Mule Division—	Barn No. 1				13,184
" " " "	— " " 1 A				640
" " " "	— " " 2				5,248
" " " "	—Try-out Lot				17,653
" " " "	—Barn No. 3				7,967
" " " "	— " " 4				23,184
" " " "	—Corral West of Barn				
	No. 3				11,216
" " " "	— " East " "				
	No. 3				5,046
" " " "	—Approach to Barns 3				
	and 4				9,199
" " " "	—Lafayette Street				
	Entrance				2,187
" " " "	—Barn No. 5				12,084
" " " "	— " " 6				14,416
" " " "	— " " 7				12,000
" " " "	—Corrals				9,400
" " " "	—H and M Truck Chute				60
" " " "	—Company Horse Barn				17,310
" " " "	—Blacksmith Shop				3,920
Hook-up Shed					5,780
Run-over Shed					1,357
Hook-up Shed Pen					12,207
Entrance to Hook-up Shed Pen					2,096
Roadway N. E. Corner of Intersection C. B. & Q.					
& C. & S. R/W					7,596
Total Used and Useful					
					Sq. Ft. 193,750
					or Acres 4.448

<u>Non-Used and Useful</u>	<u>Square Feet</u>
Land on which are:	
Club and Store Building	4,927
Stadium	77,850
Sales Pavilion	5,765
Stadium Heating Plant	1,775
Stock Show Restaurant	4,250
Stock Show Hog Barn	17,606
Stock Show Wash House	2,525
Total Non-Used and Useful	Sq. Ft. 114,698
	or Acres 2.633
Total Used and Useful	193,750
Total Non-Used and Useful	114,698
	Sq. Ft. 308,448
	or Acres 7.081

Zone 10: Description.

72. This zone is separated from the other land owned by respondents by the main lines and switch tracks of the Chicago, Burlington & Quincy Railroad and County Road No. 83. It is the site of an abandoned gravel pit and is entirely vacant except for a hamburger stand operated by a squatter. The land is very irregular as a result of gravel excavation by its former owner, the Brannan Sand & Gravel Company. A land witness called for respondent testified that he placed a lower value on this land than he did when he testified at a former hearing and that at that time he and other witnesses attributed more value to the gravel than they did to the land. The witness is of the opinion that if he were to take a buyer out to see it the buyer would probably consider it worthless. He stated, however, that this land brought good value as a gravel pit and that it will bring a value for a dump heap when the city no longer has a place to dump refuse. Respondent claims that this land is used and useful for expansion. A witness called by the Government, who is familiar with respondent's property and operations, is of the opinion that this land is not used and useful.

73. The location and character of this land are such that it is unsuited to any general stockyard purpose at the

present time. It is so irregular in surface that great expense in leveling would be required even if there were a stockyard use to which respondent would put the land. It is isolated and lies across a road and a railroad track from the main body of the yards. It is in reality a wasting asset. Its potentiality as a source of gravel is already being exhausted. With a sufficient amount of vacant land already included in other zones to satisfy the requirements of respondent's growth for many years it does not seem fair to shippers to include this zone in the used and useful land of respondent when the character and time of the use are so problematical and so speculative. It is, therefore, found that the 100,319 square feet or 2.303 acres of land in this zone are not used and useful in the rendition of any service, the reasonableness of the rates for which is being determined herein.

74. A summary of land heretofore found to be used and useful and that found to be not used and useful is as follows:

Used and Useful	Acres	Square Feet
Zone No. 1	33.360	1,453,212
" " 2	22.147	964,741
" " 3	12.117	527,796
" " 4	10.725	467,142.5
" " 5	-----	-----
" " 6	0.235	10,193
" " 7	-----	-----
" " 8	0.759	33,062
" " 9	4.448	193,750
" " 10	-----	-----
Total Used and Useful	83.791	3,649,896.5 Sq. Ft. or 83.791 Acres
Non-Used and Useful	Acres	Square Feet
Zone No. 1	4.907	213,744
" " 2	.835	36,352
" " 3	7.708	335,778
" " 4	7.997	348,367.5
" " 5	12.640	550,598
" " 6	3.148	137,150
" " 7	4.608	200,724

" " 8	-----	-----
" " 9	2.633	114,698
" " 10	2.303	100,319
<hr/>		<hr/>
Total Non-Used and Useful 46.779		2,037,730.5 Sq.Ft.or 46.779
Total Used and Useful		3,649,896.5
Total Non-Used and Useful		2,037,730.5
<hr/>		<hr/>
Total Area		5,687,627 Sq.Ft.or 130.570 Acres

STRUCTURES

General statement and findings:

75. The structures located on the land hereinbefore found to be used and useful are used by respondent inseparably with the land in rendering those services, the reasonableness of the rates for which is being determined in this order. It is found that all structures located on land herein found to be used and useful are themselves used and useful in the rendition of services, the reasonableness of the rates for which is determined herein, and that all structures located on land found not to be used and useful are not used and useful.

E. VALUATION OF RESPONDENT'S PROPERTY

VALUE OF USED AND USEFUL LAND AND VALUE OF
NON-USED AND USEFUL LAND*General statement:*

76. Four witnesses testified as to the value of respondent's land. Three of them were called by respondent and one by the Government. The witnesses, Barclay Ivins, Harry W. Newcomb, and L. F. Eppich, who were called by respondent served as an appraisal committee and submitted to respondent a joint report in which is set forth their opinion as to the value of respondent's land. This joint report is in evidence. The witness, John A. Zelinski, called

by the Government also prepared a report setting forth his opinion as to the value of respondent's land. This report is in evidence. All four witnesses testified at the hearing, and were examined and cross-examined as to the factors which they considered in arriving at the respective values which they placed upon respondent's land. All the witnesses were men of long experience and unquestioned standing. The three called by respondent are all engaged in the real-estate business in Denver and have been for periods varying from 24 to 38 years. They are all members of the Denver Real Estate Exchange. The witness, Ivins, has served as a member of and as chairman of the Business and Industrial Property Appraisal Committee. He has managed important business blocks in the retail business district in the center of Denver and properties located in the financial district. He has also handled trackage and industrial properties.

77. The witness, Newcomb, called by respondent is president of a company which conducts in Denver a general real-estate business. He has had experience in the appraisal of land for local utilities, railroads, banks, industries, and other businesses. The witness, Eppich, called by respondent has been engaged in the real-estate business in Denver for nearly 40 years and has had much experience in appraising property in and around Denver. He is the loan correspondent and appraiser for two large life-insurance companies in New York and for one in North Carolina. He has had experience in appraising real estate in San Francisco, Los Angeles, and elsewhere. For a time he was chairman of the Zoning Commission of the City of Denver and is a member of the Board of Adjustments. For nine years he has been a member of the committee of the Denver Planning Commission.

78. The witness, Zelinski, called by the Government is a civil engineer whose training was had at Ohio State University. His practical experience began while in high school and

continued throughout his formal professional training. He has had engineering experience and has done consulting work in connection with sewer and water construction disposal plants, garbage reduction plants, and for some time was a member of an engineering firm with offices at Painesville, Ohio. In 1916 he entered the service of the Interstate Commerce Commission as junior land appraiser and served in that capacity until the fall of 1917. After an interval of some three years he returned to the Interstate Commerce Commission with an assignment in the Land Appraisal Department. He held all positions in this department from junior land appraiser to assistant supervisor of land appraisals, in which capacity he served until early in 1928, when he became Assistant Director of Research for the National Association of Owners of Railroad and Public Utility Securities. In the fall of 1929 he opened an office in Washington as consultant on railroad and utility regulation. In 1934 he became principal valuation engineer of the Packers and Stockyards Division, Bureau of Animal Industry, in the Department of Agriculture. In connection with his work in the Department of Agriculture he has given testimony in rate cases held for purposes of determining the reasonableness of stockyard rates for the Union Stock Yards Company of Omaha, the St. Joseph Stock Yards Company, and the Sioux City Stock Yards Company. This work was done under contract during the time he was engaged in private practice. He has made appraisals of the stockyards properties at Cleveland and Wichita as an employee of the Department. In those stockyard-rate cases in which he appeared as a witness his testimony was confined to the valuation of land.

79. The witnesses called by respondent placed a value of \$1,645,552.50 upon the 131.045 acres of land owned by respondent at the time the appraisals were made. The witness called by the Government placed a value of \$728,284 upon the same land. The value placed upon this land by

witnesses called by respondent is more than twice as great as that placed upon it by the witness called by the Government. The witnesses called by respondent placed a value upon it greater by \$917,268.50 than did the witness called by the Government. This discrepancy is too great to be accounted for solely by the difference in opinions which is reasonably to be expected between well qualified and competent land experts. It becomes necessary, therefore, to examine the methods followed by the various witnesses and the factors influencing them in arriving at their respective values.

80. The methods followed by the witnesses are set forth in their reports and in their oral testimony. In the land report comprising the appraisal of respondent's land the witnesses called by respondent stated jointly that, in arriving at the values which they placed on the various zones and the total value which they placed upon all the land, they personally inspected all the lands of the company giving consideration to their proximity to related and other industries and to various features having a bearing upon their adaptability and desirability for industrial uses, including that for a stockyards company; that they compiled a list of sales of properties in the neighborhood of the stockyards, and personally inspected the properties, checking, in so far as they deemed it necessary, with the grantors and grantees the consideration involved and that thereupon they appraised each zone placing what they considered a conservative value upon it; that in arriving at the value of the land they gave weight to the fact of the location of the yards and their convenient accessibility to the business district of Denver over paved streets; to the fact that the topography of the land is such as to lend itself to industrial development including stockyard uses, and to the fact that the land of respondent has available street-car and bus service into the City of Denver and bus service to all parts of Colorado and adjoining states; to the fact that six railroads with their connections furnish excellent transportation

facilities for livestock and products of the packing houses; to the fact that truck lines radiating from Denver supplement the railroads and serve rich irrigation districts in Colorado; to the fact that respondent's land is favorably located as regards dependable labor supply within easy walking distance and that there are good schools, churches, playgrounds, and a branch library accessible; to the fact that the facilities located on respondent's land have ample fire protection; to the fact that the district in which respondent's land is situated is the only part of Denver zoned for a business such as that conducted by respondent; to the fact that there are located in the district some fifteen allied industries such as packing houses, rendering companies, serum plants, and that there are other non-allied industries in the district; to the fact that there are sugar factories north of Denver, the by-products of which can be used in feeding cattle and sheep; and finally that the City of Denver is growing. In addition to this general statement each of the witnesses called by respondent testified orally as to the factors which led him to his conclusion as to the value of respondent's land.

81. The witness called by the Government likewise made a general statement with respect to respondent's land and included in that statement those elements which he considered in arriving at the value which he placed upon each of the ten zones into which the land was divided for purposes of appraisal. This witness began his investigation of the value of respondent's land sometime in November 1934. He received a transcript of a record in a prior hearing and copies of the exhibits introduced. He obtained from the Interstate Commerce Commission such information as it had on railroad valuations in Denver and had access to the Commission's records in Denver. He went to Denver on January 7 and left the 8th of February, dividing his activities between the land work and the supervision of the engineering and the inspection of the property of both phases of the work. He gave consideration to the topography, size, shape, and location of respondent's land with

respect to highways, railroad trackage, and to certain centers of value or development in that portion of the city in which the property is located. He also took into consideration the general nature of the surrounding development and the use to which the surrounding property is devoted, the improvements in the community such as schools, churches, and fire protection. He considered also the fact that the property of respondent is favorably situated with respect to street cars and local transportation and to the fact that city facilities such as water mains and sewage outlets are available to respondent's land. He compiled a list of sales which had taken place over a period of many years indicating the location of these sales with respect to respondent's land and described each of these sales in his report. He valued the lands as naked, unimproved, vacant land and considered that all the adjacent property was in place and that the situation with respect to the surrounding property was unchanged in every respect. He gave weight also to the fact that the lands of respondent are especially adaptable for a stockyards utility. He looked upon the area as bare land lacking public streets and alleys. He gave little weight to the assessed value of the property. The sales information which he gathered covers land of varying degrees of similarity to the land being appraised. Some of these individual sales suffered a degree of disability in so far as their direct application to the determination of value is concerned. Many of them had taken place a great many years in the past. None of the sales considered constitute an area as large in size as respondent's land and for this reason the witness gave consideration to the element of plottage and assembly. He placed the value of the land at a suitable level such as one would reasonably expect to exist over a period of about six months prior to the making of the appraisal, and due to that fact he did not give depression or stagnation values to the land. His report contains tabulations of general business statistics in Denver.

82. A careful consideration of the appraisal reports reveals nothing which accounts for the great difference in

the values arrived at by the witnesses for each of the zones or for the land as a whole. For an explanation of this difference in value, as is testified to by witnesses called by respondent and the witness called by the Government, the oral testimony of the various witnesses has to be examined. This has been done hereinafter in connection with the testimony of the various witnesses given with respect to each of the ten zones into which the land was divided.

*Value of land in
Zone 1:*

83. All witnesses were in agreement that the highest and best use of the lands of respondent is for stockyard purposes. They are of the opinion also that the value of Zone 1 has the highest value of any of the land in the general stockyards area, that is, the land west of the Chicago, Burlington & Quincy right-of-way. Witnesses for respondent divided Zone 1 into two areas, one of which is the land in the triangle south of the Exchange Building and between the Union Pacific right-of-way and the Chicago, Burlington & Quincy right-of-way. Upon the 3.6 acres in the triangle these witnesses placed a value of \$15,000 per acre, and upon the remaining 34.934 acres in the zone they placed a value of \$17,500 per acre. The total value placed upon the smaller portion was \$54,000 and that placed upon the larger was \$611,345, a total of \$665,345 for the 38.534 acres. This total value includes that portion of Zone 1 which was sold to Armour & Company. The witness called by the Government did not sub-divide this zone, but valued it as a single parcel of land. He placed a value of \$8,500 an acre upon the zone as a whole, or a total of \$327,539 for the 38.534 acres.

84. A careful reading of the oral testimony of the witnesses called by respondent leads to the inescapable conclusion that while they visualize respondent's land as stripped of all improvements and available for industrial uses generally they considered not merely the availability of the land for all uses and purposes including its availability for

stockyard purposes but that they attached peculiar weight to the actual and profitable use to which the land is being put as a stockyard. That this is true is borne out by the following statement by the witness, Ivins, called by respondent: "What I meant when I answered that if pens were constructed on Zone 3 it would increase the value of Zone 3, is that any appraiser in appraising land for industrial uses necessarily figures into his valuation the potential value of the site. Perhaps I should not limit this solely to industrial appraisals. Here in Denver we use statistics covering the number of people passing certain corners, and these figures are compiled by the University of Denver School of Commerce. I think these facts are recognized by all appraisers. The same thing is true in a certain measure in industrial property. If a particular site has clearly a highest and best use, I do not believe any appraiser can overlook the utilization of the tract, and therefore its potential value or potential earnings to a concern engaged in the highest and best use. If pens were on the tract north of Race Court in Zone 3, it would mean that the highest and best use, which all of us, including the Government appraiser, have recognized, namely the stockyards use, had come up to some of the potentialities as we saw them, viewing the land as naked land on March 23, 1935, and since those potentialities would have actually been realized by the construction of pens, this area would have tied in closely and become a part of the main area (namely Zones 1 and 2) as an enlargement of that area. Hence, the value of Zone 3 would then more nearly approach the value of the main tract than it did on March 23, 1935".

85. This same witness looked upon certain land as "land necessary for expansion". He did not limit the expansion solely to stockyards, but to any large industrial use such as steel mills, which, as its business grew would bring land on the outside into more intense use. Questioned as to the effect of construction on such lands he replied: "Yes, I would think that if the expansion lands which I have mentioned were built up with pens or covered with

railroad tracks it would add to their value". This same witness gave it as his opinion that he could sell the stockyard land at the value he had placed upon it to a stockyard industry; that he did not know as to whether he could sell the land at that value to another industry such as to a steel plant, but that he believed he could though he might have to hold the land for a year or two, but that he does not know of any industry that has made a bona fide attempt within the past five or ten years to secure 131 acres of land in or near Denver.

86. Another witness, Harry W. Newcomb, called by respondent is of the opinion that the easiest way to sell the land would be to offer it to someone wanting to go into the stockyard business. He thinks it would be an easy matter to secure some other stockyard to buy the property at the value at which witnesses for respondent have appraised it. He is of the opinion that it could be sold at the value at which these witnesses appraised it within a fair time which might be a year or two. He is of the opinion that he could sell it at that price for stockyards purposes within a period not to exceed three months. This same witness stated: "It is beneficial to any business to have increased business. It creates values for adjoining land and gives industry a potential earning power. In 1930 we tried to keep away from that (giving any weight to the fact that the stockyards was doing a good business or doing business at all) and think we did, but having had an experience of one appraisal we have been very careful, more careful in this appraisal to keep away from that than we might have been in the other. Now, I will not say that we did, but you have in mind all the time that there is an industry there and the whole thing is to keep in mind the use of the property for the highest and best purpose (stockyard purpose) that it can be used. We considered the property for the highest and best use . . . did give thought to the intensive use of the land".

87. Another land witness, L. F. Eppich, called by respondent testified as follows: "Yes, I think I could

sell the stockyards land today if they were vacated. My first effort would be for a stockyards industry, and as to whether any other industry could be found to take such a tract, that is a matter of effort on the part of the salesman. I think it is possible. Personally, I do not think I would go outside of the stockyards industry, bearing in mind that the packing houses and related industries are all in place as they are today. It seems to me that it would require no particular effort right in the city of Denver to secure a purchaser for that piece of land with all other industries in place. No, I did not say that I felt no other industry would take 131 acres. After I had exhausted the stockyards chance it seems to me that an oil refinery, a steel mill or a smelter or something in the rubber industry might be found to use the tract. Yes, it has been some time since any industry requiring 131 acres has located in Denver. I could not say just how long. The Chamber of Commerce's efforts in this regard have evidently not met with success."

88. Again this same witness testified: "Accessibility and utility are not wholly synonymous. Utility is the use of a tract. Yes, accessibility is one of the elements of value and utility is another. Utility also means usefulness but that does not necessarily mean the ability to make money. What I considered was the use to which the land could be put; the element of the ability of the land to make money applies to their use. I considered it in connection with the stockyards area from the standpoint of potential use. Yes, I mentioned the fact that the land was available for any industry, but it is true that no industry within my memory has sought an acreage of that extent in the city of Denver."

89. Other testimony shows that while the land witnesses called by respondent visualized the land as vacant, they unconsciously thought of it as actually in use for a stockyard. This is particularly true with respect to the so-called Blayne-Murphy sale discussed more fully herein-

after (see paragraphs 90-91). On this land, which lies directly across the Chicago, Burlington & Quincy right-of-way from respondent's property, there was constructed a few years ago a packing plant on land assembled for that purpose. A viaduct was constructed from the packing company across the railroad on to respondent's land. Other expenditures were incurred for a railroad siding, grading, surfacing, and for legal services. The cost of the viaduct was \$40,000. With respect to this viaduct the witness, Newcomb, stated: "In my opinion, those additional expenditures must be considered in determining the per-acre cost of this triangular tract because they were necessary to make the tract properly accessible to the stockyards". The witness Ivins testified as follows: "I considered the land in Zone 1 to be of equal value, if not greater value than the land in Zone 9, because the land in Zone 1 is the very heart of the stockyards district." The witness Newcomb testified: "As to the stockyards, there is only one piece of property in Denver that is available for stockyard purposes and that lessens competition in property for sales for that purpose and when you lessen the competition in property for any purpose it creates a higher value for that property for that purpose."

90. As already pointed out all witnesses listed sales of land made over a long period of years within varying distances of respondent's land. Witnesses called by respondent listed in their report 11 sales which they said they took into consideration in arriving at the value which they placed upon this zone. The first of these sales was from the Hollis-Platt Horse Company to the Denver Union Stock yard Company on August 3, 1918. Witnesses estimated the value of this land at the time of the sale at \$19,340 per acre. This land consisted of a series of lots located in a block in which there was a bank and a hotel. They are near some retail establishments and a residential section and are easily accessible to 46th Avenue. They are across the Chicago, Burlington & Quincy Railroad right-of-way

and at a considerable distance from Zone 1. The character of this land and its location are quite different from that in Zone 1. The land in this sale is more nearly similar to that which would be found in a retail and business section than in an industrial section. The second sale to which they gave consideration was one from Gordon B. Hollis to Joseph P. Murphy on August 23, 1924. This also was a sale of a series of lots in the sub-division known as West Elyria. This property fronts 250 feet on Humboldt Street and 125 feet on 47th Avenue. It is in the same general section as sale No. 2. On the land are horse barns and sheds which are being used as a sales barn and feed lot for horses and mules. This property lies across the Chicago, Burlington & Quincy Railroad from the respondent's land and is dissimilar so far as the location and potential use are concerned. The land in this sale is now being held for \$22,500. Sale No. 3 is one from Gordon B. Hollis to the Drovers National Bank on January 8, 1920. This was of two lots. The indicated land value, as stated by witnesses, was \$17,500 or \$121,960 per acre. Sale No. 5, which was given consideration by witnesses is in the form of a lease of land belonging to the stockyards company and leased to the railroads which serve respondent and the industries in the packing district. The other sales considered by witnesses called by respondent were 10 to 15, inclusive, and sale 24. These sales are those which took place in the assembling of the Blayney-Murphy tract. The total land purchased by the Blayney-Murphy Company was 8.649 acres. With respect to the bearing of sales upon the value which witnesses placed upon Zone 1, the witness Ivins testified: "In Zone 1 we had to go outside of the stockyards district to find lands comparable. We found none that I considered of similar or equal value, but we figured that those lands reflected the values in Zone 1". The witness Newcomb called by respondent stated: "I do say that the valuation of the stockyards is very hard to establish by any sales that have been made in the immediate vicinity. There are a few sales that are comparable with lands in the stockyards and I have ap-

praised the value of the stockyards by my experience and best judgment of this character of property. We considered the sale, but I do not think you can appraise the value of stockyards ground by sales that have been made in that vicinity. There are not sufficient sales to place a valuation on such a large tract of ground as that, and it has to be appraised by experience and better knowledge of real estate values in this section and other sections in the city." With reference to the land in the Blayney-Murphy tract, the witness Ivins stated that: "The Blayney-Murphy tract, I do not consider, does not reflect the value in Zone 1, but Zone 1 reflects the value out there. I use it as corroborative of the opinion I formed of land in Zone 1". The witness Newcomb testified as follows: "Yes, I think we would have reached the same conclusion as to value if we had ignored the sales on all the property."

91. The witness Zelinski called by the Government listed among the sales considered by him some of those enumerated as having been considered by witnesses called by respondent. He is of the opinion that sales Nos. 1, 2, and 3 considered by witnesses called by respondent are not indicative of the value of land in Zone 1 for the reason that one of them is a small corner lot occupied by a bank and that the other two are so far removed from Zone 1 and are of such different character as to location and potential use as to make the selling price of no worth in arriving at the value of Zone 1. Witnesses called by respondent state that whether they considered the cost of the land in the Blayney-Murphy tract, or whether they considered as the value of the land the cost of the land itself together with \$40,000 expended on the viaduct and certain other expenses bringing the total amount up to \$89,717.75 for the 8.649 acres, would have had no effect upon the value which they placed upon Zone 1. The witness Zelinski called by the Government did give consideration to the cost of the Blayney-Murphy tract. He was of the opinion, however, that the viaduct leading from the Blayney-Murphy plant across the Chicago, Burlington & Quincy Railroad

is a plant facility and that its cost of construction is not a land cost. This opinion seems to be warranted for the reason that the inclusion of the cost of the viaduct, namely, \$40,000, with the cost of the land could be justified, if at all, only on the assumption that a stockyard existed on respondent's land. The witnesses called by respondent would include also in land value the cost of a railroad siding, the cost of construction of which was \$5,413.27. If the purchase price of the land, the cost of the grading, the cost of levelling and the legal expense incurred in acquiring land should all be included with the cost price of the land itself the cost of the Blayney-Murphy tract at the time of its acquisition would be approximately \$5,100 per acre. The cost of the land as computed by witnesses called by respondent is \$10,373 per acre.

92. Respondent's contention is that the improvements are necessary in order to make this land comparable to the stockyards land. Even if this were true, the value of the land in Zone 1 would not reach the figure which witnesses called by respondent have placed upon it, namely, \$17,500 per acre, for the greater portion of it and \$15,000 per acre for what they term the "triangle". If the improvements be left out of consideration, and the Blayney-Murphy land after being levelled is compared with the land in Zone 1, the general impression to be gained from the testimony of all witnesses is that the Blayney-Murphy land is comparable to the land of respondent in Zone 1. It is also the general impression to be gained from the record that the cost of the Blayney-Murphy tract reflected somewhat the fact that the sellers of the land received all their land was worth. The witness Newcomb, who assembled the Blayney-Murphy tract testified: "Yes, I assembled the Blayney-Murphy tract. I think the people that sold got a good stiff price but not more than the property was worth for the use to which it was put."

93. After giving due consideration to the character of the land in Zone 1 as compared with the character of contiguous and nearby land and after giving some consideration to the high-priced land in the vicinity of 46th Avenue, Lafayette Street, and Humboldt Street and considerable more weight to the cost of the land in the Blayney-Murphy tract, excluding, however, the cost of the spur track and the viaduct as cost of land, and taking into consideration other sales of lower priced land and all pertinent testimony of record bearing upon the value of respondent's land in Zone 1, it is found that the value of the land in this Zone is \$8,500 per acre, or \$283,560 for the 33.36 acres in this zone heretofore found to be used and useful in the rendition of services, the reasonableness of the rates for which is being determined in this order, and \$41,710 for the 4.907 acres found not to be used and useful in the rendition of such services.

*Value of land in
Zone 2:*

94. Zone 2 contains at the present 22.982 acres (after the Armour sale), of which 22.147 acres have been found to be used and useful and .835 acre not used and useful. Witnesses called by respondent placed a value of \$15,000 per acre upon this land and stated that this value is supported by sales 10 to 15 (the Blayney-Murphy tract) and by lease No. 5, which is a joint lease by the Denver Union Stock Yard Company to the six railroads under date of August 1, 1921. The witness Zelinski called by the Government placed a value of \$5,000.00 per acre on the land in Zone 2 and stated that the value of the zone is arrived at by giving consideration to the same supporting data used in Zone 1 with a scaling down on account of the greater distance of the area from the more developed portions of North Denver. The witness called by respondent also looked upon the land in Zone 2 as less valuable than a portion of Zone 1, but equal in value to that portion of Zone 1 lying south of the Exchange Building.

The witness Ivins stated that judged from the industrial use standpoint the lands in Zone 1 and Zone 2 are very similar, that Zone 2 is equally adaptable for industrial purposes as the land in Zone 1, but that it is a little further removed from the peak of trading activities and has, therefore, a slightly diminished value in relation to Zone 1. He states that for the purposes of utility it is just as ideal as Zone 1.

95. It has already been pointed out why the values placed upon Zone 1 by witnesses called by respondent cannot be accepted. The same reasons which led to this determination lead to a like determination with respect to the value placed by them upon the land in Zone 2.

96. The witness, Zelinski, called by the Government placed a value of \$5,000 per acre upon this land as contrasted with \$8,500 per acre at which he valued the land in Zone 1. With regard to the difference in value between these zones, the witness was not considering the market activity on the zones at that time for the reason that if the lands were stripped of their present improvements it is impossible to tell whether the stockyard arrangements would be rebuilt the way it has been even though the property is being valued from the standpoint of the highest and best use. He states that a shading down of values from Zone 1 to Zone 2 is not on the basis of actual use which is being made of the property. He feels that the higher levels of values would exist at the southerly portion of the zone because it has a more direct access and is closer to the zone itself. He is of the opinion that Zone 2 should have a lower value than Zone 1. If Zone 2 were stripped of all improvements the only access to it would be through Race Court and the north end of Franklin Street.

97. The testimony with respect to Zone 2 is such as to make it unnecessary to discuss the various sales and

leases which may have a bearing on its value. These have already been discussed in arriving at the fair value of the land in Zone 1. It becomes a matter, therefore, of the extent to which the value of Zone 2 should be shaded down from that of Zone 1. Witnesses called by respondent think that Zone 2 is as valuable as a portion of Zone 1 and only a little less valuable than the other portion. The witness called by the Government is of the opinion that the land in Zone 2 is considerably less valuable than the land in Zone 1. The question of the value of Zone 2 turns then largely upon the situation of this land with respect to industries, other than that conducted by respondent, in the packing district. Leaving out of consideration the railroad tracks of respondent, this tract has railroad facilities on two sides. It has an improved street on the entire northerly boundary and a roadway on a portion of the westerly side. It is contiguous to the property of Armour & Company and is on the whole as conveniently located as is Zone 1 with respect to the Cudahy Packing Company. It is less conveniently located with respect to Swift & Company than is most of Zone 1. It is farther removed from the main activity in the packing district than is Zone 1. None of the witnesses attempted to make any mathematical computation as to the relative values of these two zones. No such mathematical computation seems to be possible. If one were made it would depend upon hypotheses resting upon personal opinion and the result of such a computation would still be a matter the validity of which depends upon the exercise of a reasonable judgment. A careful consideration of all the evidence with respect to this zone leads to the conclusion that it is less valuable than Zone 1. It is found that the value of the land in Zone 2 is \$5,000 per acre, and that the value of the 22.147 acres found to be used and useful is \$110,735 and that the value of the .835 acre found to be not used and useful is \$4,175.

*Value of Land in
Zone 3:*

98. Zone 3 contains 19.825 acres of which 12.117 acres have heretofore been found to be used and useful (paragraph 52) and 7.708 acres have been found to be non-used and useful. Witnesses called by respondent placed a value of \$8,000 on this land and supported that value by a lease of the Denver Union Stock Yard Company to the Union Pacific Railroad of 9200 square feet of right-of-way extending to the feed lots located in this zone. They supported it also by the sale of approximately 366 square feet by the Northwestern Terminal Railway Company to the City and County of Denver for a consideration of \$150.

99. The witness, Zelinski, called by the Government placed a value of \$3,500 an acre on this land. He stated that he valued this land relative to the value which he placed upon Zone 1 and that he gave due regard for the cost of the land which, with a part of Zone 2, was purchased from the Riverside Cemetery Association in 1916 for \$3,000 per acre.

100. The witness Ivins called by respondent stated that the capitalized value of the lease covering the 9200 square feet of right-of-way leased to the Union Pacific is at the rate of \$8,772 per acre. He stated that this land is needed for expansion as business of the stockyards increases. It was this witness who said that when pens were constructed on this zone its value would more nearly approach the value of the main tract than it did on March 23, 1935.

101. The witness called by the Government took into account the accessibility of Zone 3 and the rail connections other than respondent's tracks which are upon it. He thinks that the fact that Race Court is on the southern boundary of this zone gives it an accessibility which the land would not have if Race Court were shifted northward to the county line. He is of the opinion, however, that the shifting of Race Court would make the tract more available for an uninterrupted use than it has at present. The wit-

ness of the opinion that it would be feasible to get railroad trackage to this land either from the Burlington Railroad or from the Northwestern Terminal. Two sales near this land are known as the Local Beef & Mutton Company sales. These sales occurred in 1922 and 1920 and were at the rate of \$3,000 per acre. This land is subject to overflow and the witness thinks this land is not worth what was paid for it. One of these sales consisted of 1.41 acres and the other of 1.34 acres purchased from the Fairmount Cemetery Association, the same association from which respondent purchased in 1916 all of Zone 3 and other lands in Zone 2.

102. These sales and the sale and lease referred to by witness for respondent are all very small when compared with the total area of Zone 3. All witnesses shaded down the value of Zone 3 from that of Zone 2, all of them giving it a value per acre of more than half of the value per acre placed upon Zone 2. It is found that the value of this zone is \$3,500 per acre and that the value of the 12.117 acres found to be used and useful is \$42,409.50 and that the value of the 7.708 acres found not to be used and useful is \$26,978.

*Value of Land in
Zone 4:*

103. Zone 4 contains 18.722 acres of which 10.725 acres have been found to be used and useful and 7.997 acres have been found to be non-used and useful. The land in this zone is that heretofore described as lying between respondent's hog and sheep division, Armour & Company's plant, and Swift & Company's plant on the east, and the South Platte River on the west. Witnesses for respondent divided this land into two portions. One portion contains 16.382 acres which do not require filling; the other contains 2.34 acres which do require filling. On that portion not requiring filling they placed a value of \$12,000 per acre or \$196,584 and on the other portion they placed a value of \$10,000 per acre or \$23,400. The total value which they placed

upon this zone was \$219,984. This zone contains railroad trackage belonging to respondent and used jointly by the railroads which serve the yards. Witnesses for respondent took into consideration the right-of-way leased by respondent to the railroads and the reflected values of Zones 1 and 2. They stated that the lease on the land by respondent is on the basis of \$8,772 per acre and that the total cost of grading to bring the land up to stockyard level was \$30,000 and that the average capitalized value of this land on this basis is \$15,834 per acre. They mentioned in their report no sales on which they relied to determine the value of this land.

104. The witness called by the Government placed a value of \$2,500 per acre on this land. He gave some consideration to the sales discussed in connection with other zones and in addition he considered a series of sales numbered from 114 to 126. Some of these sales are of small portions of land; some of them were distressed sales, which throw little light upon the value of the land in this zone. In the case of the land involved in one sale from one packing company to another, the 2.7 acres involved were carried on the books on December 31, 1930 at \$2,500. It is reported that the seller of this land considered it of a value of \$10,000 per acre. A portion of this land later sold in a distressed transaction which throws no light upon its value. Another sale which took place in the vicinity of this zone was of 2.4 acres by respondent to a packing and provision company at a price of \$1,000 per acre. Most of the sales in this series were of land at less than \$3,000 per acre. A few were at a figure above \$3,000. None of these sales involved any considerable acreage. Giving some consideration to the sales which have taken place within varying distances from Zone 4 and the character of the land itself and to its location with respect to other more valuable land owned by respondent, it is found that the value of Zone 4 is \$2,500 per acre and that the value of the 10.725 acres heretofore found to be used and useful is \$26,812.50 and the value of the 7.997 acres found not to be used and useful is \$19,992.50.

*Value of Land in
Zone 5:*

105. Zone 5 contains 12.64 acres all of which has been found to be non-used and useful. Witnesses called by respondent placed a value of \$3,500 per acre on the land or a total of \$44,240 for the entire tract. In support of this valuation they use a series of sales, some of them to the City and County of Denver made in connection with the improvement of the South Platte River. One of these was of 7.29 acres for \$26,600, or \$3,648 per acre. Another was the so-called Ruedy Products sale of approximately one acre at the rate of \$3,562 per acre and another by the same company to Meyer and Dave Averich of something over an acre at the rate of \$2,584 per acre. Another sale took place between the same parties and the land involved brought \$3,000 per acre. Another sale was from the Fairmount Cemetery Association to private parties of something less than an acre at the rate of \$2,500 per acre.

106. The witness called by the Government placed a value of \$2,000 per acre on this zone. He gave consideration to a series of sales numbered 114 to 127, some of which have already been discussed in connection with the land in Zone 4. Giving due consideration to the character and location of this land with respect to industries in its locality and some consideration to the sales of these small areas of land, it is found that the value of this land is \$2,000 per acre or \$25,280 for all of the zone, heretofore found to be non-used and useful.

*Value of Land in
Zone 6:*

107. Zone 6 contains 3.383 acres of which .235 acre, used as a roadway, has been found to be used and useful and 3.148 acres, of which a small portion is used for a railroad right-of-way and the rest of which is vacant land, has been found to be not used and useful. Witnesses for respondent placed a value of \$10,000 an acre on this land

or a total of \$33,830 and supported this value by a sale of 2.7 acres by the Burkhardt Packing & Provision Company to the Western States Packing Company in 1928 at a price of \$10,000 per acre. The witness called by the Government placed a value of \$4,000 per acre on this land or a total value of \$13,532. This witness states that this zone is valuable for small packing-house development and due to the nature of the terrain would require more than the usual expenditure for heavy foundations. In arriving at the value which he placed upon the land this witness gave consideration to sales in the so-called Union Pacific Industrial development and to sales by the stockyard company to the Burkhardt Packing Company and the Union Rendering Company. This witness gave little consideration to the Burkhardt offer to respondent of \$10,000 per acre for acreage in Zone 6 because of the divergence between this amount and the value at which the land was carried on the books of the Western States Packing Company, successor to the Burkhardt Packing & Provision Company. On the basis of all the information in the record with respect to the character and location of this land and with due consideration to the sales of parcels of land in this vicinity it is found that the value of the land in this zone is \$4,000 per acre and that the value of the .235 acre heretofore found to be used and useful is \$940, and that the value of the 3.148 acres found to be not used and useful is \$12,592.

*Value of Land in
Zone 7:*

108. There are in this zone 4.608 acres of land, all of which has been found to be not used and useful. Witnesses called by the respondent valued this land at \$4,500 per acre or a total of \$20,736. They stated that this value is supported by their sales 25, 33, 34, 35, and 36. This is a series of sales of small parcels of land some distance south of respondent's property. In 1920 the American Smelting & Refining Company sold to the City and County

of Denver about 41 acres on which there had formerly been a smelting plant. The land was practically a slag dump. The purpose of the city in purchasing the land was to buy some 300,000 or 400,000 cubic yards of slag which might be crushed and used. After the slag had been removed there were some 300,000 cubic yards of first class gravel in the tract. After the land had been bought by the city an offer of \$7,500 and later one of \$10,000 was made to the city for the land with the provision that the city might reserve the slag for its own use. The price per acre paid by the city for this land was \$1,220. This sale hardly represents a straight-out land sale. Another sale considered by the witnesses called by respondent was one of Union Pacific Railroad Company to the National Fuse & Powder Company. The area involved in this sale was slightly more than an acre and the price paid was \$3,532 per acre. The land is rough and has no street frontage. In order to reach it from the street an arroyo about 20 feet deep would have to be filled on the northeast; a deep open cut shuts off approach from that direction. This property has no trackage facilities. It is less favorably situated than is the land in Tract 7. Another sale was one from the Union Pacific Railroad Company to the City and County of Denver in 1932. The area of the land involved was .92 acre. The sale price was \$2,174. This land fronts on no street and was used by the city to provide an outlet for a storm sewer. This land is less favorably situated than is the land in Zone 7. The City and County of Denver in 1925 sold 2.8 acres to the National Fuse & Powder Company for \$7,000. This is a price of \$2,500 per acre. This land fronts on no highway or street. Another sale considered by witness called by respondent was one from Simon J. Feely to the National Fuse & Powder Company in 1929. The area of the land is 1.83 acres and consists of a series of 26 lots. These lots are located in a block bounded by 38th Street, Brighton Boulevard, and Delgany Street. These lots lie at a considerable distance south of respondent's property and on the main boulevard leading from the pack-

ing house center into the city. These lots are much more favorably situated than is the land in Zone 7.

109. The witness called by the Government placed a value of \$3,000 per acre on this zone. He stated that the same sales information was considered by him as was the case in Zone 6, due regard being had for the triangular shape of the parcel and the difficulty of efficient industrial development on the southerly point. When respondent sold the County and City of Denver land for the purpose of widening 46th Street, it retained the privilege of building railroad tracks under, over, or at grade with 46th Avenue. A witness called by respondent is of the opinion that, because of this right retained by respondent, Zone 7 has accessibility to the industrial tract. The zone as such is not now served by any railroad, but in his opinion rails could easily be brought into the zone. The conclusion to be drawn from all the evidence with respect to this zone is that it is more valuable than some of the sales enumerated by the witnesses called by respondent, but that it is less valuable than the solid city block of lots cited by them. On the basis of all the testimony it is found that the value of Zone 7 is \$3,000 per acre and that the value of the 4.608 acres hereinbefore found not to be used and useful is \$13,824.

*Value of Land in
Zone 8:*

110. Zone 8 contains .759 acre, all of which has hereinbefore been found to be used and useful. Witnesses for respondent placed a value of \$10,000 per acre upon this ground or a total of \$7,590. This zone is a triangle with its longest side fronting on 46th Street. The Colorado & Southern Railroad right-of-way and the Burlington right-of-way border it on the other two sides. In valuing this land witnesses called by respondent took into consideration the street frontage of this land, the nearness of it to the stockyards and to the business district of Elyria. The witness Ivins testified that as regards this zone the land is so close to the

main body of the stockyards that it is not affected by the depression.

111. The witness Zelinski called by the Government valued this land at \$6,000 per acre, or a total of \$4,554. This zone in his opinion is available for a gasoline station or some like development or it has the possibility of being used for a minor industry which might have railroad trackage available from the Union Pacific and Colorado & Southern joint track. Its shape, however, in all probability precludes its use for any important industrial development. On the basis of all the testimony it is found that the value of this zone is \$6,000 per acre and that the total value of the entire zone, namely, .759 acre heretofore found to be used and useful, is \$4,554.

*Value of Land in
Zone 9:*

112. The land in Zone 9 contains 7.081 acres of which 4.448 acres have heretofore been found to be used and useful and 2.633 acres to be not used and useful. Witnesses called by respondent placed a value of \$20,000 per acre upon this land or a total value of \$141,620. The witness called by the Government placed a value of \$15,246 an acre upon this land or a total of \$107,957. All the witnesses considered numerous sales which have been made in the vicinity of this zone. One set of sales is the so-called Union Pacific development near the intersection of 46th Street and Brighton Boulevard. Another sale to which much attention was given was that of the Murphy barn and lot, which is listed by the witness called by the Government in his report as Sale No. 21. This report gives the consideration for the land as \$6,000 and the consideration for the improvements thereon as \$16,000. The evidence is clear that regardless of the relative values of the land and improvements there is a reversal of figures and that the source of information gives the value of improvements as \$6,000 and that of the land as \$16,000. The area involved was slightly less than an acre. Most of the

sales which are involved in the Union Pacific industrial development are at figures considerably below the value per acre placed upon Zone 9 by witnesses called by respondent. In the few cases where the per-acre sale price exceeds that placed upon Zone 9 by witnesses called by respondent the areas are so small as not to be indicative of the value of the land in this much larger zone. As heretofore pointed out the land in this zone is more of a retail character than of an industrial character such as are the lands of respondent lying across the Chicago, Burlington & Quincy Railroad. The evidence is clear that the sales in the Union Pacific industrial development were bona fide sales.

113. Giving due consideration to the character of this land, its location relative to the sales which have taken place around it, and to the fact that the prices of the land and improvements were interchanged in the Murphy sale, it is found that the value of the land in this zone is \$15,246 per acre and that the value of the 4.448 acres, heretofore found to be used and useful, is \$67,814 and that of the 2.633 acres, heretofore found to be not used and useful, is \$40,143.

*Value of Land in
Zone 10:*

114. Zone 10 contains 2.303 acres, all of which heretofore have been found to be not used and useful. Witnesses called by respondent placed a value of \$2,500 an acre upon this land or \$5,757.50 upon the zone. The witness called by the Government placed a value of \$1,500 per acre upon this zone or a total of \$3,455. This land is practically unusable for any other purpose than the mining of gravel. It lies across the Chicago, Burlington & Quincy Railroad and County Road No. 83 from the main body of respondent's other land. The witness Newcomb called by respondent referred to its potential value as a dump heap and to the fact that one looking at the land would perhaps consider it worthless. All witnesses supported the values placed upon this land by various sales which have taken place at varying

distances from the zone. A small triangular portion of this zone was sold by respondent as a filling station site at the rate of \$3,500 per acre. A number of sales listed by witnesses called by respondent were made at about \$3,000 per acre. Giving consideration to all the information in the record with reference to this zone and to the depleted condition of the gravel pit on it and its lack of suitability for any other purpose, it is found that the value of the 2.303 acres, all of which has heretofore been found to be not used and useful, in this zone is \$1,500 per acre or a total of \$3,454.50.

115. A summary by zones of the value of the land of respondent hereinbefore found to be used and useful and of that found to be not used and useful is as follows:

Zone	Price per Acre	Total Area		Used and Useful		Not used and Useful	
		Acres	Total Value	Acres	Total Value	Acres	Total Value
1	\$ 8,500	38.267	\$325,270.00	33.360	\$283,560.00	4.907	\$ 41,710.00
2	5,000	22.982	114,910.00	22.147	110,735.00	.835	4,175.00
3	3,500	19.825	69,387.50	12.117	42,409.50	7.708	26,978.00
4	2,500	18.722	46,805.00	10.725	26,812.50	7.997	19,992.50
5	2,000	12.640	25,280.00	.....	.....	12.640	25,280.00
6	4,000	3.383	13,532.00	.235	940.00	3.148	12,592.00
7	3,000	4.608	13,824.00	.....	.....	4.608	13,824.00
8	6,000	.759	4,554.00	.759	4,554.00	.....	.....
9	15,246	7.081	107,957.00	4.448	67,814.00	2.633	40,143.00
10	1,500	2.303	3,454.50	.....	.....	2.303	3,454.50

Total 130.570 \$724,974.00 83.791 \$536,825.00 46.779 \$188,149.00

It is found that the fair value of respondent's used and useful land is \$536,825.00.

VALUE OF RESPONDENT'S USED AND USEFUL STRUCTURES AND EQUIPMENT AND VALUE OF NON-USED AND USEFUL STRUCTURES AND EQUIPMENT

General statement:

116. Two witnesses were called to testify on the value of respondent's structures and equipment. One of these, John A. Zelinski, a valuation engineer called by the Government, testified with respect to respondent's structures. His qualifications have been given hereinbefore. The other witness, K. Lee Hyder, who was called by respondent, is an engineer and architect of wide experience. He is vice pres-

ident of the American Appraisal Company, and has had many years experience in connection with construction and has had ample opportunity to observe the operations of stockyards plants including the yard of respondent. No question was raised in the hearing as to his qualification. None is raised here. He is thoroughly competent and widely experienced.

117. The engineer called by the Government testified that the cost of reproduction of respondent's structures and equipment, that is, the total cost of material and labor together with overheads, is \$2,525,150. Counsel for respondent stated on behalf of respondent that it would accept correct this cost of reproduction new of its property, provided a slight adjustment be made on account of an error in inventory in the water and sewer systems. These adjustments were made and later introduced in evidence to the Government. Zelinski, engineer for the Government, stated that in valuing the property he reached his conclusion upon the basis that the material was in place and that the property is able and willing to function as a stockyard, that is, as a business earning income. The total cost of reproduction new of all respondent's structures and equipment, together with direct construction overheads but not indirect overheads, of \$2,525,150 was allocated in accordance with finding hereinafter made, \$2,118,961 to used and useful structures and equipment, and \$406,189 to non-used and unprofitable structures and equipment. The witness, Hyder, engineer for respondent, stated that in his judgment the cost of reproduction new of respondent's structures and equipment of the date of the valuation and as determined by the witness called by the Government is substantially correct in detail. It is his opinion, however, that this amount is only the cost of the reproduction new of the properties and construction overheads. The witness Hyder called by respondent placed a value of \$2,491,233.44 upon respondent's structures and equipment new before depreciation. To the cost of reproduction new of structures and equipment the engineer called by the Government added certain percentages to cover

number of indirect construction overheads. To the cost of reproduction new as found by the engineer called by respondent he added a lump sum of \$446,438. It has already been found that all the structures and equipment located on land found to be used and useful are used and useful, and that all structures and equipment located on land hereinbefore found to be not used and useful are not used and useful.

118. In conformity with this general finding, it is found specifically that the following units of property as indicated in the table are used and useful and not used and useful, and that the value of each unit, including construction headheads, is as set forth opposite the various items, and that the total cost of reproduction new of respondent's used and useful property, including direct overheads, is \$2,118,961 and that of the non-used and useful structures and equipment, including direct overheads, is \$406,189.

118-a. BUILDINGS, STRUCTURES AND EQUIPMENT
FOUND TO BE USED AND USEFUL AND
NON-USED AND NON-USEFUL

	Reproduction New Used & Useful	Non-Used & Non-Useful
<i>Office Buildings</i>		
New Exchange Building	\$ 228,259	
Old Exchange Building	96,900	
Chute House (Bulletin Office)	32,361	
<i>General Buildings</i>		
Garage and Shop	21,952	
Club House		\$ 31,513
Stadium		176,371
Stadium Run-Over Shed	917	
Stadium Hook-up Shed	3,345	
Stadium Heating Plant		6,115
Restaurant	1,819	
Stadium Restaurant		6,066
Carpenter Shop	837	
Material Shed	436	
Hide Storage (One Story Tile Building)		14,845

Cattle Division

Open Pens	489,548
Feed Lots (Pens 4204-4212-4226)	2,723
Cattle Dip	5,166
Branding and Dehorning Chute #1	3,714
Branding and Dehorning Chute #2	3,637
Branding and Dehorning Chute #3	4,756

Viaducts and Subways

Foot Viaducts	13,229
Stock Viaduct	19,684
Subway	7,066

Hog Division

Hog Shed #1	10,501
Hog Shed #2	12,557
Hog Shed #3	12,528
Hog Shed #4	17,762
Hog Shed #5	6,706
Immunization Plant	6,688
Sheep Dip and Drain Pens	5,033
Sheep Pens at Sheep Dip	2,193

Sheep Division

Sheep Barn #1	282,254
Sheep Barn #2	285,465

Horse and Mule Division

2 Story Brick Barn #1	37,816
Covered Alley Between H & M 1 and H & M 2	509
2 Story Brick Barn #2	15,809
Frame Shed #6	4,170
Frame Shed #7	11,956
Brick Barn	21,757
Frame Barn (Show Barn)	10,089
Brick Barn (Show Barn)	15,163
Wash House	5,942
Sales Pavilion	12,885
Horse & Mule Barn #3 (3 Story Brick)	89,517
Blacksmith Shop	5,124
Retaining Wall	5,285
Corrals & Outside	5,334

Feed Facilities

Hay Barn #6	6,022
Hay Barn #2	4,328
Hay Barn #3	13,372

Hay Barn #4	18,564
Hay Barn #5	5,989
Corn Tank	3,189

Loading and Unloading Facilities

Burlington Chutes	29,654
Union Pacific Chutes	34,761
C & S Chutes	11,851
River Chutes	17,522
Truck Out Pens	916
Hog & Sheep Truck-In Dock & Area	3,426
Office at Hog & Sheep Truck Drive-In	902

Scale Houses and Scales

Cattle Scale #1	4,692
Cattle Scale #2	4,192
Cattle Scale #4	5,963
Cattle Scale #5	5,394
Cattle Scale #6	5,379
Cattle Scale #10	6,222
Cattle Scale #11	6,279
Sheep Scale #7	5,663
Sheep Scale #8	5,427
Sheep Scale #12	5,206
Hog Scales 3-9	6,119
Hog Scales 13-14	6,492
Hay Scale	1,180
Hay Scale	1,600
Hay Scale	1,180

Manure Disposal

Manure Dump (& Area)	8,058
Manure Dump Office	923
Manure Dump Shed	1,435

Railroad

Railroad Tracks	58,039
Trackmen's Tool House	261
Yard Master's Office	364

General Roadway

Sewer System	13,810
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Water System	97,806
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Fire Protection	57,064
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Floating Equipment (Wagons, etc.)	1,404
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Horses, Mules and Harness	7,221
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Total Material and Labor	2,979	\$2,118,961	\$406,189
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Condition percent:

119. The witness Zelinski called by the Government who appraised respondent's structures and equipment gave it as his opinion that taken as a whole respondent's property was 80.545 percent as good as new. It is the opinion of the engineer who was called by respondent that the structures and equipment and other physical property of respondent lacks 11.1 percent of being as good as new. This percentage deducted from 100 leaves a condition percent of 88.9. In arriving at these respective condition percents the engineers followed somewhat different methods of procedure. The engineer called by the Government was assisted in his work of appraisal by a number of engineers who are employed in the office of the principal valuation engineer at Kansas City, Missouri. There were five assistant engineers engaged in this work, each of whom gave particular attention to certain portions of respondent's structures and equipment. The chief engineer had each of these five engineers inspect each unit of equipment and structure of respondent's property and place upon it an estimate of its present condition as compared with its condition if new. The chief valuation engineer then took the percents condition as reported to him by his assistant engineers and, giving double weight to the opinion of the engineer who inventoried a particular unit, averaged the percents reported to him. Then, using this information as a guide, he inspected the property, checked the estimates as reported to him and arrived at a condition percent. He applied the condition percent of certain groups of structures and equipment against the total cost of reproduction new of each unit, thus ascertaining the cost of reproduction new less depreciation of those groups. The sum of the reproduction cost new less depreciation was related to the sum of the reproduction cost of those units. The resulting percentage represents the weighted average percent condition of all respondent's structures and equipment as testified to by Government engineer.

120. The engineer called by respondent is familiar with respondent's property, having observed it during the pro-

cess of construction of a number of units at different periods, particularly in 1923, 1925, and 1928 of the cattle yards, and the construction of the new sheep house in 1929. The witness has for many years observed also the concealed construction of the water and sewer systems, particularly when they were opened up for repair or alteration. Both witnesses took into consideration the factors of structural and economic obsolescence, together with the actual physical structural deterioration. The witness called by respondent is of the opinion that the remaining expectancy of life of a property item as compared to a similar expectancy of a new item is a definite factor in establishing the value of the property for sale, but that it is not a factor of material weight in the valuation of a property for rate-making purposes. For this purpose the actual condition of the property is controlling. Observed depreciation is all that should be given consideration, which depreciation would include such obsolescence as might exist. It is the personal conviction of the witness that the only elements of depreciation properly to be deducted in setting up value of structures and equipment as a part of a rate base is the actual depreciation which affects the capability of the property to render services as compared with new. He states, however, that observed depreciation has been given a somewhat broader interpretation by some authorities whereby it has been claimed that not only the depreciation that could be observed should be recognized but also allowances made for depreciation in certain portions of the property which could not actually be seen or inspected.

121. As regards the condition percent of many of the units of respondent's structures and equipment, the two witnesses were in close agreement. With respect to the condition percent of that portion of respondent's equipment which is under the ground, such for instance as its system of water and sewer facilities and the underground portion of posts throughout the stockyard and the inside of concrete pavements, there is considerable difference in the opinion of the witnesses as to the percent condition.

122. The witness Hyder called by respondent stated: "It is my personal conviction that the only elements of depreciation to be properly deducted in setting up value as a part of the rate base is the actual depreciation which affects the capability of the property to render services as compared with new." This view of depreciation gives less weight than is warranted to the actual physical condition of the property. A property in a very poor state of repair and destined to remain in use for only a short time might render service quite similar to that of a new property. Nevertheless, from the standpoint of management it would be unwise to follow a policy which looked upon these two properties as being anything like equal in point of physical deterioration. A reasonable conclusion is that the witness Hyder called by respondent placed a percent condition upon respondent's property somewhat higher than is warranted.

123. A very considerable portion of respondent's property consists of concrete alleys, pens with concrete flooring, and is constructed of posts, wood gates, troughs, and other facilities which can be replaced piece by piece and thus maintained in a high state of preservation through repairs. In the case of such a property one would expect to find it in a comparatively high state of preservation. On the basis of all the testimony and giving due weight to all the factors shown by the record to have a bearing upon the condition percent of respondent's property, it is found that the condition percent of the property is 80.545.

GENERAL OVERHEADS

124. The engineer for the Government added to the total cost of labor and material 5 percent of reproduction cost new for omissions and contingencies. He then added to this total certain percentages thereof on account of engineers' and architects' fees, legal expenses, general salaries and expenses, and fire insurance. He added also taxes paid by respondent during the year next preceding that in which

the hearing was held. To the sum of the total cost of material and labor and the items enumerated above he added $3\frac{1}{2}$ percent to cover interest at 7 percent for a period equal to one-half of that taken by him to be the period of construction. He used the six months' period for the reason that not all of the capital would have to be raised at the beginning of the construction period but could be raised at various times during the year and that on the whole the interest paid would be on an amount of capital averaging about half of the total cost of reproduction new of material and labor.

125. Taking the total cost new of material and labor of the used and useful structures and equipment as heretofore found and the total cost of reproduction new of the non-used and useful structures and equipment as \$2,118,961 and \$406,189, respectively, and considering the omissions and contingencies, general overheads, and interest during construction, a summary of the total cost of reproduction new of respondent's structures and equipment found to be used and useful and those found not to be used and useful is as follows:

	<u>Used and Useful</u>	<u>Not Used and Useful</u>
Total cost of reproduction new labor and material	\$2,118,961	\$406,189
Omissions and contingencies 5%	105,948	20,310
	<u>\$2,224,909</u>	<u>\$426,499</u>
Engineers' and architects' fees 5%	111,245	21,325
Legal expense 1%	22,249	4,265
General salaries and expenses 2%	44,498	8,530
Fire Insurance $\frac{1}{2}$ of 1%	11,125	2,132
Taxes during construction	30,613	5,868
	<u>\$2,444,639</u>	<u>\$468,619</u>
Interest during construction	85,562	16,402
	<u>\$2,530,201</u>	<u>\$485,021</u>
Net additions to used and useful property on account of inventory correction in water and sewer systems	2,283	.....
Total cost of reproduction new	<u>\$2,532,484</u>	<u>\$485,021</u>

(See Govt. Ex. 26, 27, 28, S-2.)

126. On the basis of all the testimony and in consideration of those factors relating to value discussed hereinbefore, it is found that the cost of reproduction new of respondent's used and useful structures and equipment in place in a property which is a going concern capable of earning money, and earning money, is \$2,532,484 and that the cost of reproduction new of its non-used and useful structures and equipment is \$485,021. It is also found that the total cost of reproduction new less depreciation of respondent's used and useful structures and equipment in place is 80.545 percent (the percent condition hereinbefore found) of \$2,532,484 or \$2,039,789. It is also found that the cost of reproduction new less depreciation of respondent's non-used and useful structures and equipment is 80.545 percent of \$485,021 or \$390,660.

INTEREST ON LAND DURING CONSTRUCTION

127. The witness, Zelinski, the engineer for the Government, did not include in the value of respondent's land or in the cost of reproduction new of respondent's structures and equipment anything on account of interest on the value of the land during the period of construction. The value of the land of respondent hereinbefore found to be used and useful is \$536,825 and the value of the land found not to be used and useful is \$188,149. Seven percent of the value of respondent's used and useful land is \$37,577.75, and seven percent of the value of respondent's non-used and useful land is \$13,170.43. Seven percent is the rate used by the engineer for the Government in computing interest which he included in the value of respondent's structures and equipment. It is found that there should be included in the value of respondent's used and useful property \$30,267 to cover interest on used and useful land during a construction period of one year.

WORKING CAPITAL

128. An accountant, H. E. Bufkin, called as a witness by the Government to audit the books and accounts of

respondent gave it as his opinion that respondent requires \$117,000 as cash working capital in the conduct of its business. From the books and records of the company he ascertained the cash-requiring items and the amounts of money necessary to meet each item as it fell due. He ascertained also the rate of turnover of commodities used by respondent and the frequency of labor payment.

129. Respondent paid out during the 5-year period from 1930 to 1934, inclusive, \$784,308.73 for hay, \$34,159.93 for bedding, and for grain \$80,987.48. The average annual amounts expended for these commodities during the period were \$156,861.75 for hay, \$6,831.99 for bedding, and \$16,197.50 for grain. The average turnover of hay was approximately 3 times during the year, of bedding 4 times, and of grain 9 times. The total annual cost of each of these divided by the rate of turnover shows the amount of cash which is necessary to finance the supplying of these commodities to patrons. The resulting working capital ascertained through this computation is \$52,287.18 for hay, \$1,708 for bedding, and \$1,799.72 for grain. These average amounts of money would not, however, be sufficient to meet the requirements at the peak seasons of the inventories. The accountant included in addition to the average amounts shown above \$20,000 as working capital to meet the peak season inventory requirements. Respondent kept on hand during the 5-year period an average inventory of materials and supplies amounting to \$10,633.84. The monthly average expenses incident to other cash-requiring items was \$14,417.30. The weekly payroll for the period was \$3,926.05.

130. Translating these figures into round numbers the accountant summarized the items of working capital, which, in his opinion, are required by respondent in the conduct of its business as follows:

Inventories - Hay	\$ 52,000.00
- Bedding	2,000.00
- Grain	2,000.00
- Material & Supplies	11,000.00

Cash not elsewhere provided	14,000.00
Insurance and Deferred	12,000.00
Pay Rolls - Weekly	4,000.00
Cash to meet Peak Inventory	20,000.00
	<hr/>
	\$117,000.00

131. Respondent did not introduce any testimony as to the amount of working capital required in the conduct of its business. It did, however, introduce in evidence a statement showing its accounts receivable as of December 31, 1934, and the number of days the respective items had been due. The bills receivable outstanding on this date totalled \$23,271.40 and the average number of days during which these bills had been due was 91.5. The witness Reinhardt, called by respondent, testified that the average amount of bills receivable for the year 1934 was in excess of that shown to be outstanding as of December 31, 1934. The average amount outstanding during the year was \$38,000. The witness, Bufkin, called by the Government included nothing in his working capital on account of these bills receivable because he believes that respondent had nothing to sell other than service, which is dependent upon the furnishing of labor, material, supplies, and feed.

132. For purposes of computation, the accountant for the Government reduced the actual experience of respondent to a hypothesis in which inventories would be kept constant and perpetual, and the payroll continuous. In order that inventories and payroll may be kept at a hypothetical level, all sales from inventory and sales of the results of labor must be paid for when due. In the instant case not all of these are paid for when due.

133. Of the approximately \$23,271 of bills receivable on December 31, 1934, whose average life was 91 days, slightly less than \$8,500 was overdue on account of non-cash-requiring items, rents and manure sales, and the non-stockyard service of loading and unloading. Not all bedding is used in rendering a stockyard service. Not all capital tied up in straw, therefore, is used rendering a

stockyard service. Respondent has increased wages 8%, which will tie up somewhat more capital. It is not possible to make an exact mathematical allocation of these amounts as between stockyard services and non-stockyard services or as to the exact amount incident to bills receivable or account of stockyard services. On the basis of the computations as made by the accountant, the testimony of respondent's secretary and treasurer, and all other information of record, it is found that \$139,300 is the amount of working capital which respondent is entitled to have included in the value of its property.

GOING CONCERN VALUE

134. Respondent's stockyard is a going concern. It has a long history of efficient and economic management which has won for it a reputation of rendering good service. It has been financially successful. It has never defaulted on its bond interest payments. It has paid its preferred dividends continuously since 1917. The audit shows that with the exception of the years 1916, 1917, and 1918 it has paid common dividends continuously from 1913 to 1934, ranging from two dollars to five dollars a share, and has paid six special dividends, two of them amounting to five dollars a share, one to fifty cents a share, one to two dollars a share, one to three dollars a share, and one to one dollar a share. Both the engineer Zelinski and the engineer Hyder considered respondent a going concern. The witness Hyder included in his value a separate amount to cover this element. The witness Zelinski did not include a separate amount. There is nothing in the entire testimony which indicates that any witness testifying on any subject had any other thought than that respondent is a going concern. The question to be determined, then, is not whether respondent is a going concern, but to what extent and in what manner going concern value is to be recognized.

135. The witness Hyder, the engineer called by respondent, stated that if capital should come to him with the

request that he establish a price which it could afford to pay to purchase the assets of respondent as an alternative to making a similar investment in purchasing land and developing a new stockyard, he would recommend a figure greater than \$350,000 as the going concern value of respondent. (Transcript pp. 2055-2063.) This witness enumerates a number of elements which tend to create value in excess of investment in the physical properties. Among these are the volume of business handled by respondent, an established organization of executives and personnel, a system of records, good credit, and a well balanced lay-out of physical facilities. He considers as one of the most outstanding features to be given consideration the expenditure of upwards of \$325,000 by respondent to induce packers and railroads to locate near its property. At the time he appraised respondent's property in 1930, he made studies as to the reasonable cost of development, that is, the expenditures which theoretically would have to be made in bringing the company to a status of normal operations following the completion of the physical properties. The assistant general manager of respondent testified that the cost of the land donated to packing companies and railroad companies by respondent has been \$254,589.38. To this he added carrying charges up to the date of the hearing, that is, taxes and interest. The original cost plus carrying charges amounted at the date of the hearing to \$325,547.10. Neither this amount nor the estimate by the witness Hyder based upon it can be taken as indicative of the amount of going concern value of respondent. The original cost together with carrying charges of what respondent has donated to packers and railroads is not a measure of going concern value. Original cost of the donations is a constant which increases with the passing of time because of continuous interest and taxes. Necessarily, original cost and carrying charges increased irrespective of whether respondent succeeds or fails, is efficiently or is inefficiently managed, or whether the going concern value is great or small, or whether there is any

such value at all. The testimony of record does not justify the inclusion of a minimum of \$350,000 as a separate item on account of going concern value or any other separate amount.

136. The witness Zelinski, the engineer called by the Government, in arriving at the value which he placed upon respondent's property, did not include a separate allowance for going concern value, but he did value the property of respondent as a going concern. He valued the property of respondent in place and reached his conclusion by considering the fact that the material was in place and that the property of respondent is functioning as a successful stockyard and as a business earning an income. (Transcript p. 440.) He valued the property as a going concern and this element permeates all his estimates of value.

137. In adopting the cost of reproduction new less depreciation of structures and the value of land, as heretofore found with respect to structures, equipment, and land, consideration has been given to the element of going concern value. Adequate allowance for the element of going concern value has been included, although no separate item on its account has been set forth.

138. A summary of the value of used and useful land, the cost of reproduction new of structures and equipment, including direct construction overheads, indirect overheads, interest on used and useful land during construction, and working capital, and the cost of these, less depreciation where depreciation exists, of respondent as a going concern is as follows:

	Cost of Reproduction New	Con- dition Percent	Cost of Reproduction New Less Depreciation
Land—Used and Useful	\$ 536,825	100	\$ 536,825
Total Material, Labor, Direct Construction Overhead and Indirect Construction Overhead	2,532,484	80.545	2,039,789

Interest on Used and Useful Land during Construction	37,578	80.545	30,267
Working Capital	139,300	100	139,300
Total on Basis of Original Testimony			\$2,746,181
Bridge in Process of Construction at Date of Oral Argument			22,500
Sewage Disposal Plant in Process of Construc- tion at Date of Oral Argument			24,000
Total			<u>\$2,792,681</u>

139. It is found that the fair value of the property of respondent as a going concern is \$2,792,681, and that the rate base on which respondent is entitled to earn a fair return is \$2,792,700.

F. REASONABLE RATE OF RETURN

140. Two witnesses, Howard D. Dozier and Arthur H. Bosworth, testified as to what rate of return in their opinion a schedule of rates for respondent should produce in order to be reasonable. Both of these witnesses gave opinions with respect to this matter in a former hearing. The witness Bosworth is a local investment banker with wide experience. He is a member of the board of directors of the General Stockyards Corporation, and of the Denver Union Stock Yard Company. No question was raised as to his qualifications at the time of the hearing and none is raised here. At the time he testified he had carefully read the testimony of the witness Dozier who testified on rate of return and had examined certain investment information submitted by that witness. He stated it as his belief that the theory of limiting electric light and power or other similar public-utility concerns to a fixed rate of return is in large part due to the fact that such utilities exercise a governmental function, and that frequently this is under a franchise which has a truly monopolistic grant and generally is accompanied by a truly sovereign grant of eminent domain. Where the Government elects to delegate to individuals the right and power to perform its duties (the performance of which if done by the Government would theoretically be on a non-profit basis,

or if profit were made it would be used to reduce taxes) the Government unquestionably has the right to say how much compensation those individuals shall have, namely, how much they shall be permitted to earn. In stockyard companies, he thinks, the situation is different; they do not exercise a Governmental function, do not have the right of eminent domain, and they are not monopolies.

141. The witness Bosworth pointed out the competitive character of respondent's business and discussed at length the hazards to which it is subject. He stated that it is always easier to raise capital for an enterprise which bids fair to grow rapidly in size and importance and that investors prefer to place their money in common stocks of going businesses which are enjoying rapid growth in sales and earnings. In the opinion of the witness, purchasers of common stock almost universally buy stock, not only on the strength of the current showing of earnings, but on prospective earnings as well, whereas investors in bonds and preferred stock are more interested in stability of earnings and a sufficient margin above interest and dividends so that a fixed rate of return will be paid regularly. The witness stated that the common-stock purchaser, however, has a different view, and that if one studies the earnings records of stockyards it is apparent that this is ~~not~~ a line of business where very rapid growth can be expected. The holder of common stocks of stockyard companies can rarely expect a stock dividend or any great increase in cash dividends. Therefore it is necessary for the common stock of stockyard companies to pay a much higher yield if the investor's dollar is to be obtained. The witness stated it as his opinion that the best measure of what the public will demand as a rate of return on stockyard property is the composite rate of return at which the securities of stockyards have been selling in the past. As indicative of what this composite rate of return on stockyard property is he submitted information showing the composite return arrived at by averaging the interest paid on the bonds, the dividends paid on the pre-

ferred stock, and the earnings per share on the common stock. This composite average yield for the years 1930 to 1934, inclusive, was 8.39 percent. The year 1934 was a grossly abnormal year because of the Government's cattle-buying program. If this year be eliminated, the composite average for the remaining years of the period is 7.75 percent.

142. The witness Bosworth submitted other information in which was shown, as of December 31, 1934, the same data for the stockyards operating at Wichita, Omaha, St. Louis, St. Paul, Fort Worth, St. Joseph, Kansas City, and Sioux City, which showed a composite average return for these yards of 9.923 as compared with a yield of 10.965 for Denver. The witness is of the opinion that 1934 was an unusual year and that it would be unsatisfactory to submit only this year. During the year 1933 the Government's hog-buying program was in operation and the witness is of the opinion that another year should be taken as representative. He took, therefore, figures for 1932 at Omaha, Kansas City, Fort Worth, Wichita, and St. Paul. These show that the composite return for these markets averaged 8.2 percent in 1932.

143. At the time the witness' testimony was given, the bonds of the Denver Union Stock Yard Company were selling to yield less than 5 percent and the preferred stock, which is callable, to yield 6.7 percent. It is the witness' opinion that, if the company had had no securities outstanding at the time he testified, it might have been possible to issue bonds on a 4½-percent basis and preferred stock on a 6½-percent basis. These securities, in his opinion, would sell at these yields only in case a substantial portion of the valuation of the property were represented by common stock.

144. In the opinion of the witness, the earnings per share of this common stock would have to be very attractive, at least 10 percent of its par value or market value in case the stock had no par value. It is the belief of the witness that the Denver Union Stock Yard Company is entitled to and should have a rate of return of 8 percent on the valuation of the property.

145. The witness is of the opinion also that, if the Secretary should permit respondent an 8 percent return, and if that 8 percent return when applied to the value of respondent's property as found by the Secretary should result in an increase in yardage charges, he would feel that respondent was entitled to make those charges as a matter of right, that is, to earn 8 percent on the fair value of the property, but that other considerations might enter into the wisdom of attempting to earn that return at a certain time, as, for instance, during a depression. The witness is of the opinion that the dividend policy of a corporation ought to be as liberal as possible to the stockholders, but not so liberal as to make impossible the building up of a reserve to take care of possible catastrophies or unforeseen contingencies. In 1930 the witness was of the opinion that the Denver Union Stock Yard Company was entitled to a rate of return of 10 percent.

146. The witness Dozier called by the Government to give his opinion as to what rate of return a schedule of rates should produce in order to be reasonable, is an economist who has given many years to the study of investments and has made a first-hand study of the subject throughout the United States. His qualifications were not questioned at the hearing. They are not questioned here. He stated that in his opinion a schedule of rates which would produce over the next few years a return varying from $6\frac{1}{2}$ to 7 percent would be reasonable. He qualified his statement, however, by saying that he did not think that a schedule of rates would be unreasonable if in the then current year, namely 1935, it should produce a rate of return somewhat below this zone of reasonableness. He stated that 1935 would in all likelihood be a year of subnormal receipts and that a schedule of reasonable rates could not be expected to yield a normal return in a year of subnormal volume and by the same token that if there should occur within the next five years a year of abnormally high receipts and the rates should produce a return of above 7 percent he would not for that reason alone judge the rates to be unreasonably high.

147. He testified in 1930 that it was his opinion that a schedule of rates which would have produced a rate of return of from $7\frac{1}{2}$ to 8 percent in the year 1929 would have been reasonable. In his statement he included a table showing the average monthly yield of long-time Government bonds from January 1926 to June 1935. The average yield in 1930 of these bonds was 3.28 and for the year as a whole varied from 3.17 to 3.43. He introduced into evidence also a statement showing for industrial and public-utility corporations the trends in bond yields, preferred stock yields, and common stock yields. These yields were bracketed in steps of one-fourth of one percent from $4\frac{1}{2}$ percent up to 7, and the number of issues showing the yield below $4\frac{1}{2}$ percent and above 7 percent stated for each of the years from 1927 to 1935 inclusive. The tabulation shows also the weighted average annual yield for these same securities.

148. The average annual yields on public utility and industrial bonds were as follows:

Year	Public Utility	Industrial
	Percent	Percent
1927	4.93	4.90
1928	4.81	4.66
1929	4.45	5.09
1930	4.59	5.03
1931	5.05	5.42
1932	5.59	6.05
1933	5.51	5.60
1934	5.31	5.64
1935 *	5.04	5.21

* As of May 10 only.

149. The average yields on preferred stocks for the same years are as follows:

Year	Public Utility	Industrial
	Percent	Percent
1927	5.63	5.42
1928	5.29	5.24
1929	5.27	5.45

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1930	5.14	5.36
1931	5.44	5.62
1932	7.05	7.72
1933	6.56	5.09
1934	*	**

* Thirteen out of 16 issues sold at 6.75 percent or more.

** Eleven out of 41 issues sold at between 4.76 and 5 percent, and 5 sold above 7 percent.

150. The average yields on common stock for the same years are as follows:

Year	Public Utility Percent	Industrial Percent
1927	4.99	4.98
1928	4.39	4.27
1929	3.26	4.09
1930	3.78	4.65
1931	5.20	5.75
1932	8.18	7.36
1933	7.58	4.82
1934	*	**

* Three issues selling at 5.50 or below, and 6 selling at 7 or above.

** Thirty-two out of 52 issues at 5 percent or below, and 6 selling at 7 or above.

151. The witness Dozier stated: "The conclusion which I draw from these yields is that within the period since the last hearing the yield on high-grade public-utility and industrial bonds has declined by about one percent. I am of the opinion that the yield obtainable on good preferred stocks at the present time is approximately one percent less than that obtainable at the date of the last hearing." He qualified this statement, however, by saying that an exception ought to be made in the case of public-utility stocks, both preferred and common. He attributed the decline in price, which would raise the yield, to special conditions, and did not believe that the situation with respect to public utility stocks should be taken as typical of the general investment market.

152. With respect to common stocks the witness stated: "The common-stock situation has been abnormal for many years, and it is difficult to draw any conclusion from facts relative to it which is thoroughly reliable in forming an opinion with respect to a normal yield on common stocks, but I do know this—that for much of the time for the last ten years the purchaser of common stocks has *not been able* to get as large a yield in current cash dividends as investors in *bonds of the identical corporations issuing the stock.*"

153. After having formed a tentative opinion on the basis of his own investigation of the earnings and yields of various types of securities issued by corporations and after having reached a tentative conclusion with respect thereto, the witness checked these opinions by the yields on various types of securities as shown by financial service organizations and by other information issued by them. The purpose of this investigation was to determine the measure of decline in yields during the past few years. He gave it as his opinion also that stockyard properties in general represent a stable type of business, and included in his statement a comparison of the profits of industrial and public-utility corporations generally with earnings of a large number of stockyard companies throughout the United States and the earnings of the Denver Union Stock Yard Company.

154. The rate of return testified to by the investment banker in 1930 as reasonable was 10 percent and in the instant case 8 percent. The zone of reasonableness testified to by the economist called in 1930 by the Government was from $7\frac{1}{2}$ to 8 percent, and in the instant case, from $6\frac{1}{2}$ to $7\frac{1}{2}$ percent. This represents a 2-percent decline in the yield testified to by the investment banker as of the two dates, and a difference of 1 percent in the zones testified to by the economist.

155. The conclusion to be drawn from the testimony is that there is a margin of at least one percent between the yield at the present time and that in 1930. In the litigation growing out of the 1930 hearing the court upheld as reason-

able a rate of return of $7\frac{1}{2}$ percent and stated that this was a minimum. If from this figure there be deducted the minimum difference between the investment yield procurable then, and that procured now, a return of $6\frac{1}{2}$ percent would result. Rates are made for the future and mathematical computations and the opinions of expert witnesses must be tempered by the exercise of a reasonable judgment. The low yield procurable on investments, and the opinion of at least one of the witnesses that the yields would continue low for a number of years, lead to the conclusion that respondent is entitled to charge rates which will yield an average rate of return of $6\frac{1}{2}$ per cent on \$2,792,700, hereinbefore found to be the rate base.

G. REASONABLE NET STOCKYARDS OPERATING INCOME

156. It is found that the reasonable average annual net operating income which should be produced by the rates hereinafter prescribed is $6\frac{1}{2}$ percent of \$2,792,700 or \$181,525.50.

H. EXPENSES AS INCURRED AND REASONABLE OPERATING EXPENSES.

General Statement:

157. In addition to producing a fair return upon the fair value of respondent's used and useful property, a reasonable schedule of rates and charges should produce enough revenues to pay all reasonable stockyard operating expenses, including adequate provision for depreciation and taxes. The audit hereinbefore referred to, and made by the accountant Bufkin, called by the Government, sets forth in minute detail all the expenses incurred by respondent on all accounts during the 5-year period from 1930 to 1934, inclusive. This audit contains also the balance sheets as of the beginning and end of each accounting period and reconciliations of surplus. No question was raised at the hearing as to the accuracy of this audit in reflecting the facts as shown by the books and accounts of respondent. In arriving at the amount of expense

incurred in rendering the services for which are charged the rates the reasonableness of which is determined in this order, an analysis has been made of the expenses as actually incurred in order to determine whether they were incurred in the rendition of a stockyard service and, if so incurred, whether reasonable. The table which follows lists all expenses as incurred and the purpose for which they were incurred. It shows also those expenses which have been eliminated from consideration altogether, those which were modified, and those which were taken into consideration in determining reasonable expenses to be covered into rates.

158. Some of the eliminations of expenses were made, because the amounts shown to have been expended were on account of the rendering of services for which are charged rates the reasonableness of which is not being determined herein, and others were made in order that there might be substituted therefore amounts determined to be reasonable on the basis of all the testimony. Respondent incurs certain expenses which do not vary greatly from year to year, irrespective of the volume of business received and handled. In the case of those expenses which show a marked degree of uniformity from year to year, the amount considered to be reasonable is a round figure equal substantially to the 5-year average or the average for a lesser number of years when no expenses on account of the item were incurred in some years. In the case of the expenses on account of those items as to which there is variation, a tendency upward or a tendency downward, all the surrounding circumstances relating to the expenditure have been examined and an effort has been made to determine whether the tendency either upward or downward is likely to be permanent. In the case of all items, an examination has been made of all the testimony and of all the information of record to the end that the expenses covered into rates may be just, reasonable, and fair. The following table sets forth the total expenses incurred by respondent, those which have been eliminated altogether for any of the reasons stated above, those which have been discarded altogether and an amount restored, and the average.

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EXPENSES OF RESPONDENT 1930-1934

Gov't Ex. Ac. Sched. NO.	1934			1933			1932			1931			1930			Expenses Con- sidered
	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	Total Expenses (Audit)	Excluded	Considered	
34 Cost of Sales—Hay	\$174,614.51	\$174,114.20	\$ 500.31	\$105,264.66	\$105,205.87	\$ 58.79	\$120,789.57	\$120,607.75	\$ 181.82	\$173,671.38	\$173,607.92	\$ 63.46	\$200,653.18	\$200,369.48	\$ 283.70	\$ 217.62
35 " " —Grain	13,254.27	13,254.27	-----	9,009.58	9,009.58	-----	12,310.14	12,310.14	-----	18,733.67	18,733.67	-----	30,129.24	30,129.24	-----	-----
36 " " —Bedding	4,694.02	4,694.02	-----	5,145.82	5,145.82	-----	6,259.58	6,259.58	-----	8,551.89	8,551.89	-----	10,762.72	10,762.72	-----	-----
37 Yard Labor	118,348.84	36,788.78	81,560.06	88,680.92	32,033.46	56,647.46	97,217.34	33,754.97	63,462.37	103,015.28	83,298.93	69,716.35	108,711.66	34,674.09	74,037.57	69,084.76
38 Horse and Truck Labor	4,692.24	-----	4,692.24	3,227.80	-----	3,227.80	3,994.16	-----	3,994.16	4,908.41	-----	4,908.41	4,550.80	-----	4,550.80	4,274.68
39 Current Yard Expense	2,959.79	-----	2,959.79	2,682.18	-----	2,682.18	2,603.72	-----	2,603.72	2,540.01	-----	2,540.01	3,110.89	-----	3,110.89	2,779.32
40 Yard Cleaning	16,021.36	1,359.43	14,661.93	10,855.67	811.98	10,043.69	12,332.68	852.75	11,479.93	16,003.26	779.11	15,224.15	17,869.14	791.01	17,078.13	13,697.57
41 Office & Management Salaries	36,409.21	-----	36,409.21	30,889.49	-----	30,889.49	34,481.07	-----	34,481.07	33,856.84	-----	33,856.84	33,129.76	-----	33,129.76	33,753.27
42 Officer's Travel & Entertain. Exp.	1,203.26	-----	1,203.26	1,119.24	-----	1,119.24	882.44	-----	882.44	561.70	-----	561.70	568.03	-----	568.03	568.93
43 Rental of Offices	2,223.50	-----	2,223.50	2,572.20	-----	2,572.20	2,572.20	-----	2,572.20	2,572.20	-----	2,572.20	2,572.20	-----	2,572.20	2,502.46
44 Office Supplies	2,419.00	-----	2,419.00	1,698.56	-----	1,698.56	1,876.07	-----	1,876.07	2,103.48	-----	2,103.48	2,280.26	-----	2,280.26	2,076.47
45 Office Expense	155.33	-----	155.33	176.89	-----	176.89	281.62	-----	281.62	303.71	-----	303.71	297.11	-----	297.11	242.93
46 Bank Service—Handling Cash	710.34	710.34	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
47 Engineering Expense	1,549.77	-----	1,549.77	1,439.10	-----	1,439.10	1,569.33	-----	1,569.33	1,599.83	-----	1,599.83	1,279.84	-----	1,279.84	1,487.57
48 Legal and Collection Expense	625.68	-----	625.68	677.68	-----	677.68	788.40	-----	788.40	1,184.72	-----	1,184.72	604.45	-----	604.45	776.19
49 Storehouse Expense	2,547.05	-----	2,547.05	2,388.54	-----	2,388.54	2,643.04	-----	2,643.04	2,673.48	-----	2,673.48	2,623.87	-----	2,623.87	2,575.20
50 Telephone and Telegraph	1,298.67	-----	1,298.67	1,407.93	-----	1,407.93	1,661.09	-----	1,661.09	1,673.25	-----	1,673.25	1,493.63	-----	1,493.63	1,506.92
51 Postage	370.56	-----	370.56	343.71	-----	343.71	374.65	-----	374.65	369.76	-----	369.76	311.72	-----	311.72	354.08
52 Audit Fees	475.00	-----	475.00	450.00	-----	450.00	450.00	-----	450.00	450.00	-----	450.00	450.00	-----	450.00	455.00
53 Directors' Fees	530.00	-----	530.00	730.00	-----	730.00	465.00	-----	465.00	515.00	-----	515.00	535.00	-----	535.00	555.00
54 Rate Hearing Expense	1,044.39	-----	1,044.39	14,543.02	-----	14,543.02	4,076.55	-----	4,076.55	1.35	-----	1.35	19.65	-----	19.65	3,936.99
55 Rates and Charges	6,069.21	-----	6,069.21	6,100.00	-----	6,100.00	9,809.75	-----	9,809.75	15,773.34	-----	15,773.34	6,182.08	-----	6,182.08	8,786.88
56 Yard Electricity	959.70	-----	959.70	801.09	-----	801.09	818.50	-----	818.50	802.67	-----	802.67	760.99	-----	760.99	828.59
57 Yard Heat Expense	341.88	-----	341.88	242.26	-----	242.26	338.24	-----	338.24	430.06	-----	430.06	362.23	-----	362.23	342.93
58 Yard Water Expense	10,116.24	-----	10,116.24	9,687.22	-----	9,687.22	11,311.86	-----	11,311.86	11,296.18	-----	11,296.18	10,457.92	-----	10,457.92	10,573.88
59 Car Partitions, Etc.	137.66	137.66	-----	76.98	76.98	-----	93.51	93.51	-----	164.36	164.36	-----	209.15	-----	209.15	-----
60 Estrays and Claims	418.72	-----	418.72	166.36	-----	166.36	270.83	-----	270.83	463.49	-----	463.49	719.41	-----	719.41	477.76
61 Yard Casualty Insurance	2,536.92	709.48	1,827.44	3,538.26	1,156.10	2,382.16	1,265.85	404.98	860.87	2,526.99	709.51	1,817.48	3,755.65	1,028.39	2,727.26	1,923.04
62 Lease of Property	616.86	-----	616.86	616.86	-----	616.86	616.80	-----	616.80	616.81	-----	616.81	462.65	-----	462.65	586.00
63 Horse & Mule Boarding Barn Exp.	3,240.60	3,240.60	-----	2,455.41	2,455.41	-----	3,156.20	3,156.20	-----	3,459.58	3,459.58	-----	2,301.94	2,301.94	-----	-----
64 Company Barn Expense	3,801.94	-----	3,801.94	3,781.23	-----	3,781.23	5,857.37	-----	5,857.37	9,167.80	-----	9,167.80	9,841.05	-----	9,841.05	6,489.88
65 Grain Elevator Expense	32.40	-----	32.40	33.09	-----	33.09	32.86	-----	32.86	33.15	-----	33.15	32.85	-----	32.85	32.87
66 Traffic—Solicitors' Salaries	6,929.83	491.52	6,438.31	5,582.19	387.77	5,194.42	8,030.00	555.87	7,474.13	7,490.45	474.03	7,016.42	6,790.79	454.64	6,336.15	6,491.89
67 " —Casualty Insurance	3.18	-----	3.18	2.04	-----	2.04	2.38	-----	2.38	3.30	-----	3.30	4.10	-----	4.10	3.00
68 " —Miscellaneous	45.15	-----	45.15	74.30	-----	74.30	45.00	-----	45.00	-----	-----	-----	-----	-----	-----	32.89
69 " —Soliciting Expense	6,667.39	472.90	6,194.49	4,921.79	341.90	4,579.89	6,650.10	460.35	6,189.75	6,775.02	428.76	6,346.26	6,914.10	462.89	6,451.21	5,952.32
70 Advertising	9,893.96	701.76	9,192.20	7,013.33	487.19	6,526.14	6,922.98	479.24	6,443.74	7,059.42	446.75	6,612.67	6,735.10	450.91	6,284.19	7,011.79
71 Dues, Donations & Subscriptions	3,823.84	3,600.59	223.25	3,148.68	2,900.28	248.40	3,154.51	2,786.11	368.40	2,958.04	2,604.56	353.48	3,342.07	2,944.95	397.12	318.13
72 Exchange Building Expense	19,626.02	-----	19,626.02	14,800.72	-----	14,800.72	17,177.54	-----	17,177.54	19,491.47	-----	19,491.47	17,972.09	-----	17,972.09	17,813.57
73 Cigar Stand Expense	14,293.84	14,293.84	-----	14,209.30	14,209.30	-----	17,943.44	17,943.44	-----	19,653.59	19,653.59	-----	21,192.08	21,192.08	-----	-----
74 Garage Expense	16,473.05	12,361.98	4,111.07	7,820.97	5,583.11	2,237.86	-----	-----	-----	-----	-----	-----	-----	-----	-----	1,269.79
75 H & M Div. and S. S. Property	6,308.24	3,386.96	2,921.28	4,332.48	2,006.33	2,326.16	3,969.81	2,131.43	1,838.38	8,075.03	4,335.56	3,739.47	8,988.09	4,825.80	4,162.29	2,933.55
76 Insurance—Fire, Tornado, Etc.	7,745.33	528.37	7,216.96	6,317.66	559.37	5,758.29	6,999.12	623.33	6,375.79	7,109.00	-----	6,485.67	7,705.91	606.42	7,099.49	6,587.24
77 Taxes	80,127.02	48,850.94	31,276.08	65,208.72	33,220.49	31,988.23	63,110.92	31,638.14	31,472.78	66,677.88	32,645.06	34,032.82	71,845.70	35,402.29	36,443.41	33,042.66
78 Depreciation Expense	54,823.60	-----	54,823.60	54,031.99	-----	54,031.99	53,931.31	-----	53,931.31	54,247.37	-----	54,247.37	53,178.30	-----	53,178.30	-----
79 Interest on Bonds	66,242.37	66,242.37	-----	69,375.00	69,375.00	-----	70,125.00	70,125.00	-----	70,875.00	70,875.00	-----	71,625.00	71,625.00	-----	-----
80 Interest Paid	-----	-----	-----	19.37	-----	19.37	-----	-----	-----	679.61	-----	679.61	-----	-----	-----	-----
81 Bond Discount and Expense	3,190.56	3,190.56	-----	3,252.48	3,252.48	-----	3,314.52	3,314.52	-----	3,376.47	3,376.47	-----	3,438.36	3,438.36	-----	-----
82 Fiscal Agents, Registrar & Trs. Em.	1,168.85	1,168.85	-----	710.16	710.16	-----	572.36	572.36	-----	726.51	726.51	-----	718.58	718.58	-----	-----
83 Appraisal Expense	3.40	-----	3.40	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
84 Dipping and Spraying Expense	812.47	-----	812.47	986.24	-----	986.24	1,881.31	-----	1,881.31	2,280.22	-----	2,280.22	2,153.31	-----	2,153.31	1,622.71
85 Blacksmith Shop Expense	3,575.90	3,575.90	-----	2,818.95	2,818.95	-----	4,568.81	4,568.81	-----	4,908.12	4,908.12	-----	5,216.55	5,216.55	-----	-----
86 (Repairs—Yd Structures, Fences, Pens	12,896.88	12,896.88	-----	4,340.71	4,340.71	-----	5,255.73	5,255.73	-----	9,712.01	9,712.01	-----	6,490.05	6,490.05	-----	-----
86 " —Chutes	1,361.58	1,361.58	-----	750.59	750.59	-----	911.09	911.09	-----	1,041.14	1,041.14	-----	696.28	696.28	-----	-----
87 " —Scales	199.94	199.94	-----	262.63	262.63	-----	262.24	262.24	-----	247.16	247.16	-----	648.66	648.66	-----	-----
88 " —Equipment & pers. Property	444.42	444.42	-----	656.36	656.36	-----	2,218.43	2,218.43	-----	2,406.21	2,406.21	-----	2,769.45	2,769.45	-----	-----
89 " —Railroad Tracks	37.50	37.50	-----	73.10	73.10	-----	11.86	11.86	-----	44.68	44.68	-----	10.78	10.78	-----	-----
90 " —Sewers	3,468.18	3,468.18	-----	758.44	758.44	-----	842.54	842.54	-----	973.44	973.44	-----	1,707.71	1,707.71	-----	-----
91 " —Water Pumps & Service L.	2,257.41	2,257.41	-----	1,984.46	1,984.46	-----	2,134.21	2,134.21	-----	2,353.10	2,353.10	-----	2,806.77	2,806.77	-----	-----
92 " —Roadway	325.68	325.68	-----	191.59	191.59	-----	249.98	249.98	-----	114.18	114.18	-----	128.26	128.26	-----	-----
93 " —Pavements	1,662.06	1,662.06	-----	141.35	141.35	-----	584.00	584.00	-----	346.58	346.58	-----	320.59	320.59	-----	-----
94 " —Garage	205.62	205.62	-----	58.60	58.60	-----	165.13	165.13	-----	121.04	121.04	-----	15.31	15.31	-----	-----
95 " —Company Auto Truck	704.59	704.59	-----	426.68	426.68	-----	451.86	451.86	-----	147.65	147.65	-----	241.32	241.32	-----	-----
96 " —Hay Barns	90.44	90.44	-----	265.64	265.64	-----	57.75	57.75	-----	147.86	147.86	-----	26.92	26.92	-----	-----
97 " —Grading	91.72	91.72	-----	-----	-----	-----	230.38	230.38	-----	42.68	42.68	-----	51.81	51.81	-----	-----
98 " —Grain Elevator	3.61	3.61	-----	3.28	3.28	-----	42.07	42.								

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Cost of Sales:

159. The rates hereinafter prescribed include a provision for a reasonable spread between gross selling price and gross costs of hay, grain, and bedding. One of the factors taken into consideration in arriving at this spread was the actual gross difference between revenues received for these items and their costs. This eliminates the necessity of carrying throughout the computations the two gross figures, and reaches the same result through the use of one net figure. Cost of sales has, therefore, been eliminated from the expense account.

Yard Labor:

160. The audit reveals an expenditure of \$118,348.84 in 1934 on account of yard labor. The expenditure for this purpose during this year was considerably higher than for any other year from 1930 to 1934, inclusive. This increase was due to the handling by respondent of Government cattle during the year 1934. The record shows that the additional expenses incident to handling these cattle were slightly over \$6,000 on account of labor and overheads. The figure of \$118,348.84 on account of yard labor shown in the audit includes also the labor used in connection with the loading and unloading of livestock arriving by rail which is not a stockyard service for which are charged rates, the reasonableness of which is being determined herein. After deducting the extraordinary cost of yard labor in 1934 and the cost of labor employed in the loading and unloading of livestock arriving by rail, the 5-year average expenditure on account of that labor employed in connection with the services for which respondent charges rates the reasonableness of which is being determined herein was \$69,084.76. It is found that there should be covered into rates on account of this item \$70,000.

Salaries:

161. The expenses incurred on account of officers' salaries and on account of management averaged for the

5-year period \$33,753.27.. It is found that there should be covered into rates on account of these salaries \$34,000.

Interstate Commerce Commission hearings:

162. Respondent incurred small amounts in 1930, 1931, 1932, and 1934 on account of hearings before the Interstate Commerce Commission, and in 1933 approximately \$14,500. Respondent is vigilant in the matter of railroad rates and looks to the end that those who ship livestock to its yards by rail may do so at reasonable rates. A reasonable amount for this purpose is a legitimate item to be covered into rates. Giving due consideration to respondent's expenditures in the past and to the testimony as a whole, it is found that there should be covered into rates on account of this item of expense \$300 per month, or \$3,600 annually.

Packers and Stockyards hearings:

163. The audit shows that the average expenditure on account of the hearings resulting from the enforcement of the Packers and Stockyards Act during the years from 1930 to 1934, inclusive, is \$8,786.88. During this period more investigational work has occurred than is likely to be the case when once the reasonableness of the rates charged by respondent has been finally determined. Hearings before the Secretary of Agriculture in connection with the enforcement of the Packers and Stockyards Act are not formal litigation the expense of which the losing litigant customarily bears. Such hearings are in the nature of informal investigations and it seems reasonable to assess some of the expenses incident thereto upon respondent's patrons. It is to be presumed that there will be less expense in the future on account of this item than there has been during the last five years. It is found, therefore, that \$100 a month, or \$1,200 annually should be covered into rates on account of this item.

Dues, donations, and subscriptions:

164. Respondent has many calls for donations to local charities, local philanthropic organizations, and in support

of civic activities. Its total contributions on account of these requests during the past five years have ranged between \$3,000 and \$4,000 a year. In determining what dues, donations, and subscriptions should be passed on to the public through the rates charged, the guide has been that those contributions which are of peculiar benefit to respondent's employees and patrons should be covered into the rates and that the remainder of them should not be. This criterion was followed in the determination of reasonable rates to be charged by the St. Joseph Stock Yards Company, the reasonableness of which rates was upheld by the Supreme Court of the United States. An analysis of these dues, donations, and subscriptions as set forth in the audit shows that slightly over \$300 annually was contributed to activities which benefit respondent's employees or patrons. It is found that there should be covered into rates on account of these items \$325.00.

Garage Expense:

165. Respondent owns and for the years 1933 and 1934 operated a garage at which it repairs its own automobiles and trucks, buys its own gas and oil, and furnishes these services to others who may desire them. It is difficult to analyze the receipts and expenditures in connection with the operation of the garage in such a way as to determine the profit or loss sustained on it. The land on which the garage is located and the structures have been included in the used and useful property, and a return on these does not constitute an expense paid by the general public. The yearly cash income from the garage does not equal the cash outlay, but if respondent did not repair its automobiles and trucks in its own garage it would incur expenses elsewhere in doing so. It seems fair, therefore, to cover something into rates. Leaving out of consideration the cost of material and its selling price, the other expenses amounted in the year 1933 to \$2,237.86 and in 1934 to \$4,111.07, or an average for the two years of \$3,174.46. It is found that there should be covered into rates on account of this item \$3,175.00.

Horse and Mule Division expenses and livestock show expenses:

166. The horse and mule division has heretofore been found to be used and useful and the stock show property not. Many of the expenses incurred in connection with this property are incurred jointly by these two divisions on account of a small payroll, the use of horses, casualty insurance, heat, light, water, boiler inspection, and repairs and maintenance, which constitute the largest single item. Some method of allocation of these expenses has to be employed and, inasmuch as repairs and maintenance occasion the largest single expenditure, the expenses have been allocated on the basis of the value of the structures. On this basis of allocation the 5-year average of expenses allocable to the horse and mule division is approximately \$3,000. It is found that there should be covered into rates on account of expenses in connection with the horse and mule division \$3,000.00.

Taxes other than Federal Income Tax:

167. If Federal income taxes for the years 1930 to 1934, inclusive, be left out of consideration along with the capital stock taxes paid by respondent during the years 1933 and 1934, the only years during the period in which the capital stock tax was paid, respondent's tax bill for the entire period was \$192,209 or an annual average of \$38,443. This amount increased by \$3,212, the annual capital stock tax, gives \$41,655 as the taxes, other than Federal income taxes, to be paid annually by respondent. The total value of both land, and structures and equipment after depreciation heretofore found originally is \$3,155,422. The addition of \$22,500, the cost of the new bridge and \$24,000, the cost of the new sewage disposal plant, brings this figure to \$3,201,922. The total value of used and useful land and used and useful structures after depreciation is \$2,623,114 or approximately 82 percent of the total. Eighty-two percent of \$41,655 is \$34,157, that portion of the taxes, other than Federal income taxes,

allocable to respondent's used and useful property. Evidence introduced and received at the time of the oral argument, subject to check, shows that respondent during the years 1937 to 1941, inclusive, will be subject to additional taxes on account of the Social Security Act in an amount of \$8,691.97, of which \$7,388.17 will be applicable to respondent's stockyard business. The sum of \$7,388.17 and \$34,157 shown above on account of other taxes is \$41,545.17. It is found that there should be covered into rates on account of taxes, other than Federal income taxes, \$41,545. An amount to cover Federal income taxes is hereinafter found.

Miscellaneous Expenses:

168. There are a number of other activities on account of which respondent incurs expenses or sustains a slight operating loss. These have not been discussed in detail but they have been given consideration in arriving at the total of miscellaneous expenses other than repairs and depreciation which respondent will be called upon to pay out of revenues received under rates prescribed as reasonable.

169. The total amount of the items hereinbefore found to be coverable into reasonable rates and those not discussed specifically, but taken approximately as incurred from 1930 to 1934 inclusive, is \$262,040.

Repairs:

170. In setting forth the expenses incident to the operation of certain portions of respondent's property, the accountant for the Government included the repairs as incurred by respondent. These repair expenses are not set forth in the table hereinbefore shown as separate items. The expenses on account of repairs therein set forth are applicable only to those items of property against which the figures appear. The 5-year averages on account of repairs of the specific items of used and useful property therein set forth are as follows:

Yard structures, fences and pens	\$ 7,739.08
Scales	324.13

Personal property	1,698.97
Sewers	1,550.06
Water pumps	2,307.19
Roadway	201.94
Pavements	610.92
Garage	113.14
Trucks	394.42
Hay barns	117.72
Grading	83.32
Grain elevators	73.81
Furniture and fixtures	33.24
	<hr/>
	\$15,247.94

It is found that there should be covered into rates on account of repairs not hereinbefore allowed in connection with other expenses \$15,300.

Depreciation Reserve:

171. In addition to those miscellaneous expenditures which it is possible for respondent to pay as they are incurred, there is another item of expense which it cannot so pay, namely, depreciation. Deterioration is constantly taking place in respondent's property through rust, rot, decay and obsolescence. In order that respondent may not suffer an invisible wastage of assets, there must be set aside in a reserve a sufficient amount to offset this irreparable physical deterioration and accruing obsolescence. During the five years from 1930 to 1934, inclusive, respondent carried into its depreciation reserve the following amounts, the annual average of which is \$54,042.51:

1930	\$53,178.30
1931	54,247.37
1932	53,931.31
1933	54,031.99
1934	54,823.60

172. The engineer Hyder called by respondent who valued respondent's structures and equipment gave it as his judgment that \$73,080 per year would be the amount necessary for respondent to carry into its depreciation

reserve. He arrived at this figure by determining that \$58,080 was the depreciation which should be provided for periodic retirements and renewals of items of property with a definite life span, and \$15,000 for general obsolescence. He further testified that the accrued depreciation of respondent's property as of December 31, 1934, was 11.1 percent which is to say that respondent's property was 89 percent as good as new on that date.

173. The engineer Zelinski called by the Government placed the straight-line depreciation upon all of respondent's property at \$95,020 per year which did not include depreciation on certain items of underground structure heretofore discussed in connection with the water and sewer system. This witness estimated that the condition percent of the property was 80.545 percent, but stated that there is no relation between the condition percent and the period of remaining life as set up in his percentage tables. The reason for this is that condition percent is based upon observation of respondent's plant, while the composite life was arrived at by use of life-expectancy tables and the experience which one would expect in the course of normal maintenance.

174. The accountant Bufkin called by the government gave it as his opinion that, if \$36,274 should be set aside each year and interest thereon computed at five percent semi-annually on a sinking-fund basis, respondent could make good the annual straight-line depreciation of \$95,020 as testified to by the engineer. These amounts have reference to all of respondent's structures and equipment. The witness Hyder called by respondent testified that in his practice he had not found the sinking-fund method of determining depreciation in use. The accountant Bufkin, called by the Government stated that the straight-line method of determining depreciation is commonly used.

175. Substantial justice in arriving at a proper amount to be covered into rates on account of depreciation of respondent's property is not dependent upon a particular method of mathematical computation but upon the observa-

tion of the condition of respondent's property, how this condition is maintained, what its policy has been with respect to repairs and retirements, and what its depreciation accounts show. Some of respondent's property is comparatively new. Other items have been in existence for considerable periods of time. The character of respondent's property is such that much of it, such as its pens and their appurtenances, can be maintained almost indefinitely through adequate repairs. Its buildings, such as the Old Exchange Building and the New Exchange Building, suffer depreciation. All these matters are factors which it is necessary to consider. Expenditures on account of repairs have already been set forth.

176. The books and records of respondent do not show in detail the history of respondent's depreciation reserve account prior to January 1, 1917, but on that date the account stood at \$153,143.11. On December 31, 1934, it stood at \$982,654.27, against which there had been charged on account of depreciation in property which had been retired \$64,640.21. Of this amount, \$4,805.39 represented depreciation on property retired prior to January 1, 1917. These amounts do not represent all the depreciation in these items of property, but only that which had taken place up to the date of their retirement. From 1923 to 1934 inclusive, or during the 12-year period prior to this inquiry, the surplus account of respondent had been increased by \$2,994.50 on account of property retired and had been decreased by \$14,377.12. This in effect represents additional depreciation over that shown in the depreciation account. The annual average depreciation taken out of the surplus was \$948.50.

177. The actual depreciation observed by the witness called by the Government was \$589,622. The condition percent observed by this witness was 80.545 percent, the lowest observed by any witness who testified with respect to respondent's property. In 1930 the same engineer called by respondent in this proceeding testified that the condition percent of the property at that time was 95 percent. The engineer called at that time by the Government placed the

condition percent of the property at 85 percent. The testimony of these witnesses and all the other testimony of record lead irresistibly to the conclusion that respondent's property has been maintained currently in a high state of physical preservation and in a condition to render an exceptionally high type of service. The observed depreciation by that witness whose condition percent was the least of all the percents testified to was \$589,622, while the net balance in respondent's depreciation reserve on December 31, 1934, was \$918,018.06. The conclusion to be drawn from all the testimony is that respondent throughout a long period of years has been carrying into its depreciation reserve account an annual amount more than sufficient to make good the physical deterioration and obsolescence in its property not restorable through repairs. As already set forth, the average annual amount carried into the depreciation reserve on account of all respondent's depreciable structures and equipment was slightly over \$54,000. The accountant for the Government gave it as his opinion that an amount of \$40,000 a year would be sufficient for the company to set aside annually as a depreciation reserve to provide for retirements and replacements in both used and useful and non-used and useful property. On the basis of a segregation of respondent's property into used and useful and non-used and useful as testified to by the witness Christensen who made a careful study of the uses to which respondent's property is put, the accountant gave it as his opinion that \$33,200 should be carried annually into the depreciation reserve on account of used and useful property. The property heretofore found to be used and useful, while corresponding in a large measure with that so defined by the witness Christensen, does not do so entirely. Giving due weight to the mathematical computations shown in the record, but considerably more to the experience and the policy of respondent, it is found that \$35,000 annually on account of depreciation should be covered into rates, the reasonableness of which is being determined herein.

Federal Income Tax:

178. In the table of expenses shown immediately following paragraph 158, all Federal income taxes paid by respondent were eliminated for the reason that an amount adequate for this purpose should be restored when computed upon the income to be received from the rates hereinafter prescribed. The Revenue Act of 1936, of which judicial notice is here taken, provides that the first \$40,000 of corporate taxable income shall be taxed at \$4,840 and the remainder at 15 per cent. This Act also levies a tax on undistributed income.

179. The gross revenue produced by an application of the rates hereinafter prescribed to the number of head of livestock and the amount of feed hereinafter found to be reasonable rate factors amounts to \$530,117. From this amount of gross revenue certain items, namely, operating expenses, including repairs, and a reasonable amount on account of depreciation, are deductible in arriving at the net taxable corporate income. These amount to \$325,415. Bond interest paid and bond interest received on tax-exempt Government obligations owned are also deductible in arriving at net taxable income. The bond interest paid by respondent during the year 1934 was \$66,242.37. The value of those portions of respondent's land, structures, and equipment heretofore found to be used and useful is 82 percent of the total value of all of respondent's land, structures, and equipment. This percentage applied to the \$66,242.37 bond interest paid by respondent is \$54,319. This amount has been taken as the bond interest allocable to respondent's used and useful land and property. This same percentage applied against \$2,171.68 interest received from investment in tax-exempt Government bonds is \$1,781. The sum of these two deductions is \$56,100. Total deductions are \$381,515. It is found therefore that \$21,130 should be covered into rates on account of Federal income tax. This amount is computed as follows:

Gross Income
Deductions

\$530,117
381,515

Taxable Income	\$148,602
Tax on \$40,000	\$4,840
Tax on remainder (\$108,602) at 15%	16,290
Total Federal Income Tax	<u>\$ 21,130</u>

Federal Surtax on Undistributed Profits:

180. Should respondent receive gross revenues equal approximately to those indicated from the application of the rates prescribed to the volume of business used as a rate factor and pursue the same dividend policy in the next few years as it pursued in 1934, it would not be subject to the federal surtax on undistributed profits. It is found that nothing should be covered into rates on account of this tax.

Increase in Pay Roll:

181. Respondent introduced evidence at the date of the oral argument showing that respondent had granted an increase of eight percent in wages and salaries except in the case of the four executive officers. That portion of the increase applicable to respondent's stockyard services is \$13,074.96. It is found that \$13,075 should be covered into rates in addition to the amounts hereinbefore covered into rates on account of pay roll.

I. REASONABLE EXPENSES

182. A summary of the amounts heretofore found to be reasonable expenses to be covered into rates to be charged by respondent is as follows:

Reasonable rate of return	\$181,526
Miscellaneous expenses, other than repairs and depreciation reserve	262,040
Repairs	15,300
Depreciation Reserve	35,000
Federal income tax	21,130
Increase in pay roll	<u>13,075</u>
	<u>\$528,071</u>

J. VOLUME OF BUSINESS REASONABLY TO BE EXPECTED

183. Respondent is entitled to charge rates which will produce revenues adequate to meet all of the costs, expenses, return, and reserve requirements set forth in paragraph 182. In arriving at a schedule of rates which will produce this amount of revenue consideration must be given to the number of head of livestock yarded and to the amount of feed, grain, and bedding sold, and to the miscellaneous services rendered.

LIVESTOCK RECEIVED FRESH FROM THE COUNTRY, RESOLD IN THE COMMISSION DIVISION, RESOLD ELSEWHERE, REWEIGHED FOR THE PURPOSE OF SALE, AND DIRECTS

184. The number of head of livestock arriving fresh from the country, resold in the commission division, resold elsewhere, reweighed for the purpose of sale, and directs during the 5-year period from 1930 to 1934 is set forth in the following table:

	1934	1933	1933	1931	1930	5-Year Average
Cattle						
Rail and Resales	403,543	233,474	249,845	319,829	390,496	
Federal Surplus Relief Corp.	146,408					
	257,135	233,474	249,845	319,829	390,496	290,156
Truck-ins	111,449	88,150	79,245	62,086	41,285	
Federal Surplus Relief Corp.	4					
	111,445	88,150	79,245	62,086	41,285	76,442
Pure Bred Bulls	842	833	1,269	1,639	1,535	1,224
Total Rail and Resales, Truck-ins and Pure Bred Bulls	369,422	322,457	330,359	383,554	433,316	367,822
Resold and Reweighed for Purposes of Sale:						
Resold to Dealers	16,526	9,771	9,287	12,561	21,201	13,869
Resold to Others	40,591	56,042	25,445	30,670	54,931	41,536
Total Resold and Reweighed	57,117	65,813	34,732	43,231	76,132	55,405
Calves						
Rail and Resales	75,687	25,724	20,342	33,676	51,535	
Federal Surplus Relief Corp.	53,375					
	22,312	25,724	20,342	33,676	51,535	30,718
Truck-ins	37,452	27,655	26,460	24,548	21,454	
Federal Surplus Relief Corp.	5					
	37,447	27,655	26,460	24,548	21,454	27,513
Total Rail, Resales & Truck-ins	59,759	53,379	46,802	58,224	72,989	58,231
Resold and Reweighed for Purposes of Sale:						
Resold to Dealers	581	769	505	375	1,031	652
Resold to Others	2,893	1,707	744	537	1,911	1,556
Total Resold and Reweighed	3,464	2,476	1,249	912	2,942	2,208
Hogs						
Rail and Resales	33,409	49,398	65,735	116,947	117,894	76,876
Directs	157,240	198,655	112,394	110,152	147,823	145,263
Federal Surplus Relief Corp.		21,842(1)				(-14,368)
	180,649	226,211	178,129	227,099	265,717	217,561
Truck-ins	360,579	294,312	308,928	237,624	168,486	
Fed. Surplus Relief Corp.		39,510				
	360,579	254,802	308,928	237,624	168,486	246,064
Total Rail, Directs, Resales & Truck-ins	451,228	481,013	487,057	464,723	434,203	463,645
Resold and Reweighed for Purposes of Sale:						
Resold to Dealers		16	43			12
Resold to Others	162	57	315	365	210	222
Total Resold & Reweighed	162	73	358	365	210	234
Sheep						
Rail and Resales	2,296,212	1,993,748	2,129,302	1,796,185	1,529,587	
Fed. Surplus Relief Corp.	116,627	39,079				
	2,179,585	1,954,669	2,129,302	1,796,185	1,529,587	1,917,866
Truck-ins	80,022	66,930	67,240	54,112	31,342	59,929
Total Rail, Resales and Truck-ins	2,259,607	2,021,599	2,196,542	1,850,297	1,560,929	1,977,795
Resold and Reweighed for Purposes of Sale:						
Resold to Dealers		1,944	80	604	1,170	760
Resold to Others	77,638	58,311	51,834	123,897	68,841	76,104
Total Resold & Reweighed	77,638	60,255	51,914	124,501	70,011	76,864

(1) Deduction

See Govt. Ex. 38, pp. 73 to 76, Govt. Ex. 43, and Respondent's Exhibit F.

185. Another source of income to respondent is the profits made on the hay, grain, bedding, and other types of feed sold. During the years 1934 and 1933 considerable amounts of hay and some grain were sold to the Federal Surplus Relief Corporation. This is not business upon which respondent can depend each year, but is an abnormal volume of sales incident to the handling of Government animals. Respondent also transfers at cost some of its inventory to the company barn and the boarding barn. The amount so transferred is also contained in the totals shown in the audit. Inasmuch as respondent makes no profit on these transfers they should be deducted in arriving at the amount of hay and grain on which respondent may be expected to make a profit. Respondent uses a considerable amount of straw in bedding cars for the loading out of livestock. The following table shows the amount of all kinds of hay, the amount of corn and other grain, and the amount of bedding which respondent sold, the amount which it sold to the Federal Surplus Relief Corporation, and the amount which it transferred at cost and the amount on which it made a profit during the 5-year period from 1930 to 1934.

	1934	1933	1932	1931	1930
All Kinds of Hay (Cwt.)	236,169	161,229	167,708	217,652	226,886
Fed. S. R. Corp.	73,155	2,007			
Transfers—					
Co. Barn	1,135	1,416	2,894	4,837	4,325
Board. Barn	1,557	1,377	1,643	1,748	894
Other	75,847	990	1,650	6,187	6,585
Amount Sold at Profit	160,322	155,439	161,521	211,067	221,667
Corn Regular (Bu.)	17,423	19,541	22,109	26,543	28,151
Fed. S. R. Corp.		1,712			
Transfers—					
Co. Barn	(34,450) (lbs. or) bu.—615	(36,000) (lbs. or) bu.—643	(55,700) (lbs. or) bu.—995	(88,300) (lbs. or) bu.—1,577	(78,150) (lbs. or) bu.—1,396
Board. Barn	(41,950) (lbs. or) bu.—749	(35,400) (lbs. or) bu.—632	(41,950) (lbs. or) bu.—749	(50,300) (lbs. or) bu.—898	(32,150) (lbs. or) bu.—574
Amount Sold at Profit	16,059	2,987	1,744	2,475	1,970
Bedding (Bales)	24,012	27,587	33,719	42,075	43,679
Transfers—					
Co. Barn	477	454	726	980	945
Board. Barn	509	451	565	608	315
Other	986	955	1,341	70	35
Amount Sold at Profit	23,026	26,632	32,378	40,417	42,384

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186. The number of head of livestock handled and the amounts of the different kinds of feed sold by respondent are helpful in determining a schedule of reasonable rates in that they are an indication as to the volume of business to be expected in the future. The record contains much evidence with respect to the trade territory from which respondent draws the bulk of its livestock, the number of head which have moved to various markets, including that at Denver, and the trend of the receipts of respondent from this trade territory. It contains also much testimony with respect to conditions which have prevailed and the opinions of two competent witnesses as to what volume of receipts respondent is likely to receive within the next few years.

187. Respondent's assistant general manager considered the years 1933 and 1934 as abnormal, and stated that in his opinion the livestock industry would not recover from the effects of the drouth before the first of January, 1937. He estimated that respondent's net operating income in the year 1935 would be \$189,430.71. This was \$54,936.96 below that received in 1933. He predicated this net operating income upon revenue-producing receipts in the following numbers:

	Rail	Drive-ins	Total
Cattle	203,530	76,815	280,345
Registered bulls	1,043	.....	1,043
Calves	20,430	21,955	42,385
Hogs	135,958	140,942	276,900
Sheep	1,651,829	56,371	1,708,200
Horses and mules	6,951	.....	6,951

188. It was stipulated at the time of the hearing that the monthly reports of respondent to the Department of Agriculture showing receipts of livestock at the Denver market for the years 1935 and 1936 should become a part of the record. According to these reports the volume of receipts for the year 1935 and 1936 was as follows:

	1935	1936
Cattle	482,421	489,768
Calves	78,279	73,767
Hogs	362,919	496,635
Sheep	2,903,355	3,023,893

189. Not all receipts of livestock at respondent's yard pay a yardage charge and some of them do not consume feed while in the yards. During the 5-year period from 1930 to 1934, inclusive, respondent collected yardage on approximately 89 percent of the cattle arrivals, 82 percent of the calf arrivals, 76 percent of the hog arrivals, and 75 percent of the sheep arrivals.

190. The application of 89 percent as to cattle, 82 percent as to calves, 76 percent as to hogs, and 75 percent as to sheep to the total receipts for 1935 and for 1936 results in the following volume of revenue-producing livestock for the two years:

Year	Cattle	Calves	Hogs	Sheep
1935	429,355	64,189	275,818	2,177,516
1936	435,894	60,489	377,443	2,267,920

191. The volume of receipts set forth in the preceding paragraph does not include the trader business handled within respondent's yards. The rates of respondent now in effect assess no yardage charge upon trader livestock except that sold in the commission division. The only contribution other than this which this class of livestock makes toward the support of the yards is the profit to respondent on hay and grain which it sells to dealers. The number of animals resold, reweighed for purposes of sale, resold to dealers, and resold to others is set forth in the table following paragraph 184.

192. The livestock purchased and disposed of by traders occupies a considerable portion of respondent's yards. In September each year traders are assigned pens in blocks 2600 to 3500 of respondent's property. These blocks contain

approximately 160 pens and the adjacent alleys. During the light season traders operate in the commission section in order to avoid the necessity of driving livestock to the trader division. In those portions of the yards occupied by the traders there are scales used for the most part by them.

193. Respondent claims that it is both impracticable and impossible to assess and collect a yardage charge on trader livestock other than that which is sold for the traders in the commission division. It is impracticable, respondent claims, because it would discourage traders from buying and thus lessen the demand for livestock, and impossible because the traders will not pay the charge.

194. The witness Pexton computes the amount of trader volume which does not appear upon the supply side of the market after the traders purchase it, and of the amount which does so appear. According to his estimate, 21 percent of trader livestock would come back into the market and compete with livestock already on the market or that to arrive in the future. The conclusion which the witness draws is that the traders increase the demand for livestock to a greater extent than they increase the supply of it, and thus tend to maintain prices at a higher level than would otherwise prevail.

195. The claim is made that since this is the case the shipping public derives more benefit from the higher prices resulting than it suffers disadvantage because the traders pay no yardage charge.

196. There is other testimony to the effect that traders increase the competition on the market and for this reason should have whatever is necessary for them to complete their operations without having to pay additional charges.

197. The presence of the traders on the market is doubtless a stabilizing factor for they can buy and hold livestock when the runs are heavy and dispose of it when the runs become lighter, but to say that they raise the general price level higher than it would be but for their presence is specu-

lative. The effect of all the marketing machinery is to bring about prices at all markets which bear such relationship to each other as the various factors warrant. The price at one market affects prices at other markets. Prices will not remain out of line for any great length of time. A trader who buys livestock at Denver and ships it to another market for sale appears on that market as a seller and tends to lower the price. The lowering of the price at that market may have the effect of lowering the price at Denver. It is difficult, if not impossible, to determine what effect the presence of traders at the various markets has upon the average altitude of prices. This is not to say, however, that the trader does not play a part in price determination. To say that the trader may be a desirable part of the market machinery is not to say that he should not pay his proportionate and reasonable share of the cost of the conduct of the market.

198. The traders have set up their places of business within respondent's stockyard and conducted it without charge, except in so far as respondent makes a profit on feed which the traders purchase and from the yardage which respondent collects on livestock resold for traders in the commission division. It may be that respondent has the right to render free services to one class of its patrons if by so doing it does not have to maintain higher charges for services rendered to others. It is, however, unjustly discriminatory as well as unreasonable for respondent to maintain a large section of valuable property and to incur numerous expenses in the rendition of free services to one class of its patrons and then remunerate itself through a charge on another class which is greater than necessary to cover the cost of rendering the service to the latter class.

199. Respondent claims that its condition is peculiar and that it is in a different state with respect to the traders operating on the Denver market than are those stockyards located on the Missouri River, and the Mississippi River, and that located at Chicago. This may well be the case, but the evidence of record does not warrant the rate-maker in relieving the traders of any yardage charge whatsoever.

200. Another witness, C. L. Harlan, an employee of the Bureau of Agricultural Economics, who is thoroughly familiar with the movement of livestock throughout the country, gave extended testimony with respect to the livestock conditions in the states of Colorado, Wyoming, and New Mexico from which originate by far the greater proportion of respondent's cattle. During the 5-year period from 1925 to 1929 respondent received a number of cattle ranging from about 14 percent to about 21 percent of the number on farms in these states on January 1 each year. For the 5-year period from 1930 to 1934 these percentages ranged from 11.1 percent to 18.3 percent. For the first of these 5-year periods the average number of cattle receipts of respondent was approximately 609,000, and for the second 5-year period 541,000. The witness estimates that there will be an increase of cattle in Colorado during the period from 1935 to 1939. He was of the opinion that the marketings at the beginning of this period, that is in 1935 and 1936, would probably be small because of the necessity of restocking, but he was of the opinion that for this period as a whole he did not expect marketings to average smaller than for the five years from 1929 to 1933.

201. Receipt of hogs at the Denver market has increased somewhat steadily for the 15-year period from 1920 to 1934. Most of the hogs received by respondent came from Colorado and Nebraska and practically all the rest of them from Wyoming and Kansas. Hog numbers have been drastically reduced throughout the entire country, and especially in the States that furnish supplies to the Denver market. The witness is of the opinion that this will result in a sharp reduction in hog receipts at Denver for the period for 1935 and for the greater part of 1936. He is of the opinion that the yearly receipts for the five years from 1936 to 1940 will not average as large as during the five years from 1929 to 1933, when the average receipts from the five States of Colorado, New Mexico, Wyoming, Kansas, and Nebraska were 611,400.

202. The supply of sheep at the Denver stockyards comes from a much wider area than do the supplies of either

cattle or hogs. These supplies originate largely in Colorado, Idaho, Wyoming, New Mexico, Utah, Oregon, California, and Texas. During the five years from 1924 to 1928, inclusive, there were on farms in these states on the average 19,572,000 sheep. The average receipts at Denver during this period were 1,965,000. For the five years from 1929 to 1933, inclusive, the average annual number of sheep on farms in these states was 25,023,000, and the average annual marketings at Denver were 2,443,000. In 1934 there were 25,891,000 head of sheep on farms and there were marketed at Denver 3,014,000. The witness is of the opinion that to the extent that probabilities favor a series of good feed years from 1935 to 1939 the number of lambs raised in these eight states can be expected to be as large as or larger from 1935 to 1939 than they were from 1929 to 1934. The witness is of the opinion that business and industrial conditions during the five years from 1935 to 1939 will be better than they were in the preceding five years, that this will result in better prices for lambs and wool, that this will bring better care of flocks, and tend to raise the percentage of the lamb crop. His conclusion is that lamb supplies in the eight states which furnish practically all of the Denver receipts will be smaller in 1935 than in 1934 and below the 5-year average from 1929 to 1933. The witness states that for the five years from 1936 to 1940 there is little reason to believe that the average will be below the 1929 to 1933 average, and it may be above.

203. It is a reasonable conclusion to be drawn from all the testimony that under ordinary conditions the revenue-producing cattle, calves, and sheep which will arrive at respondent's yards during the five years following the hearing under ordinary circumstances would exceed somewhat the receipts during the 5-year period from 1930 to 1934, and that the number of revenue-producing hogs arriving would be less than the number which arrived during that period.

204. During the period from 1930 to 1934, inclusive, the per capita consumption of hay per animal received at respondent's stockyard has been decreasing. This decline is

due to improved railroad service from the west to the River markets and Chicago and also the fact that cattle trucked into the market consume somewhat less hay than like cattle arriving by rail. Truck receipts have been increasing. It is a reasonable conclusion to be drawn from all the testimony, particularly that with respect to prospective receipts, that the consumption of hay at respondent's stockyard will not be greater during the next few years than it was during the past 4 or 5. During the 6-year period from 1931 to 1936, inclusive, the average consumption of hay was 8,770 tons a year. The 5-year average amount of sales, from 1932 to 1936, inclusive, was 8,413 tons a year. The 4-year average amount of sales, from 1933 to 1936, inclusive, was 8,484 tons a year. The 3-year average, from 1934 to 1936, inclusive, was 8,722 tons. The 2-year average, 1935 and 1936, inclusive, was 9,075 tons, and in 1936 the sales amounted to 8,736 tons. Respondent sells hay "on the fence" and "fed". For hay fed it makes an additional charge of 10c per hundred weight. During the 5-year period from 1930 to 1934, inclusive, the hay sold "on the fence" amounted to approximately 80 percent of the total hay sales, and that sold "fed", to approximately 20 percent of the total sales.

205. The number of head each species of livestock and the amount of different kinds of feed hereinafter used as a rate factor in determining a reasonable schedule of rates for respondent have not been arrived at by any purely mathematical computation, but by a consideration of the receipts which have been handled by respondent and all the testimony which has a bearing upon what the receipts of respondent are likely to be within the years immediately following those as to which specific and definite information is contained in the record.

206. On the basis of all the statistical information of record and all the opinion evidence of witnesses it is found that the following number of animals of each species and the following amounts of feed of the various kinds should be used

as a rate factor in arriving at reasonable rates to be prescribed for the rendition of services for which are charged by respondent rates, the reasonableness of which is being determined herein.

	Rail and "Plants"	Directs	Truck-ins	Resold and Reweighed for Pur- poses of Sale
Cattle	325,000	.....	75,000	56,000
Calves	20,000	.....	30,000	3,000
Hogs	25,000	145,000	225,000	250
Sheep	2,000,000	.....	80,000	75,000
Horses and Mules....	6,000	.....	
Hay			170,000 cwt.	
Corn			20,000 bu.	
Bedding			18,500 bales	
Miscellaneous grain and feed			150,000 lbs.	

207. In the finding in the preceding paragraph as to the number of animals and the amount of hay, corn, bedding, and miscellaneous feed which are herein used as a rate factor in the determination of the reasonable rates prescribed herein, no prediction is made as to the exact number of head of livestock which respondent will receive in any particular year or as to the number which traders will handle in respondent's stockyard. The finding constitutes the number of head of livestock and the amount of hay, grain, bedding, and miscellaneous feed around which respondent's revenue-producing business will tend to fluctuate during the years immediately following the date of this order. The finding is based upon the statistical information of record, the opinions of witnesses, and a test of these opinions in the light of the receipts of livestock as determined in accordance with the reports of respondent filed monthly by it with the Department of Agriculture.

208. Respondent renders certain special stockyard services the charges for some of which are set forth in its schedule and for some of which the charges are not set forth.

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The most important of these sources of revenue is rental from the Exchange Building, which has been included in respondent's used and useful property, but for which no rate is set forth in its tariff. The rental paid by respondent's tenants in this building is a matter of contract. The income from this building and from other miscellaneous services constitutes a portion of its revenues available for paying all of its reasonable operating expenses, taxes, and a fair return upon the fair value of its property. These revenues do not vary greatly from year to year, and the amount of revenue anticipated for the years following the date of this order has been taken to be the average for the five years from 1930 to 1934. During this 5-year period the revenues received from these miscellaneous services were as follows:

	1930	1931	1932	1933
Exchange Bldg. rents	45,234.50	45,636.32	43,606.66	42,044.78
Dining room	1,809.89	2,579.48	2,012.32	1,742.07
Profits from company horse and mule barn	\$ 705.18	8,927.16	6,331.08	5,283.72
Manure sales	4,306.05	4,880.75	2,784.77	2,281.60
Drive-in delivery service	916.54	.....	.....	913.02
Branding, dehorning, etc.	16,005.61	10,429.40	4,733.27	6,838.76
Weighing	743.00	712.00	1,029.00	1,124.00
Rental stock hog plant	804.00	804.00	804.00	651.00
Auto truck washing	657.00	616.15	255.45	163.25
Yard pen rental .....	.....	1,439.20	873.25	684.75
Dipping and spraying	2,973.71	3,542.23	3,168.46	881.57
Miscellaneous income	1,883.74	1,208.88	2,087.42	1,601.71
Total

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K. UNREASONABLENESS OF EXISTING RATES

209. The amount of money hereinbefore found to be necessary to pay all of respondent's operating expenses, repairs, Federal income tax, depreciation, and a reasonable return on the fair value of respondent's property found to be used and useful is \$528,071. A reasonable schedule of rates should produce this amount of gross revenue. The miscellaneous revenues derived from the rental of the Exchange Building and various other miscellaneous services the charges for which are either not set forth in respondent's schedule or have not been increased or reduced in the schedule of rates hereinafter prescribed as reasonable averaged \$73,952 during the 5-year period from 1930 to 1934, inclusive. This \$73,952, the \$350,365 procurable from yardage, and the \$105,800 procurable from profit on hay, grain, and bedding amount to \$530,117. The revenues resulting from the application of the charges here under investigation against the number of animals hereinbefore found to be a rate factor and the average per-unit profit received on hay, corn, bedding, and miscellaneous feed during the 5-year period from 1930 to 1934, inclusive, and the miscellaneous stockyard revenues are in excess of the amount hereinbefore found to be necessary to pay all reasonable operating expenses and a fair return on the fair value of respondent's used and useful property. Moreover, respondent has not assessed a yardage charge against traders' livestock resold or reweighed for purposes of sale except that resold in the commission division. It is, therefore, found that respondent's tariff schedule here under investigation contains rates and charges which are unreasonable and unjustly discriminatory.

L. REASONABLE RATES

210. On the basis of all the foregoing findings and on the basis of the statistical information contained in the record, the opinion of the various witnesses who testified, and all other information in the record, it is found and concluded

that the following constitute and are the maximum reasonable rates and charges for the following services rendered by respondent, namely:

SECTION 1.

YARDAGE CHARGES:

Yardage will be charged as shown below:

- (1) On livestock received and sold at these yards, also including livestock resold through commission firms.
- (2) On livestock sold or contracted in the country to weigh and/or deliver at these yards.
- (3) On livestock consigned direct to packers and slaughterers.

Rail:

Cattle	\$.30	per head
Calves (under one year old) .....	.20	per head
Hogs .....	.12	per head
Sheep or Goats .....	.075	per head
Horses or Mules35	per head
Pure Bred Bulls	1.00	per head

Directs:

Hogs06	per head
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Resold and/or Reweighed for purposes of sale:

Cattle15	per head
Calves (under one year old)10	per head
Hogs .....	.06	per head
Sheep or Goats .....	.03	per head
Horses or Mules .....	.35	per head
Pure Bred Bulls	1.00	per head

Trucked in or driven in:

Cattle .....	.35	per head
Calves (under one year old) .....	.25	per head
Hogs .....	.14	per head
Sheep or Goats .....	.10	per head
Pure Bred Bulls	1.00	per head

Subject to exceptions hereinafter stipulated.

EXCEPTIONS:

On livestock consigned to the Denver market and offered for sale, but forwarded unsold to another market, yardage will be waived.

On through shipments, handled for railroads and not sold, yardage will be waived.

Cattle over 400 lbs. or over one year of age will take cattle yardage.

SECTION 2.**FEED, BEDDING, ETC.:**

Hay (On fence) Current market price, F. o. b.
stockyards, plus\$.50 per cwt.

Hay (Fed) Current market price, F. o. b.
stockyards, plus60 per cwt.

Misc. feed, Current market price, F. o. b.
stockyards, plus50 per cwt.

Corn, Current market price, F. o. b.
stockyards, plus45 per bu.

Bedding, Current market price, F. o. b.
stockyards, plus40 per bale

The charges on hay, corn, and miscellaneous feed and bedding shall be divisible by five and respondent shall amend its charges whenever the margin between the cost and the sale price varies five cents from the margin of profits set forth above. When feed other than that set forth above is desired it will be furnished if obtainable by special arrangement.

SECTION 3.**BRANDING, MARKING, CASTRATING, TIPPING, DE-HORNING, ETC.:**

Branding:

One iron	\$.08 per head
Each additional iron .....	.02 per head

Dehorning or Tipping:

Cows and Steers .....	.15 per head
Bulls or Stags .....	.50 per head

Castration .....	.50 per head
Ear Cropping .....	.05 per head
Wattling .....	.05 per head

DELIVERING CATTLE TO OR FROM BRANDING CHUTES:

Two cents per head each way additional will be charged for handling cattle to or from pens in the 100 to 2,500 series, inclusive. To and from cattle pens numbered above 2,500 series, no additional charge will be made.

The company is not responsible for loss or damage to livestock incident to any of the above operations.

SECTION 4.**DIPPING CHARGES:**

Cattle	25c per head—minimum.....	\$25.00
Calves	15c per head—minimum.....	25.00
Lambs	6c per head—minimum.....	25.00
Ewes	7c per head—minimum.....	25.00
Bucks	10c per head—minimum.....	25.00
Hogs	10c per head	

The charge for dipping includes use of facilities, material, and labor incident to that service.

The company is not responsible for loss or damage to livestock incident to dipping.

All dipping of livestock is subject to the supervision and regulations of the Bureau of Animal Industry of the United States Department of Agriculture.

SECTION 5.

DISINFECTING CHARGES:

Whenever the Bureau of Animal Industry or other governmental authority deems it necessary to disinfect any portion of this company's yards, occasioned by the movement of infected stock, the following will be collected from owner of such infected stock:

Pens, Single load	\$2.50 each
Pens, Double load	4.00 each
Chutes	2.50 each
Alleys	Same proportions as pens.
Disinfecting stock cars	2.50 per car
Disinfecting stock wagons .....	.25 per wagon
Disinfecting stock trucks .....	.50 per truck

SECTION 6.

IMMUNIZATION AND VACCINATION:

Use of Facilities only:

Use of facilities for vaccinating cattle, 2c per head when the work of vaccinating is done in connection with branding, dehorning, or tipping.

When facilities are used exclusively for vaccination of cattle 5c per head will be charged.

Facilities for vaccinating and immunizing swine are leased to private parties but reasonable rates must be charged by them for this work.

The work of temperaturing and vaccinating swine is done under the supervision and regulations of the Bureau of Animal Industry, United States Department of Agriculture.

SECTION 7.

SPECIAL SALES:

Charges in connection with special sales will be made by mutual agreement.

SECTION 8.

BOARDING AND STABLING CHARGES:

Draft horses	\$.75 per day
Saddle horses .....	.75 per day
If owners call for and deliver saddle horses at company barn .....	.50 per day
Single feeds .....	.35 each

Above charges include feeding of grain and hay, watering, bedding, cleaning, saddling, and/or harnessing.

Milch cows and saddle or other horses kept in cattle, sheep, and/or hog yards and not in regular movement through market \$.25 per day
5.00 per month

SECTION 9.

WEIGHING:

Weight will be furnished as a basis for freight charges on request of the Western Weighing and Inspection Bureau or railroads for a charge of \$2.00 per draft.

SECTION 10.

MISCELLANEOUS:

Use of facilities and water for cleaning and washing trucks 50c each

211. The revenues to be derived from the application of the yardage rates and the unit profit on hay, grain, and bedding hereinbefore found to be a reasonable volume factor, and the miscellaneous revenues receivable from other of respondent's stockyard activities are as follows:

		Volume Used As A Rate Factor	Rates	Revenues Procurable
YARDAGE:				
Cattle,	Rail	325,000	\$.30	\$ 97,500
	Truck-ins	75,000	.35	26,250
	Resales	56,000	.15	8,400
	Bulls	850	1.00	850
Calves,	Rail	20,000	.20	4,000

	Truck-ins	30,000	.25	7,500	
	Resales	3,000	.10	300	
Hogs,	Rail	25,000	.12	3,000	
	Direcfs	145,000	.08	8,700	
	Truck-ins	225,000	.14	31,500	
	Resales	250	.08	15	
Sheep,	Rail	2,000,000	.075	150,000	
	Truck-ins	80,000	.10	8,000	
	Resales	75,000	.03	2,250	
Horses and mules		6,000	.35	2,100	
Total yardage					\$350,365

FEED, BEDDING, ETC.:

Hay, cwt. on fence	136,000	.50	68,000	
Hay, cwt. fed	34,000	.60	20,400	
Corn, bu.	20,000	.45	9,000	
Straw, bales	18,500	.40	7,400	
Miscellaneous feed, lbs.	150,000		1,000	
Total profit on feed, etc.				105,800

MISCELLANEOUS REVENUE 73,952

Total revenue procurable \$590,117

As hereinbefore pointed out, the revenues necessary to meet all reasonable operating expenses including repairs and provision for depreciation and to pay a fair return upon the fair value of respondent's property found to be used and useful are \$528,071. The revenues produced by the schedule of rates found to be reasonable exceed this amount by \$2,046.

ORDER

IT IS, THEREFORE, ORDERED that respondent, the Denver Union Stock Yard Company, on and after thirty days from the date of this order, cease and desist from demanding or collecting for yardage, feed, and bedding the rate or rates shown therefor in the schedule of rates and charges filed with the Secretary of Agriculture to become effective July 5, 1931, and designated and known as the Denver Union Stock Yard Company Tariff No. 3, and all supplements and amendments thereto.

IT IS FURTHER ORDERED that respondent, on and after thirty days from the date of this order, shall not publish, demand, or collect any rate or charge for the furnishing of any stockyard services in excess of the rates and charges

1932	1933	1934	Average
43,606.66	42,044.78	40,448.96	43,394.24
2,012.32	1,742.07	1,712.53	1,971.25
6,331.08	5,293.72	8,045.18	7,460.46
2,784.77	2,281.60	2,533.55	3,357.34
.....	913.05	3,492.67	1,774.08
4,735.27	6,838.76	6,488.20	8,899.44
1,029.00	1,124.00	2,491.00	1,219.80
804.00	651.00	600.00	732.60
255.45	163.25	268.60	392.09
873.25	684.75	519.50	879.17
3,163.46	881.57	684.79	2,249.15
2,087.42	1,601.71	1,332.54	1,622.86
<hr/>			
			\$73,952.48

hereinbefore found and determined to be just and reasonable for the furnishing of such service.

IT IS FURTHER ORDERED that at least ten days prior to the thirtieth day from the date of this order respondent publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act of 1921 and the regulations of the Secretary of Agriculture thereunder, a schedule effective on the thirtieth day from the date of this order showing all rates and charges for the stockyard services furnished by respondent at the Denver Union Stockyards, Denver, Colorado, and all rules and regulations changing, affecting, or determining such rates or charges and that no rate or charge so shown for any such stockyard service be in excess of the rate or charge hereinbefore determined to be just and reasonable for such service.

IT IS FURTHER ORDERED that a copy of this order be transmitted by registered mail to respondent.

IN WITNESS WHEREOF the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed in the City of Washington, District of Columbia, this 17th day of February, 1937.

HARRY L. BROWN,

Acting Secretary
of Agriculture.

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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 798

**THE DENVER UNION STOCK YARD COMPANY,
APPELLANT,**

vs.

**THE UNITED STATES OF AMERICA AND SECRE-
TARY OF AGRICULTURE**

**APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF
THE DISTRICT OF COLORADO**

FILED FEBRUARY 14, 1938.

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VOL. II

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1938.

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[fols. 348-358] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERLOCUTORY INJUNCTION—Filed March 11, 1937

This cause coming on to be heard this ninth day of March, 1937, before a statutory three-judge court sitting as the District Court of the United States for the District of Colorado, convened pursuant to the provisions of the Act of Congress of October 22, 1913, 28 U. S. C. A., Section 47, known as the District Court Jurisdiction Act, and pursuant to the provisions of the Packers and Stockyards Act 1921, relative thereto, and the Court having made and entered its Findings of Fact, Conclusions of Law and Order directing the issuance of an interlocutory injunction as hereinafter stated, upon the giving of a bond as required by the said order;

And the petitioner having duly filed a bond satisfactory to and approved by the court in the penal sum of \$50,000.00 conditioned as in said order required;

[fol. 359] Now Therefore, the United States of America and the Secretary of Agriculture of the United States, the defendants above named, its, his or their agents, servants and all persons acting or purporting to act by or on behalf of either or both of them, be and are hereby strictly enjoined and restrained until further order of the Court, absolutely to desist and refrain from enforcing or attempting to enforce a certain order promulgated by the Secretary of Agriculture, dated February 17, 1937, in a certain proceeding entitled "The Secretary of Agriculture vs. Denver Union Stock Yard Company, Respondent, Bureau of Animal Industry Docket 450", or from prosecuting petitioner for recovery of penalties, or otherwise, for failure to comply with the provisions of said order, pending the final hearing and the final decision of this Court in this cause.

This writ of interlocutory injunction shall continue until further order of the Court herein and is and shall be binding upon all persons.

Hereof Fail Not under pain of penalty that will fall upon your failure to obey this injunction.

Dated at Denver, Colorado, this 9th day of March, 1937.

Orie L. Phillips, Circuit Judge. Sam G. Bratton,
Circuit Judge. T. Blake Kennedy, Judge.

[fol. 360]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed April 8, 1937

Come the defendants in the above-entitled cause and answer the petition hereinbefore filed, as follows:

1. Defendants admit the allegations contained in Paragraphs I to IX, inclusive, of the said petition.

2. Defendants deny each and every allegation contained in Paragraph X of the said petition.

3. Answering Paragraph XI of the said petition, the defendants deny that the findings and order of the Secretary are contrary to law, or unsupported by substantial evidence, or contrary to the evidence and to the weight of the evidence, or confiscatory, arbitrary or unreasonable, or deprive petitioner of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(a) Answering sub-paragraph (a) of said Paragraph XI of the said petition, the defendants deny each and every allegation contained therein.

(b) Answering sub-paragraph (b) of said Paragraph XI of the said petition, defendants deny each and every allegation contained therein, except that defendants admit that the Secretary has excluded from the rate basis of petitioner [fol. 361] the value of 8.985 acres of land, together with the structures thereon, the said structures consisting of all the railroad trackage of petitioner, the loading and unloading docks, the loading and unloading chutes and pens, a yardmaster's office and a trackman's tool house, and that the

Secretary excluded the said 8.985 acres of land on the ground that the said land, together with the said structures thereon, are not used and useful in the rendition of services for which petitioner's rates are charged; and the defendants further admit that the Secretary did not find that the petitioner owns more trackage than is necessary for the handling of the livestock coming to its yards or that the said facilities for the loading and unloading of the livestock from cars are unnecessary or excessive in any way or to any degree.

(c) Answering sub-paragraph (c) of said Paragraph XI of the said petition, the defendants deny each and every allegation contained therein, except that they admit that the Secretary excluded from the rate base of the petitioner 2.633 acres of land and the structures thereon, the said land and structures being used for the purpose of the annual stock show, for the reason that the Secretary found that the said land and structures are not used and useful in the rendition of stockyard services; and the defendants further admit that in determining the net income of petitioner for rate-making purposes, the Secretary ~~did not exclude~~ from the said income the item of \$12,240.97 referred to in sub-paragraph (c) of Paragraph XI of the said petition, and the defendants allege the said item of \$12,240.97 is a fictitious and hypothetical item and that the evidence does not show that this amount was derived from the said annual stock show as alleged.

(d) Answering the allegations of sub-paragraph (d) of Paragraph XI of the said petition, defendants deny each [fol. 362] and every allegation contained therein, except that the defendants admit that the Secretary found that the fair value of petitioner's land used and useful for stockyard services is \$536,825, and that the sole testimony concerning the value of petitioner's land offered by the Secretary was by the witness Zelinski, a regular and permanent employee of the Department of Agriculture, who admitted in evidence that prior to the said proceeding he had never appraised any land or property in Denver or its vicinity or at any place west of Omaha, Nebraska, and that he spent two weeks on the appraisal of 130.57 acres of land owned by the petitioner, and that the evidence of petitioner on the value of his said lands was given by three appraisers each of whom had been actively engaged for a period of some twenty to thirty-five

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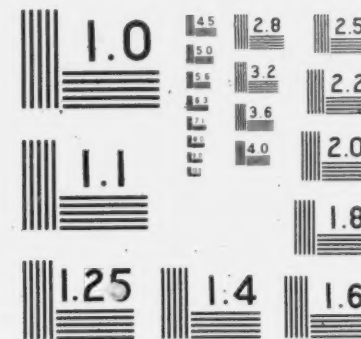
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years in the appraisal, purchase, sale and handling of industrial property in Denver:

(e) Answering the allegations of sub-paragraph (e) of Paragraph XI of the said petition, the defendants deny each and every allegation contained therein, except that they admit that the Secretary found that the reproduction new value less depreciation of petitioner's buildings, structures and equipment, used and useful in the rendition of stockyard services, is 80.545 per cent of \$2,118,960, or \$1,706,717.14.

(f) Answering sub-paragraph (f) of Paragraph XI of the said petition, the defendants deny each and every allegation contained therein, except that they admit the Secretary found a reasonable rate of return on the fair value of petitioner's property to the 6½ per cent of the value of said property.

(g) Answering sub-paragraph (g) of Paragraph XI of the said petition, the defendants deny that the proposed findings and order referred to in the said paragraph represented that the condition per cent of petitioner's structural property would be fixed at 84 per cent, or any other particular [fol. 363] figure, or that the rate of return, plus a so-called cushion, would be fixed at slightly more than 7 per cent, or at any other particular figure; and defendants further deny that the action of the Secretary in fixing the condition per cent of petitioner's structural property at 80.545 per cent and the rate of return at 6½% was arbitrary or deprives petitioner of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States; otherwise defendants admit the allegations contained in the said sub-paragraph (g).

(h) Answering sub-paragraph (h) of Paragraph XI of the said petition, the defendants deny each and every allegation contained in said paragraph, except that defendants admit the Secretary found that an adequate allowance for going concern value had been included in the valuations of petitioner's land, structures and equipment.

(i) Answering sub-paragraph (i) of Paragraph XI of the said petition, the defendants deny each and every allegation contained therein, except that they admit that the

Secretary found that the class of purchasers commonly known as "yard traders" was rendered free service by petitioner, and that such free service was unjustly discriminatory and unreasonable, and resulted in an increased charge upon shippers to the market, and that the Secretary found at paragraph 210 that petitioner's rates were unjustly discriminatory.

(j) Answering sub-paragraph (j) of said Paragraph XI of the said petition, the defendants deny that the finding of the Secretary that only \$325 should be covered into rates each year for dues, donations and subscriptions is arbitrary, unreasonable, unlawful, or beyond the Secretary's power to make or constitutes an unwarranted invasion of the managerial power and function, or deprives [fol. 364] petitioner of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States; defendants further deny that the dues, donations, and subscriptions referred to in said sub-paragraph (j) are not unreasonable in any particular or to any degree; otherwise defendants admit the allegations contained in said sub-paragraph (j).

(k) Answering sub-paragraph (k) of said Paragraph XI of the said petition, the defendants admit that the Secretary found that a reasonable allowance to be covered into rates on account of the expenses of hearings under the Packers and Stockyards Act, 1921, was \$100 per month, or \$1200 annually, and that the evidence upon which the Secretary's finding and order are based shows that the average annual expenses of petitioner for the 5-year period, 1930 to 1934, inclusive, was \$8,786.76, or a total expenditure during said period of \$43,933.80; defendants deny that they have any knowledge or information sufficient to form a belief as to the amount of the expenses which will be incurred by the petitioner in connection with the pending proceedings; otherwise defendants deny each and every allegation contained in the said sub-paragraph (k).

(1) Answering sub-paragraph (1) of Paragraph XI, the defendants deny each and every allegation contained therein, except that they admit the Secretary found that nothing should be covered into rates on account of the Federal surtax on undistributed profits and that he stated as the reason

for the said finding that if the dividend policy of petitioner within the next few years is the same as it was in 1934 petitioner would not be subject to the said tax; and the defendants further admit that petitioner has outstanding an issue of bonds in the aggregate principal amount of \$1,500,000 and that the terms of the said bonds require petitioner to deposit annually the sum of \$30,000 in a sinking fund for the retirement of the said bonds.

4. Answering Paragraph XII of said petition, the defendants admit that the order of the Secretary directs petitioner on and after thirty days from February 17, 1937, to cease and desist from making or collecting charges for yardage, feed, and bedding *at any rate other than that found by the Secretary to be just and reasonable*, and that the said order also directs petitioner at least ten days prior to the thirtieth day from February 17, 1937, to publish, give notice of, and [fols. 365-367] file with the Secretary a schedule effective thirty days from February 17, 1937, showing all rates and charges for stockyard services, the said rates and charges not to be in excess of the rates and charges determined by the Secretary to be just and reasonable; and defendants allege that the other and remaining allegations contained in said Paragraph XII set forth conclusions of law which require no answer.

5. Except as hereinbefore expressly admitted, the defendants deny each and every allegation contained in the said petition.

Wherefore, having fully answered, the defendants pray that the petition be dismissed with costs to the petitioner and for such other and further relief as the Court may deem appropriate.

Thomas J. Morrissey, United States Attorney. Robert H. Jackson, Assistant Attorney General. Hugh B. Cox, Wendell Berge, Special Assistants to the Attorney General. C. E. Miles, Attorney, Department of Agriculture.

[fol. 368] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE RESULTS OF APPLICATION OF SECRETARY'S
RATE ORDER, ETC.—Filed October 8, 1937

I.

It is hereby stipulated and agreed by and between the parties to this cause that the facts and figures contained in the following table, as qualified by the footnote appended thereto, are a true and correct statement of the gross revenues which petitioner would have received from its stockyard business in the years 1935 and 1936, respectively, had petitioner charged the maximum rates prescribed as reasonable by the Secretary of Agriculture in his order dated February 17, 1937, and had petitioner applied the rates prescribed in said order to its volume of business as shown in the table set forth below. It is understood by both parties to this cause that petitioner does not concede that the live-[fol. 369] stock resold or reweighed for the purpose of sale is business from which petitioner should derive revenues through the charging of the rates prescribed by the Secretary in his order dated February 17, 1937, or that the estimated revenues from resales totaling \$10,965.00 as shown in the following tabulation could be collected in the event effort to collect is made by petitioner.

Revenues¹

	1935 Volume	Rate in Sec'y's Order	1935 Amount Produced	1936 Volume	Rate in Sec'y's Order	1936 Amount Produced
Cattle:						
Rail.....	309,632	.30	\$92,889.60	309,818	.30	\$92,945.40
Truck-ins.....	128,249	.35	44,887.15	134,969	.35	47,239.15
Resales.....	56,000	.15	8,400.00	56,000	.15	8,400.00
Bulls.....	1,051	1.00	1,051.00	1,382	1.00	1,382.00
Calves:						
Rail.....	24,160	.20	4,832.00	23,185	.20	4,637.00
Truck-ins.....	43,230	.25	10,807.50	39,398	.25	9,849.50
Resales.....	3,000	.10	300.00	3,000	.10	300.00
Hogs:						
Rail.....	18,656	.12	2,238.72	15,879	.12	1,905.48
Directs.....	84,393	.06	5,058.78	215,871	.06	12,952.26
Truck-ins.....	132,417	.14	18,538.38	140,941	.14	19,731.74
Resales.....	250	.06	15.00	250	.06	15.00
[fol. 370]						
Sheep:						
Rail.....	1,955,166	.07½	146,637.45	2,197,814	.07½	164,836.05
Truck-ins.....	76,084	.10	7,608.40	105,282	.10	10,528.20
Resales.....	75,000	.03	2,250.00	75,000	.03	2,250.00
Horses and mules.....	10,950	.35	3,832.50	6,981	.35	2,443.35
Hay, ewt. on fence.....	171,113	.50	85,556.50	159,408	.50	79,704.00
Hay, " fed.....	16,557	.60	9,934.20	14,160	.60	8,496.00
Corn, bu.....	10,181½	.45	4,581.68	13,977	.45	6,289.65
Straw, bales.....	22,559	.40	9,023.60	28,197	.40	11,278.80
Misc. feed.....	94,475#		629.20	183,579#		1,222.64
Misc. Revenues.....			69,516.69			72,354.22
Total.....			\$528,587.75			\$558,760.44

¹ This table shows the revenues which would have been received in 1935 and in 1936 by the Denver Union Stock Yard Company had the company charged the rates prescribed by the Secretary of Agriculture in his order of February 17, 1937, and applied the rates to the volume of business handled by it in each of these years. The company does not now assess a charge against livestock resold and reweighed for the purpose of sale, except that which is handled through the Commission Division. The order of the Secretary contemplates that such a charge shall be made. The records of the company do not reveal the number of head of livestock resold or reweighed for the purpose of sale. The volume of this class of business for the years 1935 and 1936 has been assumed to be the same as that used by the Secretary as a rate factor in his order. The revenues above stated from cattle, calves, hogs, sheep, horses and mules reflect the full volume of each of these species received and sold during January in each of the years 1935 and 1936. No allocation has been made [fol. 371] or attempted to show the volume of sales during such period at or caused directly by the stock show.

Of the 22,559 bales of straw shown as the amount sold by petitioner in 1935, 5,413 bales were sold to exhibitors and others during the stock show week in January, 1935. Of the 28,197 bales of straw shown as the amount sold by petitioner in 1936, 11,876 bales were sold to exhibitors and others during stock show week in January, 1936.

The \$629.20 profit shown to have been received from the sale of miscellaneous feed in 1935 and the \$1,222.64 profit so received in 1936 was derived from the sale of miscellaneous feed to exhibitors and others during stock show week in January of the respective years.

II

It is further stipulated and agreed by and between the parties to this cause that the facts and figures contained in

[fol. 372]

1935

1936

\$358,360.26

\$370,465.20

² This amount does not include \$1,708.77 paid by petitioner in 1937 on account of ~~sales tax~~ ~~and~~ ~~und~~ ~~paid~~ ~~in~~ ~~1938~~.

III

It is further stipulated and agreed by and between the parties to this cause that the facts and figures for the years 1935 and 1936, respectively, contained in the following table are a true and correct statement of the revenues as shown in the table on page 2 of this stipulation, the reasonable expenses as shown in the table on page 3 of this stipulation, the net operating income computed from those figures, and the resulting rate of return on \$2,792,700, the fair value of petitioner's property used and useful in the rendition of stockyard services as found by the Secretary of Agriculture in his order dated February 17, 1937. It is understood by both parties that petitioner does not concede that \$2,792,700 is the fair value of petitioner's used and useful property devoted to the rendering of stockyard services.

[fol. 374]	1935	1936
Revenues (resale and reweighs included)	\$528,587.75	\$558,760.44
Total operating expenses, including taxes	\$358,360.26	\$370,465.20
Net operating income	\$170,227.49	\$188,295.24
Rate of return on \$2,792,700	6.10%	6.74%

Robert G. Bosworth, Attorney for the Plaintiff.
 Robert H. Jackson, Assistant Attorney General.
 Wendell Berge, Attorneys for the Defendant.

[fol. 375] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL STIPULATION "A" RE EXPENSES INCURRED
 BY PLAINTIFF, ETC.—Filed October 8, 1937

It is Hereby Stipulated and Agreed by and between the parties to this cause:

I

That the expenditures already incurred and paid in connection with the proceeding known as "Secretary of Agri-

culture v. The Denver Union Stock Yard Company, Respondent," being BAI Docket 450, before the Secretary of Agriculture, and exclusive of any costs and expenses of this pending proceeding in this Court, other than the premium of \$500. on the impounding bond on file herein, is \$24,654.27, and that said expenses so incurred and paid cover a period from January 1, 1935 to June 1, 1937, and are not reflected in Government Exhibit 38 being the audit of Government auditor Bufkin, nor in any other of the exhibits introduced before the Examiner.

II

That the reasonable estimated costs and expenses of the pending proceeding in this Ccn.t total \$15,785.00 itemized as follows:

[fol. 376] Printing of abstract and index (852 pgs.) and brief	\$1,500.00
Impounding expense, extra labor printing of forms, etc.:	
5 mos. (light season at \$205	\$1,025.00
4 mos. (heavy season at \$315	1,260.00 2,285.00
Attorney fees, travel expense, extra stenographic labor, etc.	12,000.00
	<hr/> \$15,785.00

III

That the total of the costs and expenses as stated in the two preceding paragraphs is \$40,439.27.

IV

It is understood by both parties to this cause that the Government does not concede that the facts and figures set out in this stipulation are relevant or material evidence in this cause.

Robert G. Bosworth, Norman A. Hutchinson, Attorneys for Plaintiff. Robert H. Jackson, Wendell Berge, Attorneys for Defendants.

[fol. 377]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION "B"—RE COMPARISON OF INCOME, ETC.—Filed
October 18, 1937

It is hereby stipulated and agreed between the parties to this cause that the facts and figures contained in the attached Exhibit, marked for identification "Plaintiff's Exhibit No. 1" are a true and correct statement of the adjusted earnings of the plaintiff for the period therein set forth, and that the said Exhibit may be introduced in evidence in this cause subject to the objections of defendants as to the materiality and relevancy of the facts and figures therein set forth, all of which objections may be argued by defendants in their brief or briefs and considered by the Court the same as though formal objection had been made thereto in open court.

II

It is further stipulated and agreed by and between the parties to this cause that the figures contained in the attached Exhibit, marked for identification "Plaintiff's Exhibit No. 2" and covering the periods therein stated, are a true and correct statement of the matters and things therein [fol. 378] set forth, and that said Exhibit may be introduced in evidence in this cause subject to the objections of defendants as to the materiality and relevancy of the facts and figures therein set forth, all of which objections may be argued by defendants in their brief or briefs and considered by the Court the same as though formal objection had been made thereto in open court.

Robert G. Bosworth, Norman A. Hutchinson, Attorneys for Plaintiff. Robert H. Jackson, Wendell Berge, Attorneys for Defendants.

[fol. 379] PLAINTIFF'S EXHIBIT No. 1.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLO.

In Equity. No. 10913

THE DENVER UNION STOCK YARD Co., Plaintiff,

vs.

UNITED STATES OF AMERICA and THE SECRETARY OF AGRICUL-
TURE, DefendantsExhibit Showing Higher Income of Plaintiff During January 1937 Compared to
an Average of December 1936 and February 1937, Caused by the Stock Show
Held in January 1937, and Bringing up to Date Respondent's (Plaintiff's)
Ex. No. 13 and No. J.

Net adjusted earnings for December 1936.....	\$6,935.57
Net adjusted earnings for February 1937.....	8,642.93
Total.....	\$15,578.50
Average per month.....	7,789.25
Net adjusted earnings for January 1937.....	\$22,030.97
Excess of January over December—February average.....	\$14,241.72
Total excess on above basis for January over previous December and following February for six years 1930 to 1935 inclusive as shown by Respondent's Ex. 13.....	\$69,552.84
Total excess for January 1936 over December 1935 and February 1936 as shown by Respondent's Ex. J.....	17,071.68
Total excess for January 1937 as shown above.....	14,241.72
Total for eight years 1930 to 1937, incl.....	\$100,866.24
Average per year for eight years.....	12,608.28

[fol. 380] PLAINTIFF'S EXHIBIT No. 2.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLO.

In Equity. No. 10913

THE DENVER UNION STOCK YARD Co., Plaintiff,

vs.

UNITED STATES OF AMERICA and THE SECRETARY OF AGRICULTURE, Defendants

Exhibit Showing Higher Income of Plaintiff From the Sale of Feed and Bedding and From the Marketing (Yardage) Charge on Livestock Sold During the Last Two Weeks of January, 1937 (The Stock Show Period) Compared to an Average of the Last Two Weeks of December, 1936, the First Two Weeks of January, 1937, and the First Two Weeks of February, 1937.

For Two Weeks Ending	Hay Profit	Corn Profit	Bedding Profit	Misc. Grain Profit	Total
Dec. 29, 1936.....	\$2009.85	692.24	448.40	3.52	
Jan. 14, 1937.....	2676.99	694.29	1064.08	36.74	
Feb. 14, 1937.....	2282.29	476.80	583.74	13.52	
Average for each two weeks.....	2323.06	621.11	698.74	17.92	
Jan. 30, 1937.....	9317.13	694.96	3335.59	815.75	
Excess for two weeks ending Jan. 30, 1937.	6994.07	73.75	2636.85	797.83	\$10,502.50

Marketing Charge						Total
For Two Weeks Ending	Cattle	Calves	Hogs	Sheep	Horses & Mules	
Dec. 29, 1936..	\$5985.65	\$902.31	\$3978.26	\$3043.78	\$42.70	
Jan. 14, 1937..	4848.10	563.02	3290.06	5607.42	14.00	
Feb. 14, 1937..	4271.25	526.63	1954.94	4686.50	78.75	
Average for each two weeks.....	5035.00	663.98	3074.42	4445.90	45.15	
Jan. 30, 1937..	10408.75	1310.84	2890.72	6368.52	309.75	

Deficit						Total
Excess for two weeks ending						
Jan. 30, 1937.	5375.75	646.86	183.70	1922.62	264.60	8,024.13
Total excess from feed, bedding and marketing.....						18,526.63

[fol. 381]

Higher Operating Expense During the Last Two Weeks of January, 1937
(Stock Show Week) Than During Other Periods Shown.

Labor costs for last two weeks of December, 1936.....	\$7,453.96
Casualty insurance.....	223.62
Labor costs for first two weeks of January, 1937.....	6,424.63
Casualty insurance.....	160.62
Labor costs for first two weeks of February, 1937.....	5,776.56
Casualty insurance.....	144.42
Average of labor costs for two weeks periods shown.....	6,551.72
Casualty insurance.....	176.22
Total.....	<u>\$6,727.94</u>
Labor costs for last two weeks of January, 1937.....	\$9,572.03
Casualty insurance.....	239.30
Total.....	<u>9,811.33</u>
Excess labor costs for last two weeks of Jan. 1937.....	3,083.39
Other Additional Expense Last Two Weeks Jan. 1937:	
Electric light and power.....	226.40
Water.....	196.60
Current Yard Expense.....	203.26
Office.....	55.00
Total.....	<u>681.26</u>
Total higher labor and miscellaneous.....	3,764.65
Total higher average income shown on sheet one.....	<u>18,526.63</u>
Total higher net income after operating expense for last two weeks of January, 1937, compared to an average of the last two weeks of December, 1936; the first two weeks of January, 1937, and the first two weeks of February, 1937.....	\$14,761.98

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

THE DENVER UNION STOCK YARD
COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE,

Defendants.

IN EQUITY

No. 10913

ABSTRACT OF EVIDENCE

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IN THE
District Court
Of The United States
 FOR THE DISTRICT OF COLORADO

THE DENVER UNION STOCK
 YARD COMPANY, a Corporation,
 Plaintiff,

vs.

UNITED STATES OF AMERICA
 and SECRETARY OF AGRICUL-
 TURE,
 Defendants.

IN EQUITY

No. 10913

Abstract of
 Evidence in Bureau
 of Animal Industry
 Docket 450,
 Secretary of
 Agriculture vs.
 Denver Union Stock
 Yard Company,
 Respondent.

TRANSCRIPT OF RECORD AND
 ABSTRACT OF EVIDENCE

- 1 Hearing held at Denver, Colorado, commencing
 June 3, 1935, before:

Examiner J. C. Brooke, Solicitor's Office, U. S.
 Department of Agriculture.

C. E. Miles, Esq., Solicitor's Office, U. S. Depart-
 ment of Agriculture, and M. O. Cooper, Bureau of
 Animal Industry, U. S. Department of Agriculture,
 appeared for the Secretary of Agriculture.

Robert G. Bosworth, Denver, Colorado, with Per-
 shing, Nye, Bosworth & Dick of counsel, appeared
 for the respondent.

- 2 The hearing was called to order by C. E. Miles
 at 10 A. M. June 3, 1935, being the date noted in
 the Order of Inquiry and Notice of Hearing, and the
 hearing was adjourned until 10 A. M. June 4, 1935.

Trans.

THE CASE FOR THE GOVERNMENT.

Thereupon the following evidence was introduced on behalf of the Secretary of Agriculture:

- 3 Government Exhibit No. 1, being the notice of posting of the Denver Union Stock Yard as a public market.

MR. BOSWORTH: Mr. Examiner I would like to have the record show objections on the part of the respondent, The Denver Union Stock Yard Company. The Denver Union Stock Yard Company objects to this proceeding and to the introduction of any evidence on the ground that:

(1) The Packers and Stockyards Act of 1921 is an unwarranted delegation of legislative authority to the Secretary of Agriculture contrary to the Constitution of the United States, and is therefore void, and that

(2) The Packers and Stockyards Act of 1921, insofar as it attempts to regulate the rates and charges of The Denver Union Stock Yard Company at its stockyards in Denver, Colorado, for services there rendered, for the use of the market there established by it, and for the use of facilities there provided by it, is beyond the power of the United States, being an intra state transaction only indirectly affecting interstate commerce and, therefore, beyond the constitutional power of Congress and void.

- 4 Objection overruled and Government Exhibit No. 1 received.

By stipulation of counsel respondent's Exhibit No. 1, being an airplane photograph of respondent's property, with the land zones as used by Government appraiser shown in various colors thereon for easy recognition, was offered and received in evidence.

Trans.

- 5 Government Exhibit No. 2, being tariffs numbered 1, 2 and 3, and supplements thereto, was offered and received in evidence.

Government Exhibit No. 3, being the tariffs in effect at Kansas City Union Stockyard, Ogden Union Stockyards, Omaha and Sioux City Stockyards and St. Joseph Stockyards were offered and received in evidence, over the objection of respondent as to their materiality.

MR. BOSWORTH: May I ask, Mr. Examiner, that the Examiner officially place upon record a statement to the effect that without the necessity of asking for specific exceptions each time there is a ruling either for or against either side here that it be taken without question that an exception is saved to the party against whom the ruling goes,—

MR. MILES: Saved as a matter of course.

MR. BOSWORTH: Saved as a matter of course.

MR. EXAMINER: It will be so understood.

- 7 Government Exhibit No. 4, being certified copies of the findings, conclusion and order of the Secretary of Agriculture in the case against the St. Joseph Stockyards Company, offered and received in evidence over the objection of respondent as to its materiality.

- 9 James C. Christensen, a witness called by the Government, testified as follows:

Direct Examination.

I reside in Denver, Colorado, and am Field Assistant to the Chief of the Packers and Stockyards Division, Bureau of Animal Industry and have occupied that position for six or seven years. Before that time I was Division Supervisor in the same Department. My duties consist of general supervi-

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sion and investigations that may be assigned to me by the Chief of the Division. The nature of those investigations are some trade practice matters, investigation of stockyards, stockyards facilities and services and various other matters that may be assigned to me from time to time.

- 11 My qualifications are that after leaving college I was stenographer with a milling company and a coal company for about a year and with the C. B. & Q. R. R. for about two years. I was then with a mercantile company for about a year, when I became stenographer with the M. K. & T. Railway, private secretary to various operating and traffic officials, freight rate clerk, freight livestock claim adjuster and traffic claim agent. My employment with the latter road covered approximately twenty years. I resigned that position and became supervisor of a freight and livestock handling bureau of the T. & P. Ry. Company for about six years, after which I entered the service of the United States Bureau of Markets, where I served as an assistant in marketing livestock and meats, livestock market supervisor and special investigator of the retail meat industry. Thereafter I was assigned to the United States Packers and Stockyards Administration as Division Supervisor and as Field Assistant to the Chief of the Division. My Government experience extends over a period of approximately sixteen years, during which time I have been constantly engaged in the livestock market supervision at public stockyards, have made extensive studies of the facilities and services at Denver, St. Joseph, Kansas City, East St. Louis, Omaha, Sioux City and Cleveland.
- 12 The purpose of the investigations was to furnish information upon which my superior officers could take such action as they deemed proper under the ACT. I have testified as a witness in the previous hearing at Denver; in two hearings at St. Joseph;

Trans.

one at Kansas City, East St. Louis, Omaha and Sioux City, and prepared the reports in connection with Cleveland. I also made an investigation and reports in regard to the facilities and services at the Wichita stockyards.

- Recently I was directed to make an investigation
13 and submit a report on the Denver Union Stock Yard. I had already made one investigation and my procedure was practically a duplicate of the procedure in the former case. I have been stationed at the Exchange Building at the Denver Union Stock Yard ever since 1922 and have been almost constantly in and around the stockyards. In the preparation of the report I discussed matters with various officers and employees of the stockyards and with other persons whom I regarded as having information of a reliable character, and made a personal inspection of the facilities and services rendered. I have gone over the property a great many times and observed its uses. During the time I was absent from Denver I was making similar investigations at other yards. I don't remember the exact date when I commenced the study preliminary to making my report but I learned about a year ago that another hearing would probably be held at Denver and I was directed to go ahead and either bring my former report up to date or prepare a new report. I have never considered my report finished, and have observed some slight changes within the last week.
- 14 Yes, I have prepared a report in two volumes. Volume 1 is a description of the property and states the purposes for which the various operating units are used principally. Volume 2 contains a description of the services.
- 15 MR. MILES: Did you turn over copies of those two volumes to any officials of the Denver Stockyards?

Trans.

Counsel for respondent stated that one copy of Mr. Christensen's report was received by The Denver Union Stock Yard Company and marked, "Received 9:30 a. m. April 13, 1935."

16 (Witness continuing). The Stockyards officials conferred with me with reference to the report, made several suggestions before the report was typed and one recent suggestion was made about Thursday of last week, which has been corrected. I base my corrections on my own observation. We did not go over Volume I in detail as I hope we might have done. Yes, I think possibly there are differences between me and the stockyard officials as to facts shown in this report where we could not agree on the status of certain properties. I have considered

17 all of the suggestions made and so far have not been able to change my report with the exception of the correction made within the past few days, which correction has been inserted as a memorandum in connection with that particular item, unit 114 being pen 4212, designated as manure dump. That correction should apply wherever that pen is referred
18 to in any way as a manure facility.

19 Volume I is not only a description of the property of The Denver Union Stock Yard Company, but it is set up in classified form and the division of the subject is divided into two classes of property.

Yes, sir, it is not only a description, but it is set up in classified form, and the division of the subject is divided into two classes of property: Class A consists of the property and services provided by the stockyards company which are reasonably necessary in that course of commerce whereby livestock passes from place of production, or shipment to, from, or through the stockyards to the place of its ultimate destination; Class B is a description of property and services provided for the stockyards company

Class A
property
defined.

Class B
property
defined.

Trans.

- which have no real connection with the commerce described above.

20 An example of the latter class is railroad track No. 15 and right-of-way shown on page 421,—the track serving Armour & Company and located on land leased to Armour & Co. with option to purchase. It has no connection with the movement of livestock and freight to and from the loading and unloading docks of the Stock Yard Company, and does not, in my judgment, serve any stockyard facilities that are essential in the rendition of stockyard services.

21 Volume 2 is a description of the services at the Denver Union Stock Yard. The general plan is to state what happens in the handling of livestock and the rendition of other services from the time the stock arrives at the stockyards until it passes out of the yards.

22 The unloading ticket appearing on page 7 of Volume 2, and all other forms inserted in this report, were furnished me by the Stock Yard Company.

I also prepared another volume entitled "Adequacy of Facilities of the Denver Union Stock Yards for the Rendition of Stock Yard Service as of January 1, 1935." That is a volume prepared by me and the data contained therein was furnished me by Government auditors who compiled certain statistics from the stockyard records; the graphs and computations were made either by me or under my supervision. Yes, Volumes 1, 2 and 3, to the best of my knowledge, are correct so far as they reflect matters of fact, and if they reflect opinions, they are my opinions.

23 MR. MILES: The Government now offers and asks to have received the three volumes just described by the witness.

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(Whereupon GOVERNMENT EXHIBITS 5, 6 and 7 were received in evidence.)

(Witness continuing). During the course of my study and in the preparation of my report I had access to and made use of maps which are before me, prepared, I think, by Government engineers under the supervision of Mr. Zelinski. These maps were prepared at my suggestion after I had outlined to the engineers the various operating units to correspond to the units described in Volume 1 of my report. I have hung the three maps on the wall.

MR. BOSWORTH: May I interrupt here I was wondering whether you, of your own knowledge, know that these maps were prepared by the Government engineers, and second, whether of your own knowledge, you know anything of the accuracy of the lines on the map. I was wondering whether or not, for example, the area of the sheep division and Sheep Barn No. 1, Sheep Barn No. 2, etc. is in proper proportion with the cattle area below.

THE WITNESS: No, I have no information of my own of the engineering facts except that I can say I know that the lines are drawn, the different operating units are outlined as I indicated, as I requested.

MR. BOSWORTH: And you are simply using these maps in your testimony from the standpoint of showing the location of the different operating units; is that right?

THE WITNESS: Yes, sir.

MR. BOSWORTH: Well, then, that is all right.

(Witness continuing). The large map is the map which was drawn to illustrate the operating units described in Volume I in my report. Each operating

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unit is given a number running consecutively throughout my report. Some of the units may not be operating units, for instance, a parcel of vacant land which you might say is not operated, but those are the units numbered on the map to correspond with the numbers and designations set out in Volume I of my report.

- 30 The map that I have just been discussing is the map referred to as No. 8. The small map at the left numbered 9 is the same character of map as No. 8 covering a different section of the property. The third map, identified as map No. 10, illustrates four outlying parcels of land which are not included on the other two maps already mentioned. Map No. 9 is used to illustrate the property lying east of the C. B. & Q. Railroad, except the small triangular parcel of land shown on map No. 10. Map No. 9 shows the stock show property, the so-called horse and mule division and certain pens and corrals and clearances in that section of the property. None of these maps shows the areas of the various tracts. I have not determined any areas myself. The areas were determined by the engineers and are shown on a separate list.
- 31
- 32 Government Exhibits numbered 8, 9 and 10, being the three maps above described, were offered and received in evidence.

MR. BOSWORTH: Of course it is understood that we are not objecting as to the maps. We are not consenting necessarily to Mr. Christensen's designations of the facilities.

MR. MILES: That is correct, sir.

(Witness continuing). I have made a study of the facilities at the Denver Union Stockyards with a view to forming an opinion as to whether the property covered aided or facilitated the stockyards or was

Trans.

necessary to the stockyards in the rendition of stockyard services, the rates and charges for which are now under investigation.

33 MR. MILES: I wish you would refer to unit Nos. 1 to 28-B inclusive, to unit 29 and 30; I wish you would indicate on the map, with full explanation, just where those units are; I wish, then, you would give us what facts you have discovered.

34 (Witness continuing). Units 1 to 28-B inclusive and units 29 and 30 are described in Volume I of my report under those unit numbers and are illustrated in yellow on map Government Exhibit No. 8. The Stock Yard Company owns these railroad tracks and other improvements which are necessary to their operations adjacent to the stockyards and other industries within the city of Denver. The Stock Yard Company does not own any locomotives, cars or other railroad equipment. The transportation facilities of the Stock Yard Company are used by the Railroads

Railroad
trackage.

35 as terminal facilities in connection with their general railroad business for switching cars and livestock to
36 and from the stockyards, * * * * and other industries for the interchange of traffic under the terms and conditions stipulated in agreements, copies of which are inserted in Volume I. I regard these facilities as incidental to services for the rates and charges accruing to the railroad companies. They are not a part of the facilities for which the Stock Yard Company derives income for stockyard services, rates and charges for which are stipulated in its schedule filed under the Packers and Stockyards Act.

Terminal
facilities.

Christen-
sen's line of
distinction.

Portion of RR
reasonably
necessary to
stockyard
operation.

Transportation facilities comprise two classes, viz: A — Those referred to in Volume I as Class A facilities, which are used and reasonably necessary in that course of commerce whereby livestock and feed and material incidental to the conduct and operation of the stockyards, move to or from the stockyards; B —

Trans.

Those referred to in Volume I as Class B facilities which are used for the transportation to and from other industries but are not used for the transportation of freight or livestock to or from the stockyards.

MR. MILES: In your opinion, Mr. Christensen, does the property covered by items, units Nos. 1 to 28-B, inclusive, units 29 and 30, aid or facilitate the respondent, or are they necessary to the respondent in the rendition of stockyard services, the rates and charges for which are under investigation in this proceeding?

A. The answer is no.

37 (Witness continuing). Units 32, 33, 34 and 35, and the chute alleys are comparable to what might be termed railroad depot facilities. They consist of the railroad loading and unloading docks and chute alleys which are adjacent to the railroad docks. They are facilities and services furnished by the Stock Yard Company, used for loading and unloading and receiving and delivering by the railroads of livestock at the stockyards, consisting of the property commonly known as the C. B. & Q. Dock, the U. P. Dock, C. & S. or Quarantine Dock and the River Dock, including platforms, chute pens and chute alleys providing means of necessary ingress and egress to and from said docks which serve the transportation facilities hereinbefore referred to. Without these docks and chute alleys and the loading and unloading services employed by the railroad companies, they could not receive for shipment or effect delivery of livestock at the stockyards.

Chutes and chute alleys are comparable to depot facilities.

Docks, chutes and pens provide necessary means of ingress and egress.

The railroad loading and unloading facilities and services referred to in Volume I as Units 32, 33, 34 and 35 constitute the necessary facilities and services "for loading and unloading en route, delivery at public stockyards of inbound shipments into

Govt. view re R. R.

Trans.

suitable pens, and the receipt and loading at such stockyards of outbound shipments," for and in consideration of the rates published in their freight tariffs. Based upon my own judgment and experience as railroad freight claim agent and stockyard supervisor, these are the facilities and services which the railroad companies are required to furnish under paragraph 5, section 15 of the Interstate Commerce Act.

The railroad companies have entered into an agreement with the Stock Yard Company whereby stockyard labor is utilized for loading and unloading livestock for a stipulated rate per deck. Loading and unloading services are not mentioned in the schedule of services, rates and charges for which are collected by the Stock Yard Company.

5
Loading and
unloading
chutes and
pens.

Unit No. 32 is at the bottom of the map and it is completely described in Volume I as unit No. 32. It consists of the loading and unloading platform, the chute pens and inclines, and the chute alley lying between the chute pens and the stockyard pens. That unit is generally known as the C. B. & Q. Dock. Unit No. 33 is generally known as the U. P. Dock. It is practically opposite the C. B. & Q. Dock on the opposite side of the cattle division. Both these units are outlined in brown. Unit No. 34 is commonly known as the C. & S. or Quarantine Dock and is located along the easterly side of the sheep and hog divisions and the truck division west of the cattle division and separated therefrom by the U. P. Railroad right-of-way and a roadway designated as Unit No. 123.

Unit No. 35 is commonly known as the River Dock, located west of the hog immunization plant and of a portion of the sheep dipping facilities and west of sheep barn No. 1. It is bordered on the west by a railroad track of the Stock Yard Company.

Trans.

- 40 The chute alleys to which I have referred in each case are located between the chute pens and the stockyard pens or a stockyard alley in some instances. They are the alleys which provide means of egress and ingress to and from the loading and unloading facilities without which the railroad companies could not receive or deliver freight or livestock to and from their cars. In my opinion these units, including the chute alleys, are transportation facilities required to be furnished by the railroads under the Interstate Commerce Act and therefore not necessary to be furnished by the Stock Yard Company.

Chute alleys described.

Transportation facilities.

- Units 136 to 145 are the facilities which I have designated as warehouse facilities. Unit 136 is the stock show stadium shown on map No. 9, and unit 137 is the stock show sales pavilion. Unit 138 is the stadium heating plant. Unit No. 139 is the building generally known as the stadium hook-up shed. Unit 140 is the stadium run-over shed, and is the runway connecting the hook-up shed with the stadium. Unit 141 is known as the hook-up shed pen and includes a small loading chute shown on the same map adjoining the hook-up shed on the south. Unit 142 is an entrance leading from the roadway south of the property to the hook-up shed pen. Unit 143 is the stock show restaurant. Unit 144 is the cement block building commonly known as the stock show hog barn site, it being my understanding that the building is not owned by the Stock Yard Company. Unit 145 is the so-called wash house located east of Lafayette Street. All these units are shown on map No. 9. The stock show facilities enumerated above are not used and useful in the rendition of stockyard services.

Stock show buildings described.

MR. BOSWORTH: Now, may it please the Examiner, it is our desire to object to that matter so far as these parties are concerned, it has been thoroughly

Respondent's exception re effect of prior decision.

Trans.

42 adjudicated by the United States District Court of Colorado and it is highly improper to raise this question at the present time. I am wholly aware of probably what Mr. Miles will say that there is nothing *res adjudicata* in connection with the rates. That is not the holding of the United States Supreme Court except as to the rates themselves but to the usefulness of facilities that is *res adjudicata* unless there is some change in conditions which this witness has certainly not testified to at the present time.

MR. MILES: Captain Bosworth has correctly stated a part of my position, which is that a rate case is not *res adjudicata*. It is my view that in this case we have a right to go into those matters which were formerly considered by a court and ruled on adversely against our present position.

MR. BOSWORTH: Do you mean, Mr. Miles, that there is to be no end of litigation upon the question of what is used and useful? ¶

MR. MILES: I mean this, Captain Bosworth, I believe that we have a right to get this matter adjudicated by the Supreme Court.

MR. BOSWORTH: You had that right before..

MR. MILES: Yes, and did not avail ourselves of it.

MR. BOSWORTH: And it became the final judgment, so far as these parties are concerned.

MR. MILES: I cannot agree that the judgment was final.

MR. BOSWORTH: Well, I want the objection noted there, may it please the court, and it certainly is one upon which I am going to stand.

THE EXAMINER: Objection overruled.

ans.

3 (Witness continuing). These facilities were not designed as a market place, for which purpose they would be superfluous and would not have been provided. They are used primarily by the Western Stock Show Association for exhibition purposes and neither that company or any of its concessionaires are within the jurisdiction of the *Packers and Stockyards Act* or render stockyard services. When the facilities are not used by the Stock Show Association, some of them are used for yarding horses, but this is more than offset by the fact that practically all of the horse and mule division is vacated and utilized by the Stock Show Association during the Stock Show period. Occasionally the stadium is leased for athletic events but none of the facilities enumerated above is ever used in the rendition of stockyard services. In my opinion, and it is my understanding, that none of these units aid or facilitate or are necessary to the respondent in the rendition of stockyard services.

MR. BOSWORTH: Now, of course, it is understood that my objection goes to the statement of his conclusion at the end of this testimony in the answer to that question.

MR. MILES: Yes, sir.

The witness then stated that a triangular stub of vacant land, shown as unit 147, is not used and useful property, nor is the vacant land on the west side of the river and shown as unit 148. The witness also stated that the commercial feed lots on tract 3 were not used and useful property of the Stock Yard Company because not operated by it. Other tracts deemed not used and useful by witnesses are other tracts of vacant land, some of which are marginal stubs, designated as units 149, 150, 151, 152, 154, 155, 156 and 161. The river easements are also designated

Feed lots.

Trans.

as not used and useful. The tract north of Race Court, tract 3-B, is also so designated.

Club building.

(Witness continuing). Unit No. 135 is designated as the club house and grounds, shown on Government Exhibit No. 9 and faces on the west side of Lafayette Street. It is not used and useful in the ~~rendition of stockyard services~~. The ground floor is used by tenants for merchandising purposes, or is vacant and unused, and the second floor is used by the Western Stock Show Association or is vacant. It is not occupied by any club at the present time. The
58 upper floor was used at one time as a club room. There are three storerooms on the ground floor, two of which are now rented and operated by merchants, and the other room is vacant. In my opinion Unit No. 135 will not aid or facilitate and is not necessary to respondent in the rendition of stockyard services, for which rates and charges are now under investigation.

Water and sewer systems.

59 The general water and sewer system is classified as partly used and useful facilities because extensions of mains from the system serve the packing plants and a portion of the leakage loss of the system
61 is borne by Swift, Armour and Stock Yard. I have no information as to what portion of the installation expense would have been eliminated if the Swift and Armour plants did not connect up with the system, nor do I know the relative miles or linear feet of pipe.

Blacksmith shop.

Unit 119 is the blacksmith shop and ground located on Lafayette Street shown on Government Exhibit No. 9. It is only partly used and useful in the rendition of stockyard services since it is used partly for services furnished the general public which has no connection with stockyard operation or stockyard services as shown in Volume I of my report, although there is nothing to indicate the extent of services rendered the outside public and that

ans.

rendered in connection with stockyard services. The amount of dollars, I think, is shown in the audit. In my judgment that proportion of the value of the property that is necessary in performance of the services in connection with the repairs to stockyard property is used and useful and that a comparatively small proportion of the value would be considered not used and useful in the rendition of stockyard services. I have no definite basis for estimating the proportions, but I think that, in my opinion, the income that has come from outside services and the amounts charged for services in connection with stockyard repairs and other services would be a fair estimate of these proportions, and that would be my recommendation.

The witness then discussed the Exchange Building and drew the line between used and useful property and not used and useful property upon the theory that any space rented or occupied by agencies not registered under the Packers and Stockyards Act was not used and useful property. The witness then catalogued such space and designated as not used and useful, the telegraph offices, U. S. Post-office, railroad freight offices, all government offices such as the U. S. Bureau of Animal Industry, serum companies, State Brand Inspectors offices, truckers offices, livestock show office, etc. He likewise recommended the exclusion of the Western Weighing and Inspection Bureau offices and the consolidated railroad freight office. He designated the garage as partly used and useful.

Throughout my direct examination I have stated that certain properties, in my opinion, did not aid or facilitate and are not necessary to the respondent in the rendition of stockyard services. I have tried to classify and allocate the facility in accordance with the definition of the word "stockyard" in Section 302

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of the Packers and Stockyards Act and in accordance with the definition of the term "stockyard services" in Section 301 (b) of the Act. I do not contend that a corporation engaged in operating a stockyard may not also engage in other lines of business and own property and render public or private services not within the jurisdiction of the Packers and Stockyards Act, but my thought is that used and useful facilities and services are those reasonably necessary in the rendition of stockyard services as defined in the Act
83 and reasonably necessary for continuation of stockyard services for a reasonable period.

Government Exhibit No. 12 offered in evidence, being a pamphlet entitled "Property and Services of The Denver Union Stock Yard not Used and Useful."

Ruling withheld on request of counsel.

85 The witness was then handed and identified Government exhibits 13 to 19, inclusive, as follows:

87 Exhibit 13: Photostatic copy of Drawing No. 37123 attached to agreement of July 20, 1922,—see Volume I, page 17, Government Exhibit No. 5 for copy of agreement.

Exhibit 14: Photostatic copy of Drawing No. 51542 attached to agreement of November 13, 1930,—see Volume I, page 381, Government Exhibit No. 5.

Exhibit 15: Photostatic copy of Drawing No. 37770 attached to agreement of September 28, 1917,—see page 97, Government Exhibit No. 5.

Exhibit 16: Photostatic copy covering Unit No. 122, page 380 of Government Exhibit No. 5, and Unit No. 123, page 381, pertaining to agreements of December 7, 1929, and November 17, 1930.

Exhibit 17: Photostatic copy of Drawing No. 51576 attached to agreement of May 10, 1930,—see page 97, Government Exhibit No. 5.

ans.

Exhibit 18: Photostatic copy of Drawing No. 51454 attached to agreement of February 19, 1930,—see page 79, Government Exhibit No. 5.

Exhibit 19: Photostatic copy of Drawing attached to agreement dated February 23, 1932,—see page 453, Government Exhibit No. 5.

The above Exhibits offered and received in evidence.

8 MR. BOSWORTH: Mr. Examiner, with regard to Exhibit 12 upon which the ruling as to the admissibility—Government Exhibit—was withheld until this morning, we would object to the introduction of this exhibit on the basis that it is improper, consisting entirely of the opinion of this witness upon the used and useful property, or rather, upon the property not used and useful in his opinion, and property which is partly used and useful in his opinion, in the rendition of stockyard services, the witness not having been qualified as a stockyard operator and not qualified, in our opinion, to express his opinion as an expert in this regard upon this particular subject.

MR. MILES: It is submitted, Mr. Examiner, that the witness is amply qualified and was qualified to express an opinion. The offer is renewed. No argument.

THE EXAMINER: The objection is overruled and Government Exhibit No. 12 will be received.

(Whereupon GOVERNMENT EXHIBIT NO. 12 was received in evidence.)

Cross Examination

When on page 4 of Volume I, Government Exhibit No. 5, I refer to persons conducting a private business at the yards I mean a firm that is not related to stockyard services and not defined as stockyard ser-

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vices, and business conducted by independent operators or individuals for their own compensation or profit and who are not registered as market agencies and dealers, or who are not performing stockyard services. Those who are registered I would regard
 90 as performing stockyard services. I would call the railroads a public business within the jurisdiction of the Interstate Commerce Commission and the serum companies I regard as private business.

Patron
defined.

The patrons of the Denver yards are those who ship livestock to the market and purchase livestock at the market. The purchaser, however, is not a patron in the same way that the shipper is a patron.

Patron
interested in
buying outlet.

91 The shipper sends his livestock to Denver to find a market. Yes, the patron is interested in the yard company having enough buyers on the market, such
 92 as feeder buyers, packers, etc. No, I don't think the shipper is the sole patron of the market and I don't think I made the statement that the shippers were the sole beneficiary.

(Counsel stated that in referring to page numbers until otherwise noted, the pages refer to Government Exhibit No. 5).

Railroad
trackage
owned by
Company.

93

Q. On page 6 you state your classifications of various facilities to be Class A and B and you state that Class A consists of property and services provided by the Stock Yard Company which are reasonably necessary in the course of commerce whereby livestock passes from the place of production or shipment to, from or through the stockyards to the place of ultimate destination. Then, in your exhibit, Government Exhibit 12, you proceed to declare that much of the property which you have listed, certainly your railroad tracks under Class A in Volume 1, is not used and useful. Is that solely because of your interpretation of the Transportation Act?

ans.

A. No, I think in Class B you will find other property than—

Q. Just a moment, I am asking you about Class A now and if you will skim your volume there very quickly you will see that the very first things you take up are the stockyard tracks, that is the tracks actually owned by the Stock Yard Company.

A. Yes, sir.

Q. And you put those under the classification of what is reasonably necessary in the course of commerce whereby livestock passes from the place of production or shipment to, from or through the stockyards to its place of ultimate destination, indicating on that basis that they are clearly used and useful and I am asking you why you eliminate them later in Government Exhibit 12.

A. Now, the classification of property under Class A does not indicate that they are or are not used and useful. That is the classification based upon the actual course of commerce whereby livestock moves to, from or through the stockyards or otherwise. Now, in Class B there are railroad tracks that are not in the exact course of commerce whereby livestock are moved to, from or through the stockyards.

(Witness continuing). The tracks I refer to in Class B are the Swift and Armour track and tracks of that character because they are not essential and used principally for livestock or other freight moving to, from or through the stockyards. Yes I admit the railroads do handle livestock in commerce. The railroad systems are necessary to bring livestock to the Denver market and to its ultimate destination, but some of the tracks are not necessary. No, I

Trackage
handles live-
stock in
commerce.

Trans.

couldn't say that the tracks I have put in Class A in Volume I (Government Exhibit No. 5) have to do with the marketing, the feeding, the watering, holding, delivery, shipment and handling in commerce of livestock. They don't have anything to do with the holding of livestock at the stockyards. They are used in transporting livestock to and from the stockyards. I don't know that the holding of livestock is dependent upon the transportation which occurs previous to the holding. The rails, as such, and the locomotives and cars have nothing to do with the actual feeding of the livestock or their watering or sale.

Trackage like
highways.

- 97 The definition of stockyard services, Section 301 (b) of the Packers and Stockyards Act was then quoted to the witness as follows: "Services or facilities furnished at a stockyard in connection with the receiving, buying or sale on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing or handling in commerce of livestock," and the witness was asked whether, except for his interpretation of the transportation act, he would hold the stockyards-owned tracks to be stockyards facilities.

(Witness continuing). No, I do not think I would. The definition says, "at the stockyards", and those functions of holding, marketing, feeding and watering must be performed at the stockyards. The transportation occurs prior to arrival and the transportation facilities to and from the yards, are much like highways. They are facilities that are used prior to and subsequent to the stockyard functions. No, I do not argue that the flow of commerce ceases at the stockyards or that the handling of livestock in commerce ceases at the stockyards; it continues through the stockyards but the services of the railroad company cease when the livestock is delivered in the

Trans.

suitable pens at the yards. Yes, it is my opinion that apart from the transportation act the railroad trackage owned by the Stock Yard Company over which the livestock passes to get to the unloading sheds and pens, is not a stockyard facility. I do not think it makes any difference that the Stock Yard Company, instead of owning the rolling stock, locomotives, etc., has leased its trackage for operation by all railroads jointly. I am differentiating between transportation facilities and stockyard facilities.

**Leasing of
trackage not
material.**

I will check to see whether Track 10 was leased to Armour & Company (respondent claims it was not). I will agree that the lease states the facts as they are. On page 15, I say that the yard company does not own or operate any railroad locomotives or cars and does not furnish transportation facilities. Yes, from my observation and experience factories do require sidetracks into their property, but I think the stockyard tracks are in a different category because they are used and operated by the railroads for their general railroad business, including the transportation of livestock to and from the stockyards and to and from the packing houses and other industries. An industry track or spur track is not used for anything else than to serve the industry.

Yes I know, with the sanction of the Interstate Commerce Commission, railroads probably do make deals with regard to the cost of installation of a long sidetrack where they expect a large volume of traffic, and this is, in effect, rent. My judgment is that railroad tracks are essential to transportation, and whenever they are within the jurisdiction of the Interstate Commerce Commission, they have nothing to do with stockyard service for which stockyard rates are charged. The rates for that service and the facilities for that service, it seems to me, pertain to transportation business and not the stockyard business.

**Railroad
tracks
essential to
transportation
of livestock.**

Trans.

I refer to Section 15, Paragraph 5, of the Transportation Act in connection with the loading and unloading facilities and not with the outside transportation facilities and by that I mean facilities that are necessary in that flow of commerce which brings livestock to, from or through the stockyards.

104

Q. Well, Mr. Christensen, we, of course, claim no interest direct or indirect by virtue of value or otherwise to a single inch of track outside our stockyard area. Now, let us limit our discussion to the trackage within the stockyards area. What part of that, if any, is outside trackage or outside transportation facilities?

A. That brings up the question of what you mean by stockyards area.

Q. Look at Government Exhibit 8. Here you have on Government Exhibit, let us say Government Exhibits 8 and 9, you have there all of the land in those two maps on the east side of the Platte River which is owned or in any manner claimed by the Stock Yard Company, haven't you?

A. Yes, sir.

Q. I am referring to the trackage which is in, on or over our stockyards property. Now what, outside of that, or ~~what are the outside facilities~~, or trackage, would you call outside transportation facilities.

A. I would call all of that outside because the property that I regard as stockyard facilities does not include the railroad right-of-way.

Q. Well aren't we doing what is sometimes described as chasing our tails around? That is, because you feel that transportation facilities by virtue of the control over them by the Interstate

Trans.

Commerce Commission are not stockyard facilities. That is what I am simply trying to get you to say, if that is your viewpoint.

A. I am not sufficiently familiar with the Interstate Commerce Act to say that my opinion is based upon that. My opinion is based upon the service and the character of the functions that are involved as compared with transportation, moving, shipping, to and from the stockyards and as to the stockyards services defined in the Packers and Stockyards Act within the stockyards.

Q. Well, I am afraid I am going to have to ask you to tell me what you mean by the services which they render, then.

A. The best answer I can give to that is the definition given in the Act.

Q. Well, read it. Here it is right here. (Handing copy of the Packers & Stockyards Act to witness).

A. The term—this is section 301 (b). "The term stockyard services means services or facilities furnished at a stockyard in connection with receiving, buying or selling on a commission basis or otherwise, marketing, or feeding, watering, hauling, delivery, shipment, weighing or handling in commerce of livestock."

106 (Witness continuing). Except for a few feet of track that may lop over on to Swift's or Armour's property, all of the railroad tracks in that area are on land either owned by the Stock Yard Company or 107 leased by the Stock Yard Company. Yes, the railroad tracks are used for transporting the livestock to the point of delivery and taking it from the point of shipment.

All trackage is on Stockyard Company land.

Trans.

I state on page 39 that Track No. 1 does not serve
 108 directly any stockyard loading or unloading facility.
 This track is shown on Government Exhibit No. 8, is
 109 numbered 1 and followed by "294 feet." That track is
 connected with the U. P. Railroad and C. & S. joint
 track. It connects with Track 25 at the north and
 forms a link in the system of tracks which serve cer-
 tain stockyard facilities and other railroad tracks not
 owned by the Stock Yard Company. It goes down
 south to the U. P. tracks which serve the loading and
 unloading dock. Yes, it is a continuous track with
 110 track 25. I don't know whether the different number-
 ing taken from the Stock Yard Company records
 merely represents a different time of construction
 but it serves a continuous trackage, and Track 25 in
 the same way, with certain switches and frogs is a
 111 continuous track with Track 28. Yes, Track No.1 and
 Track 25 is a continuous strip of railroad used as a
 tail track for loading and unloading the U. P. and
 C. & S. long livestock trains. I suppose tail track
 means an extension beyond the loading dock which
 would be necessary to hold the empties or loaded cars
 in connection with loading and unloading livestock.
 Yes, it is true that you have to have that extra space
 in order to move the train either forward or back-
 ward for the purpose of loading or unloading.

Lack of roll-
 ing stock does
 not affect
 viewpoint.

Leasing of
 trackage not
 material.

No, I don't think my viewpoint would be different
 if the Stock Yard Company owned the locomotives,
 did the actual hauling and paid the usual rental
 which all the railroads pay, one to the other, for
 freight cars that are stopped or used over the car-
 112 rier's track. I would still feel that that was a trans-
 portation function and not a stockyard function as
 defined by the Act. I do not think that the fact that
 the railroads, as I state, operate these tracks for their
 own compensation or profit, has anything to do with
 the classification of the services.

ans.

Track No. 10 is 85 feet of track directly south of the southerly edge of the Armour property and directly north of the concrete roadway. I put that track under Class B facilities because it is the lead that connects with the Armour spur track.

Q. As a practical matter it is practically a frog, isn't it, that 85 feet would be almost designated as a frog, wouldn't it, in railroad operations?

3

A. Well, it is the portion of that track which is located on stockyard land. My understanding is that Armour's track begins at the property line and the Stock Yard Company Track No. 10 extends up to the property line where it connects with this Armour track.

Q. But it takes 85 feet of track to put it on the proper curve to take it from our track to the edge of our property line, and that is Track 10, isn't it?

A. That is Track 10.

Q. Now isn't the producer of livestock interested in the movement to a packer of livestock or the movement from a packing plant of the slaughtered product in your opinion?

A. No sir, I don't think that is a stockyard function at all and furthermore this track is not a livestock track. It goes into the Armour & Company's plant and I think they call it their coal track, not used for switching livestock.

(Witness continuing). No I would not say it is used only for coal, but I say it is not a livestock track. The principal meat shipments are loaded at Track 15 or 14. This track may be used for hides, oleo and other by-products and hauling them out of the packing plant area. I think that is the case, al-

Trans.

though I am not personally familiar with that. It may be used for those purposes, but I say those are not stockyard services in my opinion. I would consider it a stockyard facility to take track from its main line to the property line of the packer.

- 115 Track No. 11 is also a tail track, and with other pieces of track bearing a separate number, forms one continuous strip connecting with the D. & S. L. Railroad in the northerly end of the yard and serves the unloading docks at the sheep barn and hog barn and the C. & S. dock.

**Necessity for
yard company
to move
tracks.**

- Yes, in my examination of a good many of the contracts contained in my Volume I, such as the contract beginning on page 98, I found that they were
- 116 ~~caused by the necessity of the Stock Yard Company~~ to move the trackage in order either to change, expand or alter its facilities. In several places in my report I mention a third rail. That is the additional rail to permit narrow gauge cars to be operated over the tracks and the third rail system extends all the way through the yards from the C. & S. right-of-way at the south end to the hay barns and manure dump at the north end near Race Court. Yes, Track 26 is a cross-over track and necessary for any traffic coming on either Track 4 or Track 25 to get over to the other track. It is necessary in order for traffic moving
- 117 ~~ing in a northerly direction over the U. P. or C. & S.~~ and our Tracks Nos. 1 and 25, to reach Hay Barn No. 4, and I think it is so used. It is used for spotting hay cars. Whether the delivery of hay to the Stock yard is a stockyard facility or service depends on what delivery you mean. I would not consider the delivery
- 118 by railroad companies as stockyard service. The only distinction between a roadway composed of steel rails and a roadway composed of asphalt, macadam, dirt, in both instances the entire material of which and the cost of which has been owned and put in place by the

rans.

Stockyard Company, would be the physical difference, but neither of them would be commonly known as the stockyard.

MR. BOSWORTH: (continuing) Well do you mean to say that a roadway through the land on which actual roadways are situated is not stockyards property, not a stockyard facility?

A. I think there are certain roadways that are necessary and incidental to stockyards services that should be classified as a part of the stockyards.

Q. Now, what roads are they?

A. Well, certainly roadways that I have designated in my report and practically all of the roadways that I have described giving access to and from the stockyards from the public highways and other means of ingress and egress to the stockyards property.

Q. What is hauled over those roadways?

A. Well, there is hauled livestock, livestock trucked to the stockyards are hauled over those, some of those roadways. Others are used for getting around with the stockyards trucks and some of them are used by the packers and the general public.

Q. And for hay and haulage of hay?

A. Yes, sir.

Q. For the cleaning of the yards?

A. Yes, sir.

Q. And you say they connect with public highways outside the stockyard area?

A. Some of them do, yes, sir.

Trans.

Q. Well, don't they all, as a matter of fact, connect either by means of cross-overs or otherwise with public highways?

A. Yes, I think practically all of them have access either directly or indirectly to some public highway.

Q. In other words, there isn't any blind roadway that starts at one blind stop and ends at one blind stop, in other words, that you can't get onto, is there?

A. Well there might be one that I have reference to that goes into the,—goes into a public street into the north end of what is known as the River Dock that ends there. That is, the southern end of that roadway does not connect with any public highway.

Q. No, but the northern does.

A. The northern does, yes, sir.

Q. And that is like a tail track, isn't it?

A. Yes sir, it is a means of ingress and egress to that portion of the yards and to other industries located in that area.

Q. And those, in your opinion, are stockyard facilities, aren't they?

A. Yes, sir.

(Witness continuing). The difference between that situation and the railroad trackage located on stockyard land is that that difference has been created by the stockyard itself. The stockyard has made deals with the railroad companies for operating
121 those facilities. Roadways are operated for the most part by the Stock Yard Company. Yes, it is correct that I testified that the fact that the Stock Yard Company had leased its rails on its own land, built

Leasing of
trackage not
material.

Trans.

by it for the joint use and operation of the carriers in the stockyards area, did not affect my decision one way or the other, and that it would make no difference whether or not the Stock Yard Company owned the locomotives and actually operated the trackage itself. My answer, if I remember it right, was that
 122 that was not the controlling factor but that the function was what governed my opinion. It indicates that the Stock Yard Company is not operating those facilities, that it has turned that function over to the railroads and that it becomes a transportation function. My understanding is that the revenue goes to whatever may be left; that is, if there is a net operating income, that it would accrue to the Stock Yard Company.

123 With regard to Unit No. 133, I have not observed that the Yardmaster's office is used by employees of the Stock Yard Company in spotting hay cars and livestock cars and as a shelter house during inclement weather. It seems to me that spotting cars is a transportation service. No, I wouldn't say that employees of the industry desiring freight cars would not pay any attention to where they go or as to what
 124 they do. Yes, they direct the spotting. No, it would not change my opinion that the employees used the Yardmaster's office to direct where cars should be unloaded, but if they used it for shelter house to any extent, it might be considered as used and useful to that extent. Yes, I testified and it was my recommendation that the various loading and unloading docks, loading and unloading chutes and the chute
 125 alleys described on page 137 of my report should be excluded from the rate base as transportation facilities or depot facilities because they are the facilities that the railroad companies need and use for loading and unloading and receiving and delivering freight and livestock at the stockyards. I don't know the term "depot facility" has ever been used before in

**Yardmaster's
office.**

**Unloading
chutes and
docks.**

Trans.

d

connection with stockyards. There is no reason in the world why the Stock Yard Company should not own its depot facilities but I do not think it comes within the definition of a stockyard or a stockyard facility. Yes, these facilities have something to do with the holding, delivery, shipment, marketing and handling of livestock in commerce.

Q. I am asking you if these unloading chutes, these docks, these so-called chute alleys, I should say as you call them chute alleys, are not services or facilities located at the Denver Union Stock Yard in Denver, Colorado?

A. Well, the word "at" is confusing, I do not know just what you mean.

Q. Well, now, answer my question. Are they not located at the Denver Union Stockyard on ground owned by the Denver Union Stock Yard Company?

A. They are located on ground owned by the Denver Stock Yard Company but they are located just outside the stockyards.

Q. Now, just a moment, they are located on ground owned by the Denver Union Stock Yard Company?

A. Principally, yes.

Q. Entirely, aren't they?

A. With one or two exceptions. Oh, you are talking about the unloading—

Q. Docks?

A. Docks, yes they are.

Q. And the unloading chutes?

A. Yes, sir.

Trans.

Q. And the unloading pens?

A. Yes, sir.

Q. And the so-called chute alleys?

A. Yes, sir.

Q. Now, don't those items of property have something to do with the marketing, holding, delivery, shipment and handling of livestock in commerce?

A. Yes, sir, in commerce but not in my opinion at the stockyards.

- 129 (Witness continuing). The chute alley is the alley adjacent to the chute pens in which the livestock is unloaded and from which it is loaded. It is a means of egress and ingress to and from loading and unloading facilities and the only means by which livestock can be received and delivered by the railroad company. The chute alleys are not used solely for that purpose but are used for other purposes, but it is the primary use, in my judgment, except for which they probably would not have been built. I have classified other alleys as "general alleys". They are numbered 43 on Government Exhibit No. 8. They are built for marketing functions out at the stockyards to get to the pens and cross-alleys and other alleys in that area. Yes, the chute alleys so-called are in some instances used like a two-way road, they are two parallel alleys, one serving the loading and unloading pens and then a parallel alley serving the stockyard pens parallel to the chute
- 130 alleys. On Government Exhibit No. 8 the brown line covers a dotted line which represents the fences between the chute alleys and the stockyard alley, the latter serving the stockyard pens and the former serving the unloading chute pens. Yes, the fence is broken all along with gates.

Chute alleys.

Trans.

131. I have not observed it as a practice that the Stock Yard Company uses the unloading chutes repeatedly for yarding off the scales. In fact I never saw any livestock yarded off the scales directly into these chute pens.

I draw the distinction between the truck loading and unloading docks, chutes, pens and these so-called Burlington, C. & S. and U. P. Docks, chute ~~allers~~, chute pens, on the fact that the railroad loading and unloading facilities, in my opinion, are required and necessary in completing the transportation function, which is a railroad service, while there is no such requirement as indicated in Section 15, paragraph 5, of the Interstate Commerce Act with respect to loading and unloading facilities for truck shipments.

- 132 Yes, my viewpoint is based upon my interpretation of Section 15, paragraph 5 of the Transportation Act in this respect, and the further fact that the Stock Yard Company receives compensation from the railroad for loading and unloading cars, uses its own employees in so doing. It is my understanding that
- 133 there is no special charge made for unloading trucks. Yes, the tariff carries a higher charge on truck shipments, but that is the yardage charge. I don't know just why they do it, but I would say that is because of the fact that the yard company has to furnish these loading and unloading facilities and because there are more numerous lots to be yarded and it requires more service. Yes, the work of loading and unloading truck shipments at the loading docks is one factor in the additional charge and the work of handling smaller consignments.

Q. Well, that enters into the measure of compensation, doesn't it, rather than the reason for the compensation, that is, the smaller consignment, that is a measure, in other words, Mr.

Christensen, just so the record may be clear, so

Viewpoint
based on
construction
of Sec. 15 (5)
of Transporta-
tion Act.

Trans.

we may be talking along the same basis, if your consignments come in small lots, as they do in a truck, and there is more work, you might be entitled to a higher rate of compensation than you would if they came in large shipments, by the fact of compensation as such is for the loading and unloading service, isn't it?

MR. MILES: Does the witness know? If he does not, I suggest that—I object to it.

Objection overruled.

(Witness continuing). Government Exhibit No. 2, being the tariff at the Denver yards, shows that for use of facilities a charge in addition to the regular yardage charges will be assessed against all livestock received at these yards by vehicles other than rail and a charge of 5c per head on cattle, 2c on 135 calves, 2c on hogs and 2c on sheep. Yes, there are chute pens which are comparable with the railroad chute pens except that they are much smaller and the yarding pens for truck shipments are more numerous and smaller than those used for rail shipments.

Yes, I am familiar with plural-owner shipments by rail and that there may be as many as 10 or 15 owners of the livestock in a single car and that the number of head of livestock of each such owner may be comparable to the number that arrives by truck. In some instances each owner's livestock is put in a separate pen, but not always. I think 137 there are more small pens being constructed than formerly because of the fact that there are more community shipments, or more plural-owner shipments than formerly.

The witness was asked whether the yard company or the commission men made any distinction as to the pen in which the rail shipments are yarded and

Trans.

a pen in which a truck shipment is yarded, and witness replied: The pens are interchangeable and can be used in almost any way that the stockyard or the commission men may see fit, but the shipments that come by rail are ordinarily first unloaded in carlot pens, whereas the truck shipments are unloaded in smaller pens adjacent to the truck dock. I think
 138 that in the truck section where most of the truck shipments are handled, the pens are smaller than they are in the so-called carlot section.

139 The sections that I have designated as purchasers' temporary holding pens and service alleys are designated p-40 within a circle. The trader section is designated by the number within the circle preceded by the letter "T", and the commission section is designated the same way preceded by the letter "C". All the sections preceded by the letter "U" are the utility pens, which are not used principally by the other sections already referred to. Such pens are not assigned or designated for the principal uses of the commission men or purchasers of livestock. No, I don't mean by the assignment of pens that the Stock Yard Company makes any ironclad assignment to anyone or that anyone has anything in the nature of a lease. It is part of the program of management of
 140 the yards for the utilization and orderly conduct of the Yard Company business. Yes, the Yard Company can change these assignments at any time it sees fit and apparently does so.

Pens are assigned in orderly conduct of the business of the Yards.

141 Commencing with page 148 I used the term "initial yarding" and by that I mean the yarding and handling of livestock consigned to the stockyards for sale while it remains the property of the consignor or the shipper. Re-yarding is the yarding and handling of livestock after it has been sold and weighed and passed into the custody of the purchaser. There are two separate and distinct services in my opinion,

Trans.

one which is necessary and required by the shipper or the vendor and the other which is necessary and required by the purchaser of livestock. Yes, I would think it would constitute re-yarding if, after the sale, the livestock was put back in the same pens from which they came to the scale.

Q. Well, as a matter of fact, Mr. Christensen, isn't the whole thing a part of the one purpose for which the producer sends his cattle or his livestock to Denver Union Stockyards?

A. Well, the purpose of the shipper in sending his livestock to the market is to sell, and for that service naturally the facilities that would be required for selling and weighing and handling and sorting his livestock preparatory to sale would be, in my opinion, initial yarding facilities.

Patrons
interested in
buying outlet.

Q. And you, then, seek to draw a line at the instant of sale, is that it?

A. Yes sir, at the sale, at the time the sale and delivery and the transfer of ownership takes place.

(Witness continuing). Yes, in my opinion the shipper is interested in preventing anything which might hamper sales. I have always drawn a line at the scale. I do not recall whether I drew such a line in the 1930 hearing. I do not recall just what I said

Shipper
interested in
preventing
hampering of
sales.

on the subject at that time. Yes, the pens to which livestock are moved after sale, whether temporary holding pens or directly the chute pens, or any other pen, they are in the operation of a stockyard. No, I couldn't say that it is true, to my knowledge, that the point of delivery of livestock is the holding pens to which it is moved after the scale. Livestock is sold in the ordinary course of business and delivery is effected when it is drawn off the scale. No, it doesn't

Trans.

alter my opinion that much of the livestock in Denver is sold freight paid to the Missouri River. No, I am not making a recommendation that there be a charge upon the purchaser for these so-called re-yarding services. I don't know that such a charge would hinder sales. It might establish a different method of arriving at market prices. I cannot answer as to whether or not, in the long run, such a charge on the purchaser would result in a lesser price to the shipper to offset whatever charge was paid by the purchaser.

- 146 No, I have never purchased livestock. My opinion is that the purchaser is going to use every argument he can to reduce the price he has to pay for the livestock he purchases. That is the normal business practice. Yes, I think it would be the purpose of the purchaser to deduct the increased cost of the purchase from the purchase price so that his net would not be affected.

- Yes, the temporary pens are used by the Stock Yard Company to some extent to clear the scale pens and the scales. There are some small truck pens which are part of the scale operating unit; then there
- 147 are other pens that are used in holding livestock for greater periods of time, some quite temporary and others for some considerable length of time. Yes, it is true that all this constitutes an orderly operation of the yard, and I will admit that the small catch pens at the scales are inadequate to handle the mass of livestock that goes over the scales in a day's time.

- No, I don't know just the exact time they start
- 148 loading the trains. The market opens between 8 and 9 o'clock, I have forgotten the exact hour. Yes, I think 8 o'clock is the time. Weighing commences shortly after the market opens. No, the catch pens would not be suitable for holding the entire movement of livestock over any scale from 9 o'clock in the morning until the loading up of the "hot shot" train.

Trans.

When I spoke in my report of packer pens I did not mean that they are leased to the packers but are only assigned to them in the orderly operation of the yard by the Yard Company. Packer pens are usually used for holding livestock purchased by the packer for local slaughter and they are, in many instances, held in those pens for some considerable time longer than if the livestock were moving out of the yards. Live- stock held for slaughter is held longer than that sold for immediate shipment. Very few hogs are sold for immediate shipment. When I said that livestock was held "indefinitely" in the purchaser section I intended to mean without any restriction as to time. I wouldn't say that they are all moved out within 24 hours. I have no specific case to refer to. The temporary pens are purely temporary places where livestock is put pending the purchaser's directions and removal from the yards. The charge is made on a shipment basis and by that I mean that all the charges are kept track of on a shipment, and when it is removed, then the charges are collected. The yardage or marketing charge is not a charge for the use of the physical facilities only. It also includes the services of yarding the livestock, driving, feeding and watering and holding the livestock. I don't recall whether the term is included in the tariff, but if it is I presume it is a charge for the privilege of the market.

Assignment of pens.

Purchaser may hold livestock in pens indefinitely.

Marketing charge.

Charge includes privilege of the market.

Q. I hand you tariff No. 3, which is the tariff now in force at the yard and ask you to read down there where it says something about privileges of the market.

A. "The schedule of charges for the privilege of the market service, feed, and so forth, rules and regulations."

Trans.

Q. All right, in other words, isn't this marketing charge for the privileges of the market in part at least?

A. That is what the schedule states. I don't know just what is meant by "privilege of the market."

Q. And how long have you been around the stockyards?

A. I have been around the Denver Stockyards for 15 or 16 years.

Charge
assessed only
on sale.

155 (Witness continuing). Yes it is true at Denver and at most stockyards that no charges are made whatever for a shipment which does not sell on the market. I am familiar with the privilege which is called "trying the market." No charge is made at Denver for that privilege. Yes, I stated in my report that all yard or marketing charges except as noted are collected from the persons who cause the live-

Producer
sends cattle
for sale.

156 are the sole beneficiaries. I don't know that anybody ever told me that theory unless it was the stockyard officials and I won't say that they have said he was the only beneficiary, but it has been stated to me that the service is furnished to the shipper and that he is the one for whom all the stockyard services are furnished. Yes, it is customary for the vendor of a house to pay the real estate man's commission. Yes, the producer of livestock, the shipper, sends the livestock here for sale.

Q. As in the case of a house, isn't it right that he should pay the charges incident to that sale, including the privilege of the market?

A. Well, including the privilege to him to come to the market and the services and facilities that he requires.

Trans.

- 157 The driving of cattle and calves from the unloading facilities, placing them in commission pens and effecting delivery to consignee or their representatives, is only part of the service rendered by the Stock Yard Company. That is the part I call the yarding service. It is not the total of services rendered by any means.
- 158 In Volume I of my report at page 158 I speak of *Yard trader.*
yard traders who buy and sell for their own account. I think they buy some cattle and make a charge based
- 159 on so much a head or so much a car, but I think in most cases they take title to the livestock that they buy and sell and in some cases they know about where they are going to place it and they collect a charge of so much a head instead of taking that in the form of a profit. That is my impression and I do not know that it is true that they operate also as order buyers. They are registered as dealers while order buyers are
- 161 registered as market agencies, because they buy for someone else on a commission basis, whereas the dealer buys for his own account or for the account of his employer. I do not think a dealer would be permitted to act as an order buyer or authorized to act as an order buyer under the Packers and Stockyards Act unless he registers as a market agency.
- 162 I have no knowledge whether they act as order buyers or not. Yes, it is to the interest of the shipper to have buyers on the market and it is to the interest of the shipper to have dealers on the market. *Yard traders beneficial.*
- When yard traders sell livestock through commission men the full yardage is collected at Denver as shown by Government Exhibit No. 2. The charge is made for exactly the same use of the market as is made by the original shipper. *Plants pay full charge.*
- 163 On page 170 of Volume I of my report, which is *General alleys and service alleys.*
~~Government Exhibit 5~~, I distinguished between general alleys and service alleys. General alleys are used for general traffic in the stockyards for the accomo-

Trans.

dation of hay wagons, manure wagons and general traffic, while the service alleys are used principally for reaching the pens adjacent to which they are located. The pen gates, in most instances, open on the service alleys. No, I do not think this designation is made by the Stock Yard Company itself. Under my distinction the only general alleys are the long north and south alleys shown on Government Exhibit 8 marked with a figure "43" in a circle. A commission man will have pens on both sides of the service alley so he can sort back and forth. The general alleys are not used in that way. Most of the service alleys extend east and west. Yes, hay wagons and manure wagons go up and down these lateral alleys and livestock is driven up and down the north and south alleys. The north and south alleys are longer because the Denver yards lie north and south. They would be comparable to a through avenue and a street. The general alleys are used for through traffic and not so much for livestock because they are not used in servicing the pens. They are used for driving the livestock from one division to another and for other purposes. Yes, the hay wagons come down the main alley to service the pens and go into the side alley to service them.

With reference to my statement on page 187, it is my understanding that most shipments of sheep consigned to a commission man regularly doing business on the second floor of the sheep barn are moved directly to his allotment of pens and that the ground floor pens in the sheep barn are used for overflow or general utility purposes, under various operating conditions. Yes, they have more uses than the second floor pens because I don't think there are any great number of general utility pens on the second floor, if any. I don't know personally of any sales having been consummated on the ground floor. Yes, I think it is true that when the commission pens are crowded

Trans.

sheep are sold in these ground floor pens. Yes, those sections are crowded during the peak season. Yes, 170 there are well marked peak seasons in sheep, the greatest receipts at the Denver Stockyards usually come in October. These sheep that come in the Fall come from the ranges and mountain passes. I don't know just when the peak season is on the northern feedlot sheep. **Peak seasons.**

Yes, there is a well defined peak in cattle receipts which occurs in October and November and maybe somewhat later than that in the Fall of the year. January is the peak with regard to hogs. Yes, the peak load of cattle and sheep overlap to a certain extent. **Peak seasons.**

The sidewalk of which I speak on page 209 of my report is not a public sidewalk out on Lafayette Street but is a sidewalk on stockyards land by which people approach the area shown on Government Exhibit 9. It was my judgment that it was appurtenant to the club building. It is used by persons having business in the area shown on Government Exhibit 9, but it leads directly to the stairway leading up to the second floor of the club building and also directly into the area shown on Government Exhibit 9. 173

On page 210 of my report I assign the stock show use as a secondary use of the horse and mule division (Witness was asked to check the agreement to see if the time allotted to stockshow use was not two weeks). Whatever the agreement states is the time is correct and during the balance of that yearly period the property is used by the horse and mule division. I incorporated in my volume the leases between the Stock Yard Company and the Colorado Horse & Mule Company, although those leases have expired by lapse of time. It is my understanding that they have not been renewed. 174

Trans.

MR. BOSWORTH: You are correct, Mr. Christensen, these leases have expired, renewal having been refused, and the Colorado Horse & Mule Company is occupying the premises at will or by sufferance.

Trader scale.

177 All scales are for the general use of the business of the stockyard but a particular scale mentioned on page 241 of my report is one of the scales that is principally used in connection with weighing traders' cattle because it is adjacent to the section in which the traders operate. Many of the traders during the peak season are moved north of the 2600 alley, but I don't think the regular traders are. During the light season I don't think their allotments are changed but they operate in the commission section to avoid driving the livestock down to the so-called

178 trader section. Yes, I believe it is true that assignments to dealers are only made from September to January each year and that the assignments are made in September. This scale may be used in some instances for weighing in commission cattle but not to the same extent. Yes, it is used like every other scales weighing any livestock that comes there for weighing. The same thing is true of Scale No. 6 on page 245 of my report, ~~only it is further south and is used to a greater extent when a trader's business is heavy and during the light season it is closed for a considerable portion of the year.~~

Packer scale.

180 Yes, it is my understanding that Scale No. 3 is operated by a packer and not operated by the Stock Yard Company. I notice that the scale is not in actual use. The north scale, which is the larger scale, is not used for weighing market hogs but is used by the packer for weighing hogs in that section of the yard which is now used by the packers as holding pens.

182 I put in the contract on page 253 and the following pages for the purpose of showing the terms and

Trans.

conditions under which the water system therein referred to was put in. I don't know whether they have expired and been fully cancelled but I presume the documents will show. No, I don't know that there is no such Company as the Denver Union Water Company and I didn't know that it had gone out of business fifteen years ago. I don't know whether the agreement referred to on pages 260, 261, 263, has been cancelled or not; all I know is what appears in the document itself. The same is true of the contract commencing on page 264. **Water system.**

On page 295 I speak of a general sewer system. No, **Sewer system.** I don't believe the sewer outlets are shown on Government Exhibit 8. No, I could not indicate where they are. I might approximate their location. I know that there is one sewer line originating in the cattle division that passes through the railroad right-of-way and through Units 149 and possibly 156. Then there is another line further south and possibly one more outlet over west of Swift & Company. That is all I can remember at the present time except the sewer from the horse and mule division which passes over on the east side of the C. B. & Q. tracks, entering into the 18 inch city sewer, located partly on the stock yard land. This empties into the main sewer leading to the Platte River. The contract on page 295, referring to an agreement in 1904 by which the Ward Hotel was given some sort of a sewer line right, I do not think that contract is in force. I think the Ward Hotel is connected with the City sewer and to the old sewer line has been abandoned.

In referring to the Armour viaduct on page 329 and the Swift & Co. viaduct on page 330, I did not mean to imply these are Armour and Swift properties and not Stock Yard property. The only reason that I designated them as ~~Armour~~ and Swift viaducts

Trans.

was because they lead towards their plants. They also serve cattle pens in between.

187 The easement for the Union Pacific sewer does not interfere with the surface use of the ground in any way. It could only interfere in case they were repairing the sewer. Yes, the Stock Yard Company under the agreement maintain and hold dominion and control over the tracks.

188 On page 379 I speak of a roadway as the Swift & Company roadway. It is simply designated that way to identify that particular part of a general roadway which now extends from 46th Avenue on the south to the County road on the north. I have shown it in three sections but they all constitute one complete roadway through the property. One of those sections I designated as the Armour roadway, but that is merely a designation. They are used as an approach and exit to stockyards property and also to the packing plants adjacent thereto and to some extent for just ordinary general traffic from Franklin Street to 46th Avenue. No, I think it has not been dedicated to public use. It is a private roadway and there are signs at both ends which indicate a private road. I designate one of the sections of this road Unit 123 as

189 a joint roadway leased from the Union Pacific. The Swift and Armour roadways, page 191, were built first and there was no roadway through the property until this joint roadway which made a connecting link joined them together, and made a through roadway. I don't mean to imply that it is a joint roadway, for the use of Armour & Co. and Swift & Co. The roadways are in agreement, and they indicate that it was provided at least for the use of Armour. They wanted another way to get out except going north. They wanted to get one south, and this property was leased from the Union Pacific Railway Company, being part of their right-of-way, and some shifting of the tracks was necessary in

Trans.

order to make this roadway, which is located principally on the Union Pacific Right-of-way and extends over some six feet or more on Swift & Co.'s property, where it adjoins that property. Yes the roadway mentioned on page 393 of my report is a private roadway used to get to cars standing on Track 28. If they were unloading cars with hay or freight spotted on that track they would use this roadway. Yes all of the roadways are used for stockyard purposes in stockyard operation and in connection with stockyard property.

- 193
- 194 Yes, the principal purpose of shippers in sending livestock to the Denver market is the sale, and they are accordingly interested in the fact of sale and having a market. Yes, I think there is a distinction between the market and the market place. The market place is a facility while the market is a transaction which constitutes trading and marketing livestock at the stockyards. They are bound up very closely together. You could not have the one without the other. All the men who are at the stockyards
- 195 in their own business, profession or official duties, deal with the livestock industry or are people engaged in the livestock industry. Yes, the railroads and the offices in the Exchange Building are concerned with the transportation of livestock,—that is the principal part of their business, and the serum companies are concerned with the prevention of disease and maintain a stock of disinfectants there for disinfecting cars and pens.
- Shipper interested in sales.
- All tenants engaged in livestock industry.

- No, you don't ordinarily speak of the Laramie yards as the Laramie market, nor of the Pueblo yards as the Pueblo market. They are regarded as transit yards,—feed yards. Yes there is a distinction between those places and Denver, and that distinction lies in the market. Yes, it is a considerable convenience to the shipper or the purchaser to have these railroad offices at the stockyards where their trans-
- R. R. and telegraph offices convenient to shipper.

Trans.

portation questions can be settled. It is a particular convenience to the livestock industry to have these telegraph offices there. Yes, the bulk of the mail handled in and out of the postoffice is in connection with livestock and in connection with mail received 197 and sent by people engaged in the livestock industry.

Q. And if these market agencies and dealers were not at Denver and operating, as you define it, on the market place, the shipper would not send his livestock to Denver except as a transit yard like Pueblo, would he?

A. Well, if there was no market there he would not send them there for sale.

Q. And without getting into the question of the number of individuals or firms, you cannot have a market without the market agencies and dealers there, can you?

A. They could have a market there by having the shippers sell their own livestock to the independent purchaser, for instance, the packer buyers might meet the producers direct, but that would hardly be practical.

Q. That is somewhat theoretical, isn't it, because that never has been worked out in practice and never has been done, has it?

A. Not to any great extent.

207 No, there is nothing in the Transportation Act which permits the Interstate Commerce Commission to compel the Stock Yard Company to build loading docks or to give land or provide facilities for loading and unloading livestock. It might require the railroads to build them. Yes, the presence of those unloading docks at the stockyards and the presence of the railroad tracks on your land is equally of benefit to the producer and the presence of the loading docks 208 and trackage is also a benefit to the producer. Yes

Market could not exist without traders, dealers, and other market agencies.

I. C. C. can't compel Yard Co. to build tracks and docks.

Docks and trackage benefit producers.

Trans.

they do handle livestock in commerce.

When the club building so-called was constructed there probably was use for it. I don't remember and I don't know just when it was constructed. I was not here at the time. No, I don't take the position that it is not proper to have in the rate base as used and useful property, property which is devoted to the care and comfort of people regularly employed at the stockyards or of the patrons of the yards. Yes, at the present time the second floor of that building has an occupancy connected with the livestock industry and whatever income is derived from the rental of the stores, helps the carrying cost of that building.

Club building
once needed.

(Then witness was requested to consider both Government Exhibit 5 and Government Exhibit 12, in the discussion of the stock show property).

I don't know when the stock show started and how long it has been running, but it has been for a great many years. Now none of the facilities, in my opinion, are excessive or not needed for the show. I think the show has been a benefit to the livestock industry as a whole. It has had a tendency to improve the herds, has been a valuable educational unit in the livestock industry and that benefit spreads out pretty well throughout the industry. Yes, during the show livestock is sold in the sales pavilion but in certain other buildings I have not seen it sold. The sales pavilion is not the same as the stadium. Yes, individual animals are frequently exhibited at the stadium before going to the sales pavilion, and some of the livestock that is sold during the show week is handled in the yards proper and sold in another auction facility in the cattle division. A great deal of livestock is sent to the yards during the show time for sale. Yes, I think a good deal of grade stuff, so-called, is also sent here at that time as well as pure-bred breeding stock. Denver has a very extensive auction sale of feeder cattle. In point of dollars there

Stock show.

Facilities not
excessive.

Show has
benefited in-
dustry as a
whole.

Livestock
sold in yards
show week in
large volume.

Large feeder
cattle auction.

Trans.

is a large volume of livestock sold at the Denver show. There is also a large market for bulls.

Stadium
necessary to
house show.

212 The show generally starts the second Saturday in January and lasts until the following Saturday. Yes, the stadium is necessary properly to house and handle the show. It is here the public assembles.

Rodeo does
not affect
decision.

213 The animals are not stabled in the stadium, but all of the barns on both side of Lafayette Street, as well as those on so-called Zone 9, are occupied. Yes, it does affect my viewpoint that a rodeo or public show is held in the stadium for which a charge is made to those who see it, for the reason that a rodeo or a show of that kind is not a stockyard service for which rates are charged. In my opinion, the stadium is not used and useful property, and the fact that it may derive income from the rodeo, does not in itself make any difference. My theory has always been that if a piece of property is not used and useful in the rendition of stockyard services and it is excluded for that reason,
214 that the expense and income should also be treated in like manner.

Q. Well, what I am getting at, of course, is this, that if this additional income did not come in to help carry the cost of the show, the Stock Yard Company from one source or another, would have to pay out additional money, would it not?

A. Well, if it saw fit to take up that slack and take care of a deficit, if there was any, it would do so.

Additional
income does
not affect
decision.

215 (Witness continuing). There has been a deficit almost every year for the last ten or fifteen years in connection with the Stock Show. I do not know of any athletic contests having been held in the stadium since time of my testimony in the 1930 hearing. No, if there had been contests held and income derived therefrom during the light season,

Trans.

I don't think that would make any difference in my mind. All additional revenue that you can obtain simply helps the carrying charges on the property.

Yes, I know a stockyards company spends money for advertisements. From my own viewpoint I feel that possibly some classes of advertising would be all right, such as newspaper advertising to the effect
216 that they are conducting a stockyards.

Q. And one of the best advertisements, as the saying is, is a satisfied customer, isn't it? Show as an advertising medium.

A. Well, that is a common saying.

Q. And if you have a good show and demonstrate a wide outlet, it is as good advertising as you can have at a stockyards, isn't it?

A. No, I don't believe that that class of advertising would come within what I would consider a modest or reasonable advertising expense.

Q. Is that merely due to the size or the nature of it?

A. The nature of it.

Q. Not the amount expended?

A. Well, no, not the amount of expense, but both taken together.

(Witness continuing). I know that buyers come to the stock show from various States. Yes, I think the feeders bought at the Denver show and shown at other shows in other sections of the country, have a tendency to advertise the breeding section from which
218 they come. Yes, I know that the distribution is very wide at Denver. Yes, I think feeders go from Denver as far East as Ohio. Wide distribution of livestock.

Yes, I know Dr. John R. Mohler. He is Chief of the United States Bureau of Animal Industry, Department of Agriculture, and one of my superiors.

219 Q. I am reading to you, Mr. Christensen, a

Trans.

Dr. Mohler's
statement.

paragraph from an article written by Dr. John R. Mohler, which was published in June, 1930, in the Breeder's Gazette. As a matter of fact, I will read you, so the context will be clear, perhaps two or three paragraphs:

"In the industrial world a firm which expects to prosper and produce dividends does not use obsolete methods and equipment. Junking old machinery and remodeling old factories takes both courage and capital. But in the end such a course is the wisest and most economical.

"How is the livestock industry meeting this same situation? Is there a readiness to admit the obsolescence of types of livestock that no longer meet production needs and market requirements? Is there a willingness to discard former method for newer ones that are better? Is the livestock industry as progressive as it might be? There is evident need also for a closer relation between our standards for breeding stock and the utility value of the product. If, as now appears to be the case, quality in meat is an inherited character, we may wisely develop, within the breeds, strains of cattle, sheep and swine that will produce *meat of assured quality*. In any case the industry may wisely cull out, at once, the types that are plainly unfit in the light of present breeding and market standards.

"Naturally we look to the great stock shows as the supreme authority on animal conformation. Hence every means of stimulating entries by the best breeders adds to the value of such shows. And, conversely, any condition that discourages the most able breeders from showing their animals tends to place leadership in less worthy hands. Hence we should strive to encourage, throughout the industry, confidence in the competence and fairness of judging." "I am

220

Trans.

confident that the entire complexion of the live-stock industry in a given area can be changed by energetic work of the proper kind."

Do you agree with those statements, Mr. Christensen?

MR. MILES: Objected to, Mr. Examiner on the ground that the witness has not been qualified to express his opinion on these matters and has denied his qualifications.

MR. BOSWORTH: Mr. Examiner, he has testified with regard to the stock show property, so-called, and has, in the light of Mr. Miles' objection, presumed to designate it as not used and useful in stockyards operation. Certainly a query to him as to whether or not the stock show is a great instrumentality to which you must look for improvement of the herds, is a proper question, in view of his testimony in this case on the subject of used and useful property.

221 MR. MILES: His testimony was to the effect that these various utilities were not used and useful, although that is not the language, in the conduct of the stockyard operations, for which rates and charges were made and which rates and charges are now under investigation.

MR. BOSWORTH: Well, that necessarily involves, Mr. Examiner, the question of whether or not this stock show is a benefit to the industry as a whole.

MR. MILES: There is no rate or charge made for the conduct of this stock show set out in their tariff or rates and charges.

THE EXAMINER: What you say may be true, Mr. Bosworth, as the Examiner sees it, but as I understand it, the witness is not qualified as an expert along the lines of breeding and didn't testify anything concerning that on direct examination, so I sustain the objection.

Trans.

MR. BOSWORTH: Note an exception. (Continuing). Well, Mr. Christensen, you have heard the portion that I have read which I will read again:

"Naturally we look to the great stock shows as the supreme authority on animal conformation. Hence every means of stimulating entries by the best breeders adds to the value of such shows."

In your opinion, does it add to the value of the show to the industry as a whole?

MR. MILES: Same objection.

THE EXAMINER: Read the question.

(Whereupon the question was read).

MR. MILES: Now the Captain has, with his usual skill, injected into the record the inadmissable. Why prolong it?

THE EXAMINER: Objection sustained.

The Breeder's Gazette containing an article by Dr. John R. Mohler, published June, 1930, was marked for identification as respondent's Exhibit 2 and was offered and received in evidence over the objection of the Government as to its materiality.

224 (Witness continuing). Referring to my testimony yesterday concerning the loading and unloading docks, chute alleys, chute pens, I testified that the bulk of the loading occurs after noon at the yards and before the "Hot Shot" leaves in the afternoon, and then pretty well on into the night until all the trains pull out. The bulk of the unloading is generally done during the night and early morning, the same men do the loading and unloading at the stock
225 yards and do other jobs around the yards. The cleaning gang, for instance, frequently assists in the load-

Loading after-
noon, unload-
ing at night.

Trans.

ing during the peak season and some time the scale gang assists after the scale is closed.

I have spoken of a river easement under Class B facilities. It is not my understanding that the Stock Yard Company has parted with its right to occupy that 50 foot strip. I don't think there is anything in the deed that would prevent the Stock Yard Company from using that property for any purpose that did not interfere with the purpose for which it was
 226 deeded to the City and County. The deeds speak for themselves. My recollection is that the Stock Yard Company may still use that property for any purpose that does not interfere with the ingress or egress or the purposes stated in the deeds. **River easement.**

Q. As a matter of fact the Stock Yard Company is using that 50 foot strip now, is it not, on the river side and as a roadway?

A. It is possible for vehicles to pass around the west side of the railroad tracks nearest the river, and they may pass over this particular—pass over this strip of land, this 50 foot strip, although I haven't made any of the measurements myself, and I don't know whether they do or do not really use this strip.

(Witness continuing). The strip is not 50 feet wide at the top. I don't know whether the 50 foot measures from the toe of the slope in the river. That is an engineering problem. I have seen wagons on the portion of the roadway leading into the north end of the river dock but I don't remember that. I have ever seen any vehicles pass around the west side. I have walked around there a great many times. There are some automobile tracks and vehicle tracks, but
 227 not a clearly defined roadway. I have spent about three-fourths of my time in my Denver office. Yes I do know that trucks do run on that area west of

Trans.

the railroad track clear around by the sheep barns in connection with freight traffic. There are vehicle tracks all the way around the west side of the railroad tracks passing over the stockyards property and in order to get out at the south they have to pass over a strip of land owned by Swift & Company. There would be no means of passing all the way around over stockyards land.

Official channel has been benefit to yards.

Put lands above flood level.

Yes, I think it has been a benefit to the stockyards property to have this official channel established. I imagine it has been so constructed as to prevent any flooding in that section of the property, and I don't think the flood waters ever reach the property since the river was improved in that section.

229 Yes, the bulk of the tracts designated No. 149, 156 and 162 was received by the Stock Yard Company in the exchange of property due to the establishment of the official channel. Yes, the old natural channel of the Platte River swung down almost to the railroad track in Unit 149. Yes, those tracts of land are filling up very rapidly, some of them are almost leveled up, and in Tracts 156 and 149 the part nearest the river bed was filled with gravel for the most part obtained in the construction of the official channel. The river was pushed further west. I don't know whether the Stock Yard Company was under the necessity of extending its sewer lines into the river, because I don't know the location and did not make an investigation of that.

Sewer system.

231 Yes, sewers in stockyard operation are used for more than just carrying off refuse matter. They are used for draining purposes; rain and snow goes out through the sewer outlet the same as any other drainage or surface water. I do not know whether every pen is graded to a central manhole, but the purpose is to provide suitable drainage for the stockyard. Yes, I know that the cattle yard is paved; the drain-

Trans.

age seems to be quite efficient. In a general way I know the sewer outlets must cross the so-called Easement No. 162 and the Units numbered 149 and 156, because I know there are sewers there and they must have an outlet, but the exact location I am not prepared to indicate. No, my units do not in any manner conform to the Government Land Appraiser's zones. My numbers do not have any connection with any other designation which may be used by the Government or by the Stock Yard Company. The lines on Government Exhibit 8, I think, originated to indicate separate times of purchase.

Drainage efficient.

No, the Stock Yard Company could not operate without an effective system of drainage and sewerage, could not operate very well; it would lead to an unsanitary condition, and I do not think the producer would willingly send his livestock to that market for sale. The better the facilities the more inclined he would be to patronize the market.

Patron wants up-to-date facilities.

My Unit 148 is the same thing as Government Land Appraiser's Zone 5. It lies west of the river and west of the river easement and is shown on Government Exhibit 10. The easement in that particular case is deeded for the purpose of a roadway or street, and only extends as far as 49th Avenue. No, I have no idea of the cost of a bridge across the river. The feasibility would be the same as a bridge across any other river of that width, which I imagine is about 200 feet with a 50 foot easement on each side. Yes, it is true that since the Stock Yard Company has the right to use the bridge for driving livestock and to have the easement vacated at any time it utilizes Unit 148, the barrier remains the river alone. Yes, I think the river isolates that tract from a practical standpoint, because in my opinion, it would be impractical to operate a portion of the stockyards segregated across the river so far from the other portions of the

The question of a bridge across the river.

Trans.

yard, and because it is separated from the other portions by a network of railroad tracks, and its distance and separation from the market, the trading center, would divide the operating operations, so that it would be, in my opinion, impractical to operate any stockyard facility. The two big packing houses are in between the cattle division and this tract. Yes, the tract is directly west of the sheep barn, across the railroad track, the river easement and the river channel. No, the railroad tracks in the center of the yards have not isolated the west from the east portion because there is a sub-way and a viaduct. I don't think the bridge would unify the yards to a great extent.

Pen 4212.

- 237 Washington Street on the west edge of this tract is an improved street. No, I have corrected my report and stated that I did not consider Pen 4212 as
- 240 manure storage. I think that that pen was designed as a cattle pen and is a very essential cattle pen for the reason stated, namely, for handling large droves of cows and calves and for handling shipments that may be shipped through, going to pasture. Yes, these large pens and the entire north end of the cattle pen area were effectively used during the Government cattle buying program.

Parking space permissible.

- 246 With the change in transportation conditions I think there are certain areas that would be permissible to include in the stockyards facilities as areas for parking of automobiles. The parking space in front of the Exchange Building is probably adequate for the Stock Yard Company and the patrons who come to deal with the stockyard and market agencies and dealers. Yes, the tract west of the stadium on the Colorado & Eastern right-of-way is quite well filled with trucks and automobiles during certain days of the week by people who are principally those who have business at the yards with the commission

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men and livestock. Yes, I know that during certain days of the week, particularly during the peak season cars are parked clear up into Lafayette Street and on 47th Avenue and that the people walk down through the subway to get to the yards. I think that the trucks that bring livestock to the market always find room to park near the stockyards in some permissible place on the public street or on the so-called Colorado & Eastern right-of-way. No, I am not familiar with the ordinance under which a line of trucks is not permitted to stop on the public highway. I regard much of the trucking as an outside transportation matter because much of the livestock is carried by independent truckers who do not own the livestock and receive their compensation from the owner for whom they are hauling and I think that there would be no obligation to provide them with trucking space at the market. Yes, I think the Stock Yard Company would have the right to own property that would protect its business. Yes, I think it is true that patrons of the yard, both shippers and buyers, are coming to the yards by automobile in increasing numbers and that truck shipments are increasing.

Truck parking.**Shippers and buyers come by automobile, increasingly.**

Yes, gravel is essential in stockyard operation. Yes, I know that the Secretary allowed Unit 152 as a gravel pit in the 1930 hearing and that I am now recommending that it be excluded. It was my opinion then, and it is now, that it is not essential or needed or used and useful as a gravel pit for stockyard operation. A part was sold for a filling station but the physical condition of the balance remains as it was at the time of the 1930 hearing.

Scale No. 7 in the sheep barn is used to some extent in the same manner as other scales. I do not think that my report on page 250 says that it is used exclusively by the packers. The scale records show that during the year 1934 46 drafts, 6,916 head of

Packer scale.

Trans.

sheep were weighed on that scale and that it was open three days. Yes, that weighing was by the Stock Yard Company. My information is that additional livestock is weighed on that scale by the packers. I don't know of any additional weighing by the Stock Yard Company. I don't know whether the scale tickets on Scale No. 7 are consolidated with Scale No. 8 upstairs in the sheep barn. My information was taken from the scale records showing the weighing on each scale. No, there is nothing improper in having the scale records of an overflow scale go in with the records of Scale No. 8, but I would not have had that information.

- 253 No, I don't mean that because a scale or any other facility in the yard is not used constantly that it is not a stockyard facility nor that it should be eliminated because of that.

Feed lots.

- I speak of commercial feed lots in the plural sense because they were built at different times and in two sections, one lying east of the railroad track and the other west of the track. Yes, both
- 254 are located in Zone 3. At the present time all the land is leased but I don't know what the arrangement is between Swift & Company who owns the buildings on the property east of the railroad track.
- 256 Yes, you usually find feed lots near a stockyard, particularly if it is a central market. They are patronized by owners of livestock who desire to feed and fatten them preparatory for market. The producer frequently finds that a little more maturing will increase his price. A great many livestock are brought into the stockyards that are suitable for further feeding and finishing. Yes, at a stockyard in the range country a good many two-way animals come in, which means fat enough to slaughter but animals which would benefit from further feeding. Yes, a well matured fat animal draws a

Trans.

- 257 better price than less matured animals, and if there was no need for a feed lot there would be no patronage. The fact that it is patronized by producers indicates that it is essential to the industry. The
- 258 reason I say that in my opinion it is improper for the Stock Yard Company to utilize land for feed lot purposes is because the livestock that is held on that property is not for sale, they are not on the market; they may have been at the market and taken out of the stockyard and come back later on, but during the period that they are on feed they are not, in my opinion, at the stockyard as a public market place. No, I would not say that because livestock stops at a feed lot the flow of commerce has ceased, but during the time that it is on the feed lot it is not at the market place. The feed lot is the eddy of the stream but the livestock remains in the flow of commerce from the point of origin to the point of destination. No,
- 259 assuming that the Stockyards will need land for expansion, and that the land is being held solely for that purpose, I would not say there was anything improper in the yard company utilizing that land in the meantime.
- 266 In Government Exhibit 12 I have listed as Unit 103 "General Water System" under partly used and useful facilities. The first paragraph refers to the original mains that were laid, or perhaps I should say to the system; I have not checked the number of pipes or the number of branches or mains; I am referring to the pipes that were laid under the original agreement with Swift & Company and Armour & Company inserted at pages 254 to 266, inclusive of Government Exhibit 5. No, I have no knowledge as to whether those agreements are in effect or are void and have been cancelled except what appears in these copies. Yes, the first agreement on page 256, dated in 1906,

Use of land pending expansion of facilities is proper.

Water system.

Trans.

says that it shall be in effect for ten years. It is my understanding that the water plant is municipally owned but I do not know whether the Denver Union Water Company is in existence or not. The agreement of February 6, 1907, is an amendment relating only to leakages and repairs and the reading of meters. It has nothing to do with the amount of water.

268

Q. Do you know whether or not at the time an enlargement of the packing plants which are now the Swift and Armour plants took place and demands were made by that Company for an adequate supply of water without which they would not increase their plants, do you think that the producer was interested in this situation sufficiently to have part of the cost thrown on him?

A. No, sir.

Q. You do not think so?

A. No, sir.

Q. In other words, you do not believe that the producer is interested in the movement out of meat or the production of meat?

A. Yes, he is interested in that, but it would not be fair to collect from him the cost of building packing plants or increasing this water supply.

Q. Would it not be fair to him to do it if that was a necessary thing in order to build up a market outlet?

Government's objection on the ground that question asked for a conclusion of law was overruled.

Market
essential to
producer.

(Witness continuing). The question is based
269 upon the assumption that it was necessary to build
up a market outlet. If that was true why perhaps

Trans.

it would be a benefit to the purchaser, but I cannot see that the market outlet is in any way directly connected with the improvement of a packing house. Whether the improvements mean the buying of more livestock depends upon their nature.

270

Q. I think I used the phrase, if I did not I certainly intended to do so, increasing the capacity of the packing plant. Now, increasing the capacity means that they are more active buyers on that market, does it not, generally speaking?

A. Anything that creates a greater buying power on the market, I think, is beneficial to the producer.

Shippers benefited by anything which increases buying power.

(Witness continuing). This particular unit (Unit 103) is the old 12 inch main which tacks on to the city main at the corner of 46th and Lafayette Street. It was built jointly to serve the stockyards and the Swift and Armour plants. No, I don't know where that main goes. I could not locate it except that I noticed a few hydrants here and there. Yes, it serves the pen triangle south of the Exchange Building and by a lateral I understand it serves the Exchange Building but I have not checked these lines. This is an engineering function.

Water system.

271 Yes, I think that even if it should develop that it serves in connection with other mains the entire stockyards property and that it taps a runoff to serve Swift & Company and Armour & Company, still that part that extends beyond the stockyard facilities would not be used and useful in the rendition of stockyard services. Yes, I think a fair way of allocating the physical property as it stands today would be on a basis of the amount of pipe that goes beyond the boundary line of the stockyards property. I think it should be borne in mind that the entire main, all the way from the City

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main, is serving the packers as well as the Stock Yard Company, and because of that joint use I have described, the facility is partly used and use-
 272 ful property. The part that is beyond the stock-yards area is not used and useful. I could not say that if it is a 12 inch pipe that 4 inches is used and useful and the rest of it is not used and useful. Yes, water is a stockyard service. The question of whether a service rendered the packers is a stockyard service depends upon whether it meets the definition in the Act. Any service the Stock Yard Company performs outside the stockyard would certainly not be a stockyard service.

I only inserted these documents to show the division of cost. No, if the yard company was successful in getting Swift and Armour to pay a bigger proportion than the actual amount of main that they receive, I wouldn't have any objection.
 275 So long as the yard company does not make any agreement which affects its services and which does not embody an unjust charge to the patrons, it might make whatever contract it saw fit.

I don't know whether or not there is a 16 inch main which practically parallels this 12 inch main. I know there is another main that comes in towards the northern end of the yard which is tied into this system and steps up the pressure. No, those mains are not regarded as partly used and useful. It is my understanding they are entirely on stockyard
 276 property. I have seen a great many fire hydrants but I can't remember the locations. Yes, I think the yards are pretty well supplied with water and hydrants throughout the yards and around the sheep and hog divisions.

I don't remember whether I was away when the K. & B. Packing plant caught on fire, or when the H. & M. Packing plant recently caught fire. I

Trans-

277 don't know how the Denver Fire Department got water to fight those fires. No, I don't want the Secretary to understand my recommendation with regard to Unit 103 to apply to the entire water system. **Blacksmith shop.**

In speaking of the blacksmith shop (Unit 119) and the fact that it is used by the Stock Yard Company and the general public, I mean by the general public anyone who might patronize the blacksmith shop. Yes, I have seen members of the general public patronize the shop within the last two or three years. No, I don't know whose horses were shod there. Yes, I know that those horses were horses which the commission men used in the
 278 alleys, and also the stockyards horses are shod there. Comparatively speaking I don't know whether it is true that the bulk of the work in the blacksmith shop now has more to do with body and automobile truck repair than with shoeing horses. I know that the yard company operates the shop and that they have all, or a great deal of their blacksmithing done at this shop. I don't know whether the yard company makes the hinges for the pen gates there or not. I can't say how often I have inspected it but I
 279 have passed the open door frequently. No, I didn't know that a new punching equipment to complete
 280 the hinges had been installed a year or so ago. Yes, I believe the branding irons are made there. Yes, in the operation of a yard such as that of The Denver Union Stock Yard Company, a blacksmith shop is necessary. It is the outside service to the public that would not be necessary or incidental to the rendition of stockyard services. Yes, whatever income is derived from this incidental service goes
 281 into the general revenues of the company and leaves less to be spread in rates.

Trans.

A good deal of the same thing is true with respect to the garage and auto repair shop, Units 131 and 132.

Western Weighing & Inspection Bureau office excluded.

Shipper interested in freight.

- 283 As to the chute house, I am recommending exclusion of the Western Weighing & Inspection Bureau office because it performs service for the railroad companies and not for the Stock Yard Company. It is connected with the transportation service. Yes, a patron of this market is interested in the freight charge he has to pay and the Bureau determines what freight charges are due on a shipment. I think they could operate without an office in the stockyards, but it would have to be quickly accessible at least to the loading and unloading chutes where they perform most of their services. Yes, I think it would be advantageous for it to be quickly accessible to the market agencies and dealers on account of the account sales and the purchases. I think it is a very logical place for them to have their office, but I can't say any other
- 284 system would be detrimental. It is my understanding that the Bureau receives copies of all scale tickets. Yes, I think the Bureau checks the shipments for transit. I understand that it is their function to check the shipments to see if the shipment comes within the transit privilege. Yes, that privilege is a benefit to the shipper.

Sale of gasoline to public not objectionable

No there is no objection to the fact that there is some income from the sale of gasoline to the general public by the filling station, Unit 133. Yes, in my opinion, I think it would be advantageous and proper for the Stock Yard Company to have gasoline storage tanks and facilities for servicing its own equipment and as a convenience to the shipper who comes to the market also, but the fact that sales of gasoline and revenue are made and derived from sale to the general public does, in my

Trans.

opinion, prevent it from being used and useful.
 286 Although the income may assist in carrying the
 cost and lightening the burden on the rate payer,
 it is not a question of revenue but is a question
 of use and investment in so much equipment that
 probably would not be necessary for servicing a
 stockyard company's equipment alone. Yes, there
 are only two pumps, one with cheap gasoline and
 287 one with a better grade. I don't believe it would
 be necessary to have as much equipment and ground
 devoted to that purpose if it were for the Stock
 Yard Company alone. I couldn't name how much
 less equipment or land would be necessary. I don't
 think it is necessary to have a passageway on both
 sides of the pumps. I don't think it would slow up
 288 operations very much if the trucks had to get in
 a line so that a truck wanting water and air would
 have to wait until the truck taking gasoline got
 out of the way.

No, I can't segregate any portion of the building
 or equipment of the blacksmith shop that would
 not be needed for stockyards use exclusively.

Blacksmith
shop neces-
sary.

When I say in Government Exhibit 7 that facil-
 ities are adequate for the functions for which they
 are designed I mean that the cattle pens, sheep
 and hog barns are adequately good, but I would
 not say that at all times they are adequate from
 the standpoint of size and amount to handle all
 cattle, sheep and hogs efficiently. There may have
 been a single day or hour or some short space of
 time when the yards were full but as a practical
 proposition I consider them adequate, both in size,
 construction and condition for the ordinary flow
 289 of livestock through the stockyards. Yes, a con-
 tinuous heavy run would have a tendency to cause
 the yards to fill up unless they were moved out very
 290 promptly. Yes, it has been my experience that when

Pens not ade-
quate at peak
times.

Pens adequate
in size, con-
struction and
condition.

Trans.

Carryover
is large at
peak seasons.

Sheep barn
inadequate
during peak
season.

Hog
division.

these heavy runs occur there is more carryover stuff than there is normally at other seasons of the year. Yes, although I have classified the triangle south of the Exchange Building as within the cattle area, it is used extensively for sheep during the heavy sheep movements. I think the sheep barn is entirely occupied at certain times and this triangle has also been occupied. Yes, it is generally understood that a covered inclosure is always more appropriate for sheep, although cattle and hog facilities may be used alternately. I think the producer's attitude is that he would rather have his sheep in a covered pen if they have to be held for any great length of time or during inclement weather. No, I don't think he wants to take any chance that might be detrimental to his interests.

292 The ground floor of the sheep barn constitutes the principal sales section of the hog division. Part of it is set aside and used for that exclusively. Yes, I mean that irrespective of Hog Barns 2, 3, 4 and
293 5, hogs are yarded and sold in the sheep barn regularly. Yes, the five-year moving average shown on pages 3 and 4 has trended upward since 1925;
294 1934 was the biggest sheep year in the history of the stockyards. 1933 was the largest hog year, and October, 1934, was the largest cattle month.

296 I stated in Government Exhibit 7 that Government purchases did not represent a corresponding reduction in the potential supply since a large number of this class of livestock would be shipped under normal conditions and many would die under
297 ordinary conditions. Yes, I think it is true as to all markets that if, on January 1, 1935, there was 16% less of all species on the farm, it is reasonable to assume that the reduction of all species will be 16%, although as I have stated there might be livestock imported into this particular trade territory

Trans.

that would offset some of the loss and make a further reduction at some other market. Yes, the 298 figures shown on page 4 of my tables of 490,825 head of Government purchases represent the abnormal movement in 1934. No, my tables do not show any abnormal movement due to the drouth 299 apart from the Government program. My opinion is that it would be proper for a stockyards company to hold land for expansion when it is apparent that the property would be absolutely needed and utilized, but I think it should only come into the rate base when it is actually needed and put in use. Yes, from a stockholder's viewpoint I think it would be a different proposition altogether and that the management might be considered derelict in its duty if it waited until it needed the land to acquire it. No, I don't think the management would be derelict in its duty to the producer to wait, because the present users of the stockyards are not providing for facilities for future generations. I cannot say that I think it is more advantageous for 300 the producer to stand the carrying charges of property eminently necessary but not presently used than to have a higher cost of the property included in the rate base if the yard company had waited 304 to acquire the property. I think the producer would have to take the consequences when he required services. No, I don't think the right of eminent domain affects the situation in my mind. From the stockyards stockholders' attitude, the fact that the yard company may not have the power of eminent domain might have some bearing, but as to the stock yard services to the shippers and the users of the stockyards for which rates are now prescribed or under investigation, I would say that it would have no influence on my decision. I think it is up to the stockholders whether or not they want to provide for the future but I don't feel that

Expansion
land.

Lack of
power of
eminent
domain.

Trans.

any such property should be included in the rate base until it is used and useful and actually brought into service and the shipper is able to derive some benefit from it.

Truck
shipments
increased.

307 I do not know whether or not economic conditions existing in this country since 1930 have affected the consummation of the Stock Yard Company's plans to utilize certain tracts. I have not made any study of economic conditions or the advisability or reasons why certain improvements have not been made. As to whether or not there have been any shifts in the nature and type of receipts at Denver since 1930, there has been a decrease in the rail shipments and an increase in the truck shipments. Also on cattle there was quite a definite decline in the receipts from 1926 to 1933, with an increase of rail shipments from 1933 to 1934. The receipts of cattle by truck have increased during that period. I think the increase in cattle is due to the Government purchases in 1934. Yes, I show a constantly increasing five-year moving average on all species since 1930.

311 Yes, I suggest an enlargement of the hog facilities in a certain manner. As to whether or not it is a management function as to how the enlargement shall take place, I presume the management would decide what they would do under certain circumstances.

Q. You conceive it the duty of the Department of Agriculture to outline the method of expansion?

MR. MILES: Now, Mr. Examiner, aren't we trespassing upon fields of law?

MR. BOSWORTH: No, we are not.

MR. MILES: I must disagree with you, Captain, I am sorry.

Trans.

MR. BOSWORTH: Well, Mr. Examiner, our position is this with regard to it, and we want it clearly understood in the record and understood throughout that if Mr. Christensen is making the suggestion out of the kindness of his heart, that is one thing, but if he is appearing here as a Government official suggesting to the management of the Denver Union Stock Yard how needed enlargements of its property shall take place, we insist that neither he nor the Department of Agriculture has any such function or power or right under the Packers and Stockyards Act of 1921

MR. MILES: If that be true, it is because of the law. You are now asking this witness his opinion on a matter of law.

THE EXAMINER: As the Examiner understands it, Mr. Christensen has been testifying in this matter, giving his own opinion and not been attempting to speak for the Department of Agriculture. If Mr. Christensen can elaborate on what he stated and as to what his views are, he may answer under that theory.

MR. BOSWORTH: Now, there is one other thing I would like to get settled right here, Mr. Examiner. Do we understand that Mr. Christensen is not testifying here as a member of the Department of Agriculture staff?

MR. MILES: Emphatically, he is. He is giving his opinion.

THE EXAMINER: He is a member of the Department of Agriculture staff, but he is testifying as an expert, giving his own opinion in this matter, and as I understand it, he has not attempted to testify as to any views of the Secretary of Agriculture.

Trans.

(Witness continuing). I am not attempting to say what the Stock Yard Company shall do in the way of expansion or improvements. I am offering this to show how additional room could be acquired without extending the facilities over more land areas. It is my idea of how I would do it if I was
 314 operating the stockyards. It seems to me that it would be the logical thing to double-deck the hog facilities and the most economical thing that could be done to provide for the increased receipts if and when this expansion became necessary. No, I don't know that double-decking of the hog barns has been abandoned by the management of the stockyards. No, the suggestion contemplates the reallocation of the space that would be available in this reconstructed facility.
 315

No idea of cost of double decking.

No, I have never figured out the cost of double-decking. I have made no cost study and do not have any idea of the difference in cost between expanding the facilities onto the territory north of Race Court as against double-decking. Yes, taking the service into consideration, I will admit that it is to the advantage of the rate payer to have the expansion carried forward in the most economical manner, and I mean by "service" having the trading centers on each species so located that they can be handled advantageously alternately in adjacent facilities.

Loading and unloading facilities.

The loading and unloading facilities now known as the C. & S. Railroad Dock, including the chute alley and the alley west of the chute all would be approximately 50 feet wide. The alley is about 14 to 16 feet wide and therefore eliminating the alley adjoining the chute alley, the entire space devoted to the chute and chute alleys is around 34 to 36 feet wide out to the railroad track. A city street
 317 is from 50 to 60 feet wide. That area is rather

Trans.

congested at some times when the trucks are coming in with livestock to be unloaded at the truck unloading chutes. No, I don't think that my plan would tend to increase the congestion because it would widen the traffic artery. No, at the present time the truck unloading does not move through that area. I am advocating the removal of only that portion of the C. & S. Dock that extends as far north as the subway. No a 36 or 40 foot space is not sufficient for truck unloading, but my plan would create a through line instead of a stub as it now is. No, I don't think it would require the trucker to drive about two miles to get to the Exchange Building. If he didn't want to drive he could walk across the viaduct. Yes, that would mean he would have to leave his truck some place. No, he could not leave it at the unloading space without congestion. He would either have to provide his own parking space or utilize parking space furnished by the Stock Yard Company.

Alleys frequently congested.

On page 34 of my report I say that more complete utilization of marginal areas within Tract 1 would be satisfactory from the standpoint of the cattle division. Unit 158 is one such marginal area. This could be utilized to good advantage for additional cattle pens if and when needed. There is also a little strip on the west side of the yards, Unit 159, which is approximately 25 feet wide and 55 feet long. The balance of the strip is not over 10 feet wide. No, I don't think there are any pens in the stockyards regularly used for cattle, not including the catch pens around the scales, that are 10 feet in width. The normal sized pen in the cattle division is approximately 30 by 35 feet. No this strip would not even hold one pen of the size that the Stock Yard Company has found best suited to its use on this market.

Expansion land in Zone 2.

Trans.

With regard to Tract 158, the lower end has an extreme width of 25 feet between the Burlington right-of-way and Alley 43, and opens out into Alley 43 at the north end where the largest dimension of a cattle cut-out division is 112½ feet, approximately. Yes, truck-outs have increased at the Denver yards, and if the truck-out divisions were enlarged the expansion might be located on this tract adjacent to the present truck-out facilities. Yes, it is advantageous to the industry to have a cattle truck-out division with access to a paved road and to the main arteries out into the country.

Fire protection.

- 324 Yes, I know the Chicago fire in the stockyards recently was rather serious and stripped the cattle yards pretty completely, but I do not know whether or not since that time the underwriters are insisting that you maintain more than Alley 43 as an access to the north end of the property. I have not consulted with any of the underwriters.

Marginal strips of land.

- There are some other small marginal strips. One is down close to the Exchange Building extending from the south end of the Burlington dock, which is
- 325 simply a small passageway. It is indicated as Unit 157 and is approximately 5 feet in width, just a small passageway. I agree that it would not be suitable for additional pens. I think its best use is for a pedestrian way. No that is not available for the expansion of your cattle facilities. It is necessary for the stockyards men to use that passageway to get up to the unloading dock.

- 326 Well, Unit 118, being a strip along the east side of railroad track No. 28, which is now used as a roadway and for storing stockyards building material is not entirely utilized and could be used for expansion of the cattle division. It would take approximately 16 to 20 pens in a single row if the old material now piled on the tract were moved and

Tram.

stored at one end. Yes, I have observed the use
 327 of that tract the past year. Yes I know that on the
 south end of that tract, close to the carpenter shop,
 the Stock Yard Company manufactures its concrete
 posts for its pens, but in drying they are stored over
 only a small part of the southern end. Yes, the D.
 & S. L. and the Northwestern terminal comes in on
 Track No. 12 and connects with Track 4 and Track
 28 of the Stock Yard Company, but I have not been
 advised by anyone in the stockyard office that Tract
 118 is being held for unloading docks for the North-
 western terminal, but I drew my own conclusions
 328 from the location of the railroad track and the space
 allowed in there, that that property had been left
 there for a loading and unloading dock for rail ship-
 ments, but the particular railroad was not men-
 tioned.

Re-direct examination

The feed lots occupy the northerly portion of Zone
 3, which is designated as Tract No. 146 on Govern-
 329 ment Exhibit 8. They are operated by a lessee for
 feeding livestock for various people who buy live-
 stock or have livestock that they want to prepare
 for market. According to my information, the grain
 elevator and buildings, office buildings and pens and
 inclosures on the area lying east of the railroad
 track were built by Swift & Company and were given
 330 over to the present lessee. The balance of Zone 3
 331 is designated on Government Exhibit 8, as Unit 153.
 It is vacant land, mostly smooth; the northeast
 corner is elevated and has not been graded down.
 That is where the gravel deposit is located. Yes,
 gravel is being removed from that area currently.

The Western Weighing & Inspection Bureau is
 a railroad agency and its functions are to check the
 weights and the condition of the livestock to see
 that the railroad companies get proper revenue and

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ascertain the extent of injuries to livestock when
334 it is loaded or unloaded. It was set up for the
benefit of the carriers.

In 1934 there were received 708,988 hogs and 2,108,655 sheep, or a total of 3,817,721. A total of 765,417 cattle and calves were handled in 1934. The area of the hog and sheep division is only about one-fifth or one-sixth as large as the cattle area. The trend of the receipts of cattle during the past five years, exclusive of Government purchases in 1934, has been generally down.

No objection
to manure
sales.

No, the Government has no objection to the yard
343 company selling manure to the truck gardeners. I
think I testified that whatever income is derived
therefrom lightened the burden of the rate payers.
No there is no particular objection that the yard
company makes the haulage of the product avail-
able to the purchaser.

Peak load.

344 Yes, I think there is such a thing as property
being used and useful when it is only used at great
intervals and especially when other facilities especi-
345 ally for the service are available. I do not think a
stockyard company is required to provide for oc-
casional peak loads. I believe there is a practical
point beyond which a corporation should not be re-
quired to go to provide for some unusual and some
extreme condition. What I call a peak load would be
the maximum receipts that have ever been received.
Yes, I am basing my testimony upon a conception
of a peak load being an unusual situation. Yes,
I am familiar with the daily peak load in the elec-
trical industry; that is not unusual, it happens
daily, and in the street car industry there is a daily
346 peak load. Yes, in the livestock industry of Denver
there is a point within each year when you receive
the greatest amount of livestock during that year.
If you call that a peak load why, they occur annually

Trans.

and it might occur weekly and it might occur monthly. If you are talking about a peak point covering two or three months, that occurs every year at *Denver. It is equally well defined in the case of* sheep. The hog receipts are not so heavy and do
 347 not fluctuate as widely as cattle and sheep. No, I do not have in any of my tabulations and exhibits any statement of the receipts by months showing the lowest and the highest months in each year. Yes, I know that cattle fluctuate very widely in the Denver market, and so do sheep.

348 I don't see how the Western Weighing & Inspection Bureau benefits the producer any. The railroad companies are obligated and do carry on their own part of the work. They have this agency to check up for their own benefit.

Q. If you were a purchaser at this market and a patron from the standpoint of purchasing, and found that by virtue of the Western Weighing & Inspection Bureau your transportation cost was \$50 less per car due to the transit arrangement because that Western Weighing & Inspection Bureau could establish the identity of your shipment, would you not think that was a benefit to you as a patron of the market?

A. No, I don't feel so any more than the benefit that I would derive and be entitled to from the railroad companies in carrying out the orders of the Interstate Commerce and their schedule of rates and charges for transportation services. It occurs to me that the manner in which the railroad company carries out its obligations is not an additional benefit to the producers or the shippers of livestock.

(Witness excused).

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350 MR. JOHN A. ZELINSKI, a witness called by the Government, testified as follows:

I am the principal valuation engineer for the Packers and Stockyards Division of the Bureau of Animal Industry, and have been employed in that capacity since the middle of August, 1934. I reside in Washington, D. C. My duties are to take responsible charge of the preparation of valuation reports in connection with rate proceedings under the Packers and Stockyards Act. My valuation reports cover all kinds and classes of property, structural property and land in general.

Qualifications.

351 The witness then gave his qualifications, commencing from his graduation from Ohio State University with the degree of Civil Engineering. The witness further stated that he was supposed to have graduated with the class of 1912, but was forced by financial reasons to work for a couple of years prior to graduation, during which time he was Assistant County Engineer of Lake County, Ohio; after graduation he was employed for six months by a consulting engineer in sanitary engineering such as sewage and garbage reduction plants; thereafter he became Chief Draftsman for a proposed traction railroad, but that he never got beyond the blueprint stage on account of financial difficulties. He then entered general engineering practice, including municipal work, paving work, waterworks, and was City Engineer of Painesville, Ohio; he also looked after the construction in part of the Diamond Alkali Company plant at Fairport,
352 Ohio. In 1916 he left Painesville and entered the employ of the Interstate Commerce Commission as Junior Land Appraiser, leaving that service in 1917 to enter the army, but returned in 1919, leaving the service shortly thereafter to become Construction Engineer for the Diamond Alkali Company, where

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he stayed for a year in charge of construction of a general mill building suitable for a chemical plant and of a small switching railroad owned by the Company; in November, 1920, he returned to the work for the Interstate Commerce Commission, in the Land Appraisal Department, where he successively held all of the positions from Junior Land Appraiser to Assistant Supervisor of Land Appraisal. In January, 1928, he left the service of the Commission to become Assistant Director of Research for the National Association of Owners of Railroad and Public Utility Securities, in which capacity he appeared before the Commission in matters where the organization was interested, particularly in accounting and evaluation matters. In October, 1929, he resigned that position and opened up an office as a practitioner, consultant on railroad and utility regulation, and was so engaged until August of 1934, since which time he has been in his present position with the Department of Agriculture. While acting as a consultant he was employed by the Department of Agriculture, various railroads, and the Department of Justice.

(Witness continuing). I have appeared as witness in the valuation cases of the Omaha Union Stockyards, St. Joseph Stockyards, Sioux City Stockyards and I have made appraisals at Cleveland and Wichita, where there was no formal rate hearing. In all of those cases, except at Wichita, I appeared as a witness on land only. I also appraised the structural property at Wichita. In the present case I was in charge of the appraisal on both the land and structural property, but of course I did not do all of the details myself.

355 I first began to investigate the land values at the Denver stockyards sometime in November, 1934, at which time I received from the Bureau of Ani-

Method and
time spent
at Denver.

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mal Industry a transcript of the record of the prior hearing, with copies of Exhibits, etc. I also went to the Interstate Commerce Commission and obtained such information as it had on railroad valuations in Denver and obtained permission to get access to further records in Denver in charge of the Commission. I came to Denver about January 7th 356 and left about February 8th, 1935, and during that time I divided my activities between the land work and the supervision of the engineering and the inspection of the property incident to both phases of the work. (Land and structural property). I did not do actually *any* of the detail inventory work. That was done by a corps of engineers who consulted me daily. I spent about half of my time on each of these phases of the work. I then spent about a week in our field offices in Kansas City, arranging for the compilation and the pricing of the engineering report and made some arrangements for the preparation of map work and calculation of areas incident to the land appraisal. I then returned to Washington shortly after the middle of February, and for a period of three months devoted a large part of my time to bringing into one complete unified whole both the land and engineering appraisals.

**Zelinski's
elements of
land value.**

- 357 The elements going to make the land value, are the elements that a particular piece of property possesses that give it a certain serviceability incident to making a proper development on the site according to the particular neighborhood in which it is located, or according to the particular utility to which it might be devoted. The topography and 358 size and shape enters into the value, the location generally in respect to the highways and railroad trackage and also with respect to certain centers of value or development in the particular part of the city, if the property happens to be located in a city,

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the general nature of the surrounding development, the use to which the surrounding property is devoted, the improvements in the community, such as schools and churches, fire protection and matters of that kind, are elements of value. I think practically all of these elements apply to the value of the Denver stockyards property. This property is of course affected by the condition of the trackage, the conditions of the street accessibility, the condition of the available outlets for the disposal of sewage, the availability of water and paving, street car service and things of that kind, all of which I think I enumerate in the text of the land report which I prepared on this property.

"I made an inspection of the lands of the Company on foot. I first made one general inspection to familiarize myself with the actual lay of the land in so far as its street access and trackage and topography were concerned, and, of course, the use of the property itself and the use of the surrounding lands in the stockyards vicinity. I then proceeded to interview the Interstate Commerce Commission appraiser here whom I knew had assembled a large volume of data, sales information of property in the vicinity of the Stock Yard Company. This was partly the same information, partly supplemental information to that which I had abstracted from the record of the prior proceeding and after securing this data I, incidentally in connection with securing it, spotted the location of this data on a map which I had. I then proceeded again to go over the property and note the location of the data as far as its relation to the lands of the stockyards was concerned. I also noted in connection with prior proceedings that data had been gathered or referred to some distance from the stockyards location and to familiarize myself with the lands that were involved in those locations I made inspections of those lands

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as well in order that I might satisfy myself as to whether there was any influence to be had from those properties in determining the valuation of the Denver stockyards and also to get a better perspective of the general value situation in the northern part of Denver. Now, having inspected these sites that were in the sales data and supporting data, I again made further inspection of the stockyards property in connection with the inventory which we were making of the physical structures, familiarizing myself, of course, in greater detail with the roads and the location of the sewers, water, and such other elements and factors as I thought might have a bearing on the land valuation."

359 Yes, I prepared a written report of my investigation of land values and certain maps. I submitted the maps and had them checked as to areas by the stockyards engineers, so that there was an agreement as to what the areas of the respective zones were, and after discussion and tentative zoning with Mr. Shoemaker and Mr. Pexton, we were in agreement as to how the property should be zoned for the purpose of evaluation.

361 My first exhibit is a map on a 200-foot scale outlining the boundaries of the stockyards property and the limits of each of the zones into which the property has been divided, each zone being colored in distinctive color. This zone map was prepared by our engineers in Kansas City under my direction.

Govt. Ex.
20 offered
and received.

The map was marked Government Exhibit 20 and 361 was offered and received in evidence.

The next exhibit is a map prepared by me, using the prior exhibit as a base, and upon which there has been extended the subdivisions of property in the vicinity of the stockyards and south thereof, showing the streets and block numbers and each

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362 of the zones in the appraisal in a solid color. Also the location of supporting data which is referred to in the text of my report. Each of these supporting data is given a distinctive number corresponding with the number assigned to it in the land report.

The map was marked for identification Government Exhibit 21, and was offered and received in evidence. Govt. Ex. 21 received.

The zone map and zoning ordinance of the City of Denver was marked for identification as Government Exhibit 22, and was offered and received in evidence. Zoning Ordinance. Govt. Ex. 22 received.

363 (Witness continuing). My last exhibit is the text of the report itself. It shows the total value of the stockyards property as appraised by me in two places, in the report. The first is an unnumbered page preceding the report, headed "Summary of land appraisal, The Denver Union Stock Yard Company, Denver, Colorado." It is a tabulation by zones and also shows the total area and the total value. 364 The zone numbers correspond with the zone shown on the map. This appears again on page 18 of my report.

I valued the lands of the Stock Yard Company as naked, unimproved vacant lands, stripped of all improvements which we inventory in our engineering report. I considered the situation of adjoining property unchanged, with all buildings thereon in place. Lands valued as naked land.

366 (Witness continuing). I give a total acreage of 131.045 acres, and I included all the lands, not eliminating any of the lands that Mr. Christensen testified were, in his opinion, not used and useful. The total value as found by me is \$728,284.

Government counsel then asked the witness to read into the record his statement beginning with numbered page No. 1 of his report, as follows:

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367

METHOD OF APPRAISAL .

to

Method of
appraisal by
Govt. land
witness.

388 "In general the method used in appraising the lands of The Denver Union Stock Yard of Denver, Colorado, has been that laid down and approved by the Supreme Court of the United States in the Minnesota Rate Cases, which is a method of valuation applicable to the appraisal of public utility or quasi public utility properties. It has been the endeavor of the appraiser to base his values upon the values of similar adjacent and/or adjoining property.

"The properties most similar to the lands of The Denver Union Stock Yard Company are those lying east of Washington Street and north of 40th Avenue extending across the Burlington right-of-way to the Union Pacific right-of-way in the northerly portion of the City of Denver, and just south of the Adams County line.

"The industrial lands south of 40th Street and those manufacturing and wholesale lands extending into the business district of the City of Denver were deemed by the appraiser to be too remote to have any reflective influence upon the lands under appraisal. Sales of property in the general vicinity of the stockyards have been investigated and their locations are platted in a red color upon the land appraisal sales map which accompanies this report. These have been identified by numbers shown on the map which correspond to the numbering on the individual sales data attached hereto.

"In view of the scarcity of sales information during the last two years (the depressed business conditions have resulted in a stagnation of normal sales), this class of information has been listed over a period extending generally as far back as 1920, in order that normal conditions for the date of the

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appraisal might be approximated. Some of these sales are of little, if any, probative worth in determining industrial land values such as those in the area under appraisal, but they have aided the appraiser in getting a perspective of values for the North Denver area in which the stockyards are located."

I think at this point I might make this statement that locally the area generally is called East Denver, as Mr. Bosworth stated this morning.

"It is for this reason that while not weighing in the forming of a judgment on the actual unit values determined upon for this appraisal, they are listed for comparative purposes.

GENERAL DESCRIPTION OF THE LANDS UNDER APPRAISAL

"The lands of The Denver Union Stock Yard Company are located just inside the northerly corporate limits of the City of Denver and about three miles northeasterly of the center of the intensive business district of the City, which locally is considered to be between 15th and 17th Streets in one direction and between Champa and California Streets in the other.

General
description
of lands.

"The main body of the yards lies between the main line right-of-way of the Chicago, Burlington & Quincy Railroad on the easterly side and the channel of the South Platte River on the westerly side and extending from the Colorado & Southern right-of-way on the south to Race Court on the north. In addition there are a number of detached parcels south of the Colorado & Southern right-of-way and west of the Platte River and an important area located east of the Burlington right-of-way and north of 46th Avenue, which will be later described as the horse and mule division.

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"Within the confines of the general area first described the stockyards are bordered on the west by the packing house properties of Swift & Company and Armour & Company, and in part by the abandoned site of the Blayney-Murphy Company, which is now the property of the Cudahy Packing Company. Across the right-of-way of the Burlington on the east, and opposite the center of the main area, is located the plant of the Cudahy Packing Company, successor in title to the Blayney-Murphy Company. West of the South Platte River, opposite the main body of the yards, are also to be found the plants of the smaller packing companies known as the K. & B. Packing Company and the Capitol Packing Company. South of the Colorado & Southern and fronting 46th Avenue is the plant of the Pepper Packing Company, successor in title to the Western States Packing Company. In this area is also located the plant of the Union Rendering Company, which adjoins both the South Platte River and the Colorado & Southern Railway.

"North of Race Court and adjoining that thoroughfare is a portion of the stockyard area which is devoted to feed lot activities and across the Adams County line and north on Franklin Street are other small packing plants and feed lots. The area immediately adjoining the stockyards ownership on the north is the location of the Riverside Cemetery. A small area of stockyard property lies east of the Burlington right-of-way and the intervening County Road No. 83 and south and west of Race Court, which will be further described as Zone 10.

"East of this property are considerable areas of vacant level land which in turn reach almost to the industrial properties bordering the Union Pacific and Northwestern Terminal right-of-way. South of

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the Cudahy Packing Plant, heretofore mentioned, east of the horse and mule division, is a modest residential sub-division known locally as the town of Elyria. This is interspersed here and there with small retail stores, garages and the usual small business activity incident to a residential location.

"Immediately south of 46th Avenue and east of the Burlington right-of-way lie the Union Pacific Shops and grounds and an industrial development promoted by the Union Pacific Railroad, which includes such industries as the Purina Mills, the Colorado Animal By-Products Company, and minor industrial businesses, such as lumber companies, fuel yards, gasoline stations, etc. Further south lie scattered industrial developments covering such activities as feed mills and elevators, iron foundries, metal works and the like.

"West of the South Platte River beyond Washington Street there is also a modest residential development suitable for the housing of the various classes of employees needed to serve the stockyard and packing house industry and the miscellaneous manufacturing development in the general vicinity.

"Within the actively used portion of the yards the stockyards are directly connected with the packing plants by special stock driveways and viaducts, which are so placed as to avoid any interference with the vehicular traffic, reaching all of these establishments. The Cudahy Packing Company plant, above referred to, is likewise reached by means of an overhead viaduct traversing the pen areas and the tracks of the Burlington Railroad as well. Both the yards and the packing plants are served by the interconnected railway facilities of the several trunk line railroads which enter the city of Denver and the trackage facilities of the Stock Yard Company itself which are generally used by these railroads.

Trans.

Accessible to
highways.

"The lands of the Stock Yard Company are accessible to improved highways on their outlying boundaries and the interior access is furnished through roadways on the lands of the Stock Yard Company itself, or lands owned by the railroad companies which adjoin. The accessibility will be discussed further under the caption of 'Highways.'

Exchange
Building.

"The Exchange Building, which is a modern office building, is located in the southerly portion of the yards, about opposite 47th Avenue, and is reached by means of a subway continuation of that street from its intersection with Lafayette Street, which latter passes through the main portion of the horse and mule division. The stockyards car line of the Denver Tramway Company serves the yards and has its terminus near the intersection of Lafayette Street and 47th Avenue, the equivalent of one block from the Exchange Building, with the service adequate during ordinary business hours and frequent during the rush hours. This line connects in the business district with others where transfer is possible to all parts of the city.

Growth of
population.

"The City of Denver, Colorado, has a population approximating 300,000 people in its corporate limits and 350,000 in its metropolitan area. The growth of the city disclosed in its population, is evidenced by the following figures of the United States Bureau of the Census:

1900—133,859
1910—213,381
1920—256,491
1930—287,861

In addition the metropolitan area had a further population of 23,841 in 1920 and 42,900 in 1930. While the rate of growth has slowed perceptibly in the last fifteen years, Denver has generally shown

Trans.

a healthy and progressive expansion. Such a condition, of course, makes for improvement in land values in times of prosperity and has a tendency toward stability even in depressed periods such as we have recently experienced.

"Facilities are available in the City and in the vicinity of the stockyards district, as well as for all of the needful utilities, necessary to an industrial location. The labor supply is plentiful and various, and labor troubles offer no problems. Adequate housing, school and park facilities for this population are provided. While the City is not dependent upon one industry or upon one group of industries, the leading industry in the City in total volume is the foodproducts industry, particularly meat packing. The large percentage of home ownership by industrial workers is a stabilizing influence upon the labor conditions. Labor supply plentiful.

RAILROAD FACILITIES

"The Denver Union Stock Yard lands are served in part over railroad trackage owned by the Stock Yard Company itself, and in part by the trackage owned by the Chicago, Burlington & Quincy Railroad, the Union Pacific Railroad, the Colorado & Southern Railway, and the Northwestern Terminal Railway Company. These facilities are all interconnected and are available through interchange and switching to the other trunk line railroads which reach the City of Denver. These are the Atchison, Topeka & Santa Fe, the Chicago, Rock Island & Pacific, the Denver & Rio Grande Western and the Denver & Salt Lake Railroad, which leases the Northwestern Terminal Railway Company in Denver. B. B. facilities.

B. B. Trackage yard owned by Yard Co.

"The Stock Yard Company owns no rolling stock or equipment so that the switching services are per- Excellent trackage facilities.

Trans.

formed under a joint agreement by the railroad systems named above. Switching rates are modest and on competitive traffic, they are absorbed by the line-haul railroads. This trackage provides excellent service advantages for the site and, with the transit privileges provided for in the railroad tariffs, the location is favored with a rate advantage as well.

**Dotsero
Cut-off is
important
improvement.**

"Lately the completion of the Dotsero Cut-off has improved the railroad facilities of the Denver area. In conjunction with the Moffat Tunnel this new line reduces the distance between Denver and Salt Lake City about one hundred and seventy-five miles and shortens the time approximately eight hours over the Denver and Rio Grande Western. This has brought about certain rate reductions between Denver and Western Colorado and enables the Denver market to reach additional traffic as well.

**Transit
privileges
at Denver.**

"While there is a perennial attempt by the Missouri River markets to secure similar transit privileges as those available at Denver, up to the time of the writing of this report these efforts have not been successful, although it appears that they might shortly prevail. Nevertheless, this rate feature has proved to be a distinct advantage to the Denver location up to the present time."

Right there I might add that I have since been informed by Mr. Pexton of the Stock Yard Company that the transit privileges will probably be accorded to the Missouri River markets about July 15th; that he understands that the new tariff will be filed on the 15th of June and will go into effect in about thirty days.

**Date of
valuation.**

Q. While you are stopped right there will you tell us as to what date was this valuation?

A. As of January 1, 1935.

Trans.

(Witness continuing). These railroads provide excellent transportation facilities for a very large area of range country tributary to the City of Denver, where livestock is produced, that is, livestock is produced in the ranch country and not in the City of Denver, and to a farming area where it is finished for the market. In addition they are arteries for distributing livestock for stocking and feeding purposes to the widespread farms, ranches and feed lots accessible to Denver. The transit facilities also enable the ready movement of the stock at favorable rates to eastern and western packers in the consuming centers. While the switching services are performed by the railroads under the joint agreement, the loading and unloading of livestock is handled by the Stock Yard Company under a per car arrangement with the railroads. The Stock Yard Company, however, furnishes the necessary docks and chute pens incident to the performing of this service.

HIGHWAY FACILITIES

"The Denver Union Stock Yard district is well located with respect to improved vehicular highways insofar as its outside boundaries are concerned. 46th Avenue in the southern limits of the area is an improved paved highway carrying the east and west traffic and connecting with Washington Avenue west of the yards and with the stockyard roadway crossing what will later be described as Zone 6 to reach the improved roadway serving the Swift & Company and Armour & Company packing plants, as well as the main yard area through the center of this development. East of the Burlington Railroad right-of-way 46th Avenue connects with Brighton Boulevard and York Avenue, important north and south arteries on which traffic moves from the main portion of the City of Denver, the first of which

Highway
facilities.

Trans.

provides a connection from Downing Street by way of 38th Street as well. Brighton Boulevard connects with the County road No. 83 near the northeasterly portion of the yards and furnishes an excellent outlet for vehicular traffic to the north.

"Traffic to the north end of the yards is also ~~routed in considerable volume by way of~~ Race Street and Race Court, the latter of which passes under County road No. 83 and the Burlington right-of-way by means of a subway which eliminates the danger of railroad and highway accidents. Race Court also furnishes a means of connection with Franklin Street at the north tip of the yard, which is an outlet into the Adams County suburban and farming development. The Livestock Exchange Building area is reached, as heretofore stated, by means of a subway under the Burlington right-of-way from the intersection of 47th Avenue and Lafayette Street. It is also reached by means of a roadway in part on the Colorado & Southern and Union Pacific joint right-of-way, and in part upon the northwesterly side of the Burlington right-of-way. This latter roadway also connects with the road heretofore described as passing through the center of the main development.

"These streets and highways are of great advantage to the stockyard location in providing ingress and egress to the patrons of the yards whose livestock is moving by way of trucks and to all those having business in the yard area who travel by means of privately owned automobiles.

TOPOGRAPHY AND LAY OF THE LAND

"The main area of the Denver Union Stock Yard ~~lands lies on a gradual slope from the Burlington right-of-way bordering it on the easterly side, falling off to the bank of the South Platte River, which~~

Topography
of land.

Trans.

borders the main area on the westerly side. The main portion of the cattle division, which is long and relatively narrow, is virtually level, the rise being most marked on the easterly side where the alleys slope up markedly to the chute pens and Burlington Railroad dock. I might state here that while I call that the Burlington Railroad dock it is the dock owned by the Stock Yard Company. I just referred to it as the Burlington Railroad dock for the purpose of identification. Somewhat lower lie the sheep and hog divisions which have, to a considerable extent, been placed on filled lands which formerly abutted the low bank of the South Platte River.

"South of Swift & Company the area has been recently filled in and marked here and there by minor depressions resulting from the settlement of the fill. The lowest portion of the main area lies north of Armour & Company's plant and in what was formerly an old bed of the South Platte River, which has been filled in part, but is not up to the grade of the general level of the yard area.

"Within the last few years, with the straightening Flood and widening of the South Platte River channel, protection. there has been constructed a levee or embankment of considerable extent which has been rip-rapped with loose stone to prevent the washing of the embankment. This improvement in the channel has been attended by filling portions of the yard area with the dredged material and in general offers adequate protection against the flood waters of the river. As the improvement has not been continued in to Adams County, there remains under the highway bridge crossing of Franklin Street and the railroad bridge of the Northwestern Terminal Railway Company a much smaller opening for the passage of water than that provided for by the newly im-

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proved channel. This might prove a serious handicap in the event of high flood waters, as the volume of water which could pass through the new channel would meet a severe restriction in the openings under these two bridges.

"I might say that since I came here I have been out at that location and find that the recent high waters of the South Platte have resulted in a washing out of a part of the highway bridge. The highway bridge has a wider opening than the Northwestern Terminal Railroad bridge but it was in front of the drift and I have an idea that with the restriction of water passing through the railroad bridge that it had to take the brunt of the force of the stream and that is what caused the washout on the highway bridge."

Q. Where is the highway bridge located that you first referred to?

A. That highway bridge is located on Franklin Street at the north tip of the yards just north of Race Court.

(Witness continuing). The lands lying north of Race Court rise quite markedly to the north and east and are highest in the gravel bank area at the northeast corner of the stockyard ownership. Lands lying west of the South Platte River are reasonably level, but lie some four or five feet below the river embankment, which borders it on the easterly boundary. Lands south of the Colorado & Southern in what will be referred to in this report as Zone 6, lie from three to twelve feet below the railroad embankments and are at present in the process of being filled in part by the City in its use of them as a dump.

"The lands in Zone 7, which lie south of 46th Avenue between the South Platte River and the

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Burlington right-of-way, occupy what in effect is a miniature bowl surrounded on two sides by the embankments of the river and railroad. Of the lands lying east of the Burlington right-of-way, those in what will be referred to as Zone 10 are an old gravel pit, virtually all cut up by excavation, the general level of which was originally at the grade of County highway No. 83 and Race Street.

"The horse and mule division in the area east of the Burlington right-of-way and north of 46th Avenue and the Colorado & Southern right-of-way lies topographically higher than the main body of the yards and at grade with 46th Avenue and Lafayette Street, the latter of which divides this division into two parts.

"From the preceding description it will be readily seen that all of these lands are accessible to easy drainage to the South Platte River, while at the same time offering no serious impediment to the movement of livestock and traffic because there are no pronounced grades in any of the roadways or alleyways. **Drainage.**

BUILDING AND ZONING RESTRICTIONS

"The lands of The Denver Union Stock Yard Company lie within the areas zoned as "B" Industrial District. These are shown on the accompanying zoning map of the City of Denver, which is filed in the pamphlet containing the building zone ordinance with revisions in the latter to January 1, 1935. This zoning ordinance permits uses in the "B" Industrial District which are virtually unrestricted so long as there is no conflict with the general ordinances regulating nuisances. **Zoning restrictions.**

"On account of the prevailing winds in Denver, being from the south, the areas so zoned are wholly

Trans.

Stockyard is located on only available site.

on the extreme northerly boundary of the City and no other location of industrial area for a stockyards utility is available within the City limits. The area so zoned, however, is quite large, approximating a thousand acres, the largest portion of which, however, lies east of the main line of the Chicago, Burlington & Quincy Railroad and north of 48th Avenue. It would thus appear that the stockyards location, from a zoning ordinance standpoint, is so located as to be virtually the only location possible for such a utility. True it is that large vacant areas and sparsely settled areas east of the Burlington main line are so zoned, but these are not so located as to be developed for such a utility without considerable expenditure for drainage and other utility facilities.

"While it might be possible to have the zoning ordinance amended to expand the area of unrestricted industrial utility, it is reasonable to assume that such expansion would not be permitted materially south of the present southern limits of Zone "B" Industrial District.

SPECIAL ADAPTABILITY OF THE STOCKYARD SITE

"The development of the use of the lands of the stockyard company has been gradual throughout its entire history. Virtually the entire area has been developed from acreage property and by the expenditure of large sums of money for improvements of various kinds has reached a high state of efficiency and adaptability for its particular use.

"Confined as it is between the railroad and river embankments, with a cemetery development to the north, no material change in the present layout or departure from the present plan is in prospect. The present community of interest with the three large

ans.

packing plants and other inter-connected facilities for movement of stock from the yards, of course, provides a dominating element in making this site especially adaptable for a stockyard utility.

"These facts have been considered by the appraiser in the determination of his values for the various zones into which the property has been sub-divided for the purpose of this appraisal. It should not be overlooked, however, that for the purpose of comparing the values of this property with the sales of units comparable to the integral portions of which the yards are now comprised, it is necessary to take into consideration the lack of dedicated public streets and alleys to serve so large an area. In fact, the removal from direct access on the principal thoroughfares reflects itself in the zoning adopted by the appraiser. Moreover, many of the improvements which go to make the land valuable and desirable from an industrial standpoint have been valued separately by our engineers in setting up the cost of reproduction of the physical plant. This class of improvements is usually provided for by the municipality and paid for through the medium of special assessments against the properties which benefit from the improvements.

Lack of
dedicated
streets
detrimental.

"An example of this is the cost of construction of the various roadways which are ordinarily reflected in a land value, but which in this case is set up in our engineering report. The same can be said of sewers which serve the drainage of the entire area. Consideration of these factors is an important modifying influence upon land value determination where the appraisal is made, as here, on the assumption that the improvements are stripped from the property and their value found separately and set up as an integral part of the physical structure valuation.

Increased
value due
to highways
and sewers
not consid-
ered in land
appraisal

Trans.

ASSESSMENTS FOR TAXATION

"The assessments of real estate for taxation purposes in this portion of the City of Denver are no guide to the true values of the real estate insofar as actual worth is concerned. They are, however, of some worth in disclosing the relative values of different tracts and the relative values of different locations and street accesses. The lands are purported to be assessed as nearly as possible at the full value of the real estate, but a comparison of these assessments with sales of properties at similar dates discloses that the assessment will vary materially in either direction from the sales price.

"The conclusion has been reached, therefore, that the assessments are of little probative worth in the determination of actual values in this part of Denver. They have been considered by the appraiser solely for the purpose of relationship between different portions of the ownership of the stockyards lands. At the same time it is well to point out that in the various agreements between the Stock Yard Company and the railroads affecting the use of their respective lands, it is the practice to pro-rate taxes to be paid by the contracting parties on the basis of applying the local tax rate to a 50% valuation of the property.

SALES DATA

"Sales of land in the general vicinity of the stockyard properties have been compiled and are transmitted with this report as a part of the supporting data which were considered by the appraiser in arriving at his conclusions. In addition, as heretofore stated, sales of properties somewhat remote from the stockyard vicinity are included because they have been referred to in prior hearing and have been helpful to the appraiser in getting a broader

rans.

perspective of the general valuation situation in North Denver.

"This sales information covers lands of varying degree of similiarity to the lands here under appraisal and will be referred to in the detailed statements covering the respective zones of value which have been established to break down the area by relative levels of value. As is to be expected from this character of data, the individual sale may suffer some degree of disability insofar as its direct application in the determination of value is concerned. However, these matters are given consideration when determining the weight to be given to the individual sale insofar as its worth as support is concerned. None of these sales constitutes an area as large in size as the assembled area of the Stock Yard Company. For this reason consideration has been given to the element of plottage and assembly of so large a tract in one holding for use by a single industry. At the same time the existence of abutting improved streets and special improvement assessed against the properties in the sales data have been considered in weighing the fact that a similar class of improvements is inventoried by our engineers in the cost of reproduction report.

"Leases to which the Stock Yard Company is a party are also attached as part of the supporting data. The lease covering the general use of railroad tracks has not been separately listed for the reason that it is the opinion of the appraiser that the entire railroad usage, including loading and unloading facilities, should be considered as a composite whole and at the making of this report no definite analysis is available on the allocation of the respective revenues and costs incident to the use of these facilities.

"I might add at this point that I don't believe that it would be possible from the accounts to allocate

Trans.

all of the costs and revenues against all of the properties that are used for railroad purposes and for loading and unloading purposes from the accounts due to the fact that certain expenses which I would consider as overhead expenses cannot be broken down in proportion to what they would probably apply in the handling of the loading and unloading of the stock.

BUSINESS DEPRESSION AND LAND VALUES

"The values placed by the appraiser are aimed to be fixed at a suitable level such as one should reasonably expect to exist over a period of about six months prior to the making of the appraisal.

"Such a period, however, should not be one of subnormal business conditions and for this reason no attempt is made to predicate values upon evidences of distressed transferring of real estate. That depressed business conditions make for a depression in realty values is certain, but it is rarely possible to find sufficient transactions to establish definitely the extent of the recession. This is because realty values stagnate and much of the property which moves is handled to a large extent on a foreclosure basis. It is for this reason that there is a great scarcity of transfers of real estate similar in character to the stockyards property at the present time. Nevertheless while the stockyards and packing house industry has enjoyed a marked degree of stability in its business, it cannot help but be affected by the general business depression.

"In other parts of Denver the effect of the depression is much more striking and those people who were interviewed by the appraiser as to the relative levels of value, express opinions that the extent of the recession varies anywhere from 25 to 50 per cent below the level of values existing in 1929 and 1930.

Trans.

The endeavor to find a norm of value by the appraiser is evidenced by the consideration of a large amount of data antedating the business recession.

"In attempting to form a reasonable judgment as to the present level of values, general business statistics of Denver have been compiled and attached as a part of this report. Notwithstanding the assessments of real property in Denver have been successively marked down for the last three years until they average at least 25 per cent below those of 1929 and 1930, including the assessments of the stockyard property, the level of values established is not as low as might be contended for, based on these statistics. It is distinctly felt that the level of values is such as would prevail over a period of normal business conditions in this general vicinity.

SUMMARY OF VALUATION BY ZONES

"The lands of the Stock Yard Company were subdivided in a previous proceeding, before the Secretary of Agriculture, into eleven tracts. As these sub-divisions did not lend themselves to the value zoning deemed proper by the appraiser, they have been divided into ten zones in agreement with the management of the Stock Yard Company.

"These zones of value are outlined in the accompanying sales map and are identifiable by color and number. The areas of the respective zones have been agreed to by the stockyard engineers and the summary of value shows the application of the respective units to those zone areas as well as the total area and total value found for the entire stockyard land ownership."

(Witness continuing). On page 18 of my report follows the summary which appears in the forepart of the report. Following that are several photostats, **Building permits.**

Trans.

the first of which is entitled "Denver Building Permits." One of the standard barometers of the real estate situation in the city is the number of building construction permits issued by the Building Department of the City, and I thought it pertinent to include these graphs which show the number and value of the building permits for the City of Denver from 1925 to 1934, inclusive. The graph was prepared by me from data obtained from the Denver Chamber of Commerce publication.

Bank clearings.

The next photostat shows the Denver bank clearings and the Denver postal receipts. These are also general business indicators for the City. The source 389 of the information is the Denver Chamber of Commerce publication.

Manufactures.

The third graph on manufacturing in Denver is included to show the business conditions, since that also has a material effect upon the demand for industrial property. It is true the industrial properties may not be identically similar to those that are used by the stockyard company, but the general level of industrial land values is pertinent in my opinion, and of course is affected by the amount and value of manufacturing. The source of the information is the United States Bi-annual Census of Manufacturers.

Species of livestock.

The next graph is a graph showing the total receipts of species of stock at the yards and a graph of all species, obtained from the 1934 annual report of the Stock Yard Company. The reason the variation on the species where the volume is small looks so pronounced is that I used logarithmic cross section paper, using a logarithmic scale, where the volume is small the percentage relationship shows up more markedly.

Trans.

390 Yes, I made the statement on page 13 of my report that it is necessary to take into consideration the lack of dedicated streets and alleys. I took that fact into consideration because in going on the concept that these lands are stripped of all improvements that are upon them naturally the roadways which we have inventoried in our engineering report are considered stripped off the property, so that the area becomes a very large area without any access shown. Stripped of these improvements that area has its access only through what one would call stub end streets, except as far as Race Court is concerned.

Lack of streets.

Basis of appraisal.

391 The purpose of the sales sheet, commencing on page 33 of my report, is to find out what the nearby lands are selling for and to make comparisons between those lands and integral parts of the lands of the Stock Yard Company as to their similarity, and also to give each one of these sales data some study as to whether it should receive any weight

392 in determining the value of the individual zone. The contiguity is not shown on the sales sheet but it is shown on the sales map which accompanies the report. On the sales map I have outlined in a red color the description of the specific areas covered in the sales sheet and used the same number as is used on the corresponding sales sheet. All sales data which follows on page 33 up to and inclusive of page 257 have a number on the sales sheet or a number

393 with a letter suffix. The sales after 257 are sales in which the Stock Yard Company itself was a party and are an endeavor to list as near as possible such sales to find out the original cost, so those sales carry a prefix of the letter A each time. Some of these sales are shown on the map, but not many, because a large number go back to early dates and have no probative value. They are listed because

Trans.

they were sales made to the Stock Yard Company and in an endeavor to study what the original cost of it was if such a thing were possible to determine.

Returning to my explanation of the use of the sales sheets, Government Exhibit 21, which is called in its title "The Land Appraisal Sales Map," has outlined in a red color the limits of the legal description of the lands covered in each of these transfers and has a number for each one of them. For example Sale No. 1 on page 33 of the report, the locations of the land described in that sale are shown in red at about the center of the map. There may be some little variation in the locations, but these red outlines give it substantially correct. On this sales
395 map I show each sale except where there is a letter suffix such as Sale 1-A. In such cases they are part of or prior sales of the same land.

On certain sales sheets such as the one on page 160 of my report, under the caption remark I state "Agreement on sale analysis signed Barton of I. C. C., Gilmore of U. P., September 10, 1932." That is due to the manner in which I compiled a considerable portion of this supporting data, securing the ~~Washington transcript of the record in the prior~~ hearing and certain sales referred to therein. I also secured information from the Interstate Commerce Commission appraiser in Denver. I found
396 that the same class of data as that which I was seeking had been an issue in valuation proceedings under the Interstate Commerce Commission between the railroads entering the City of Denver and the Commission's Bureau of Valuation and that the parties had reached agreement. Barton was the Appraiser then in Denver for the I. C. C. I verified the
397 fact of agreement by interviewing Mr. Gilmore in
.. * Omaha.

Trans.

398 Yes, in my opinion the figures set out at the beginning of my report is my opinion of the value of the property.

Government Exhibit 23, being the land appraisal report, was offered and received in evidence.

Govt. Ex. 23
received.

I was also directed by the Department to make an inventory and appraisal of the structural property of the Denver Union Stock Yard, which I have
399 done. Yes, I have assistants. The Department maintains a small organization of valuation engineers, with offices at Kansas City. Those engineers met me at Denver on January 7, and we commenced to work on January 8, 1935. Prior to that time I had instructed two of the engineers to proceed to Denver for the purpose of preparing a map or group of maps and assist Mr. Christensen in the preparation of such a breakdown on the map as Mr. Christensen would need for the purpose of properly describing his facilities. When we came in January we retained for a temporary period a group of young men to assist in the so-called manual labor phase
400 of preparing the inventory. I assigned a portion of the inventory to be taken by each one of the engineers from our Kansas City office and my assistant, Mr. Galbreath, collected the price data and labor cost data. While here he interviewed some material men, building contractors, labor union officials and others to secure the necessary information for a proper pricing of the inventory. The men consulted with me every day, and I spent a part of each day at the yards. After the measurements had been concluded, the engineers were instructed to view the property for the purpose of stating a condition per cent of each of the major units, and each of the engineers in the Kansas City office made such an estimate. The data was assembled, completed and computations made at Kansas City. When all of these data had

Method of
structural
appraisal.

Detailed
inventory
prepared.

Method of
determining
condition
per cent.

Trans.

been compiled it was typed up in report form and the price extensions, quantities, and prices on labor and material are shown in a series of reports which we have prepared for introduction into this hearing. The engineers working with me were Mr. Galbreath, 401 Mr. Cushing, Mr. Johnson, Mr. McClintock, Mr. Schramm. Mr. Snider, while not an engineer, made certain calculations he was competent to make. 402 Then we had nine helpers.

403 We received hearty co-operation from the Stock Yard officials and their engineers in the furnishing 404 of considerable map information and other engineering data. The final result of my inventory and appraisal are my own results. I accept the responsibility 405 for the final figures in the appraisal and supervised the preparation of those facts and figures. The basis of the labor cost was the union wage scale in Denver considered in connection with the code and scale of fair wages.

I would not say that I attempted to locate the various sewers and water pipes and all underground construction personally myself, but I assigned one of our engineers to that purpose and where there was a particular situation that he thought should be called to my attention, he advised me and I would look at that myself. The Stock Yard Company furnished us 406 maps and sketches and other information of that type concerning the water line and sewers. My value was determined as of January 1, 1935.

Water and
sewer
facilities.

I have two blueprint maps which delineate the water and sewer facilities of the Stock Yard Company, one showing the facilities of the main yard area and the other those in the so-called horse and mule division. The latter is the smaller of the two maps.

Trans.

The map was marked for identification as Government Exhibit 24 and offered in evidence. Counsel for respondent stated that he had no objection if it were understood that respondent was not bound by Mr. Zelinski's statement concerning 50% ownership, etc. as appears on the blueprint. With that understanding the Exhibit was admitted.

Govt. Ex. 24
received
subject to
qualification.

409 (Witness continuing). The inscription "50 per
410 cent ownership" is the analysis of our engineer with
my approval based upon his interpretation of the contract.

Objection was made that this was a conclusion of law of the witness and with consent of Government Counsel the notations appearing on Government Exhibit 24 were physically deleted.

(Witness continuing). The next map is similar to Exhibit 24 covering the main yard area of the Stock Yard Company and shows the location of the respective sewer and water facilities, service lines, hydrants and the like, based on information obtained from the Stock Yard Company.

416 The witness stated in explanation of Government Exhibit 24 and 25, that a certain sewer constructed by the City through stockyards land did not appear on Government Exhibit 24, but witness had obtained information since coming to Denver that sewers were constructed as part of the river improvement and ownership thereof given to the yard company.

Counsel for respondent stated that this was in connection with the exchange of properties due to the establishment of the official channel and in lieu of condemnation (see transcript pages 413 and 414). As to Government Exhibit 25, witness stated that the same main which he had designated as "50 per cent ownership" in Government Exhibit 24 appeared on Government Exhibit 25 and should be treated the

Trans.

Govt. Exhibits 24 & 25 withdrawn.

same way in the inventory. Government Exhibit 25 was offered in evidence. Respondent's Counsel stated that Exhibits 24 and 25 were not complete, and did not show all of the water mains. Exhibits 24 and 25 were withdrawn.

419 The pipe which I designated as 50% ownership was set up that way in the original inventory in 1929 and 1930. The instrument concerning it is listed in Mr. Christensen's exhibit as well as in the auditor's statement. As to the 16 inch main, I discussed it with officials of the Stock Yard Company and there is some question as to whether that main had not also been settled during the past hearing. It had not been
420 included in the inventory by either engineer. The Stock Yard engineer stated that he had made repairs to the pipe, but on checking with the City department, they claimed ownership and said they would repair the pipe. Yes, that concluded my investigation as to the water.

As to the changes in the sewer system, we are compiling a statement of changes and the suggestions of
421 the Stock Yard engineer. In addition we have prepared a ~~separate statement on the so-called out-fall sewer~~ which serves Swift & Company and the Stock Yard Company jointly. It was constructed as a part of the consideration on the part of the City when the river improvement was being performed, and the sewer was a necessary piece of construction to take care of existing sewers of both the Stock Yard Company and Swift & Company. On the basis of the proportionate diameter of the pipe of the sewer of the Stock Yard Company which empties into the out-fall sewer, I think that about 33% of the cost of this sewer should be allocated to The Denver Union Stock Yard Company. Yes there are certain minor changes necessary in my inventory and appraisal as of the values and those will be submitted in the form of

Trans.

422 these tabular statements. The first is in connection with the out-fall sewer.

423 The tabulation was marked Government Exhibit 26.

(Witness continuing). The figures shown on Government Exhibit 26 are in addition to my cost of reproduction new and to the cost of reproduction new less depreciation.

Government Exhibit 26 was offered and received in evidence. Govt. Exhibit 26 received

424 (Witness continuing). My next exhibit is entitled "Additions to Sewer and Water System", which was prepared under my direction. It shows the detail of the changes which would result in the cost of reproduction new of the sewer incident to making changes in both directions. It shows that there would be a total net addition to cost of reproduction new less depreciation of \$721.00 and of cost of reproduction new of \$1,000.

Government Exhibit 27 was offered and received in evidence, the witness stating that the addition did not include the addition which appears in Government Exhibit 26. Govt. Ex. 27 received.

426 (Witness continuing). I have prepared a report on the value of the stockyards structural property in three Volumes. They were prepared under my direction. The first volume is a general summary and a detailed summary as to large units of property, showing the cost of reproduction new and the cost of reproduction less depreciation of the physical plant of the Denver Stock Yard Company. The second tabulation is a computation showing what the so-called straight line depreciation would be if derived from the mortality tables of each of the structures that are listed in the report. The numbers such as B-13 and

Trans.

- Y-9 are the designations that were given to the buildings or structures in Government Exhibit 8. The first column headed with the letter A is our cost of reproduction new for the specific unit of property. Column B is the estimated life in years based upon mortality tables published in various engineering books, periodicals and also, of course, based upon my own experience. It expresses my judgment as to what the normal expectancy of life of that particular
- 428 structure would be under ordinary maintenance conditions. The third column headed with the Capital letter C is the annual rate of straight line depreciation which would follow from the use of the service life used in column B, and column D is the mathematical computation arrived at by the application of the percentage in column C to the total money in column A.
- 429 I assume a construction period of one year and my reproduction cost new is \$3,015,222, subject to the corrections in Exhibits 26 and 27. No, this figure
- 430 does not include land, but I have included interest during construction on the structural property but not interests during construction on land. I would recommend that 7% on the land value figure for the period of one year be added in connection with the determination of the final valuation of the property.
- 431 In this volume I have shown the amount of the cost of reproduction less depreciation on the first nine pages of the exhibit. My figure on the cost of reproduction new less depreciation is \$2,428,600, not including the corrections on Government Exhibits 26 and 27. Wherever I speak of reproduction new less depreciation, these figures should be corrected to the extent disclosed in Exhibits 26 and 27. No I cannot
- 432 say what, in my opinion, is the final value of the

Trans.

property because there are items that may or may not be included.

Government Exhibit 28, being Volume I of the Land Appraiser's report, was offered and received in evidence. **Govt. Exhibit 28 received.**

Volume 2, Government Exhibit 29, is a tabulation of the details set out disclosing how the figures in the summary have been built up for a portion of the units appearing in the detailed summary. Volumes 2 and 3 together give the complete details for all of the separate units and disclose how the quantities of material and labor have been apportioned. It was prepared under my direction.

433 Government Exhibit 29, being the volume just described, and entitled "Office Building, General Buildings, Cattle Division, Viaducts and Subway, Hog Division", was offered and received in evidence. **Govt. Exhibit 29 received.**

Government Exhibit 30, being Volume 3 of the report was offered and received in evidence. **Govt. Exhibit 30 received.**

A fourth volume, which is not numbered but which is designated for identification as Government Exhibit 31, is entitled "Supplemental Appraisal" and contains the items of labor in "company work" reapportioned at the scale of wages paid by the Stock Yard Company during 1934, and is therefore a restatement of the summary and the detail of pricing on certain portions of the construction which I feel would be performed by Company forces during the the time that the main body of the plant was being constructed by the contractor. It shows the effect of using company labor in part of the construction program on the cost of reproduction less depreciation and on the cost of reproduction new. This, of course, covers only a minor portion of the construction in the plant. It changes the cost of reproduction now from \$3,025,222 to \$2,977,150, and

Trans.

the cost of reproduction new less depreciation from \$2,428,600 to \$2,398,931.

MR. MILES: The Government now offers as Exhibit 31 the volume referred to as Government Exhibit 31 for identification.

MR. BOSWORTH: We object, Mr. Examiner, upon several grounds, perhaps all of which go to the materiality of this exhibit for the reason that the company is not able on any construction basis to employ its own laborers. We have four carpenters who are non-union men and under the rules of this locality that precludes their working while any union men are working on the property and that is very strictly enforced here. We feel that the exhibit, therefore, not taking into account those facts, is prejudicial and does not reflect the true condition and for that reason it is immaterial and incompetent.

Govt. Ex. 31
received over
objection of
respondent.

MR. MILES: No argument. Renew the offer.

THE EXAMINER: Objection overruled and Government Exhibit 31 will be received.

(Whereupon Government Exhibit No. 31 was received in evidence).

Condition
Percent.

436 (Witness continuing). The cost of reproduction new less depreciation appears in all three volumes, but I have compiled an additional volume entitled "Condition Percent January 1, 1935" showing the percentages adopted on each of the units of property listed in the summary. It shows in addition to the percentage adopted by me, the condition per cent as found by each of the engineers who worked under me. The first page is illustrative. The designation U-1 preceding the new Exchange Building ties up with Government Exhibit 8. The letters C, G, J and so forth, appearing at the head of the column, are

Trans.

438 the initials of those engineers. In determining the weighted average double weight was given to the estimate of the engineer who actually inventoried that particular structure or unit, and the totals derived are therefore divided by six. The figures of the various engineers were submitted to me, we discussed
439 them in Kansas City and then I adopted a condition per cent and my conclusion was based upon those figures plus actual inspection. My percentage was adopted after discussion with the engineers.

The tabulation was marked Government Exhibit 32 and was offered and received in evidence.

Govt. Exhibit
32 received.

MR. MILES: (Continuing). Mr. Zelinski, in valuing the stockyard property did you reach your conclusion based upon material in place, also on a property that is able and willing to function as a stockyard and as a business earning an income?

A. I did.

441 (Witness continuing). The compilation entitled "Areas of Services and Facilities" is a compilation of the area of each tract of land designated by Mr. Christensen.

The said tabulation was marked for identification as Government Exhibit 33 and was offered and received in evidence upon the understanding that it only referred to areas and had no bearing upon the classification of facilities and services.

Govt. Ex. 33
received for
certain
purposes.

442 (Witness continuing). I have a volume entitled "Wholesale Price Comparisons", being a series of graphs showing certain wholesale commodities and their index number based upon 1926 as 100. The purpose is to show in general the position which the current time of the report occupies in the general price structure of the country.

Trans.

Govt. Ex. 34
received.

The volume was marked Exhibit 34 and was offered and received in evidence over the objection of respondent as to its materiality.

Govt. Ex. 35
received.

442 A volume entitled "Construction Cost Curve, Engineering News Record," containing a tabulation and graph showing the general construction costs as compiled by the Engineering News Record and their relative levels over a period of years was marked for identification as Exhibit 35, was identified by the witness and was offered and received in evidence over the objection of respondent as to materiality.

Govt. Ex. 36
received.

443 A volume entitled "Current Building and Construction Wage Rate Per Our Yearly Averages, Engineering News Record" being a tabulation and graph showing yearly averages of wages for skilled and common labor, compiled by the Engineering News, was offered and received in evidence over the objection of respondent as to its materiality.

445

Cross Examination:

Elements of
land value.

Considering the land first, the elements of value which I considered were the proximity of the land to highways, railroads, its freedom from floods, its topography, the availability of fire protection, easy access to the availability of water and other city advantages, such as electricity, car lines, labor supply, schools, churches, proper housing for labor, recreation grounds, and so forth, the nearness of the property to general industrial centers of the city and the location of the land with regard to the particular related industries. Yes, the lay of the land from the standpoint of drainage and the availability of the ready disposal of sewerage are 446 important elements in the value of land. Yes, I 447 felt that the zoning ordinance in Denver has a decided effect upon this property. All these ele-

Trans.

448 ments apply in varying degrees to this property. You find more of the elements, if not all of them, to a greater degree in a larger assembled tract than you would in any one isolated tract.

Where I spoke of the absence of highways in the tract, I meant an absence of dedicated public streets. The absence of dedicated streets under certain circumstances can be an advantage in connection with the tract for a large industry but is not always so. You must remember in this case I am valuing this property not for the special use and in the special way that the Stock Yard Company is using it, but I am considering its availability for a stockyards use and stripped of these improvements I am trying to visualize the effect of the lack of direct access to a large portion of this area, which I think should be considered in

Lack of streets.

449 the valuation. Compared with a steel mill industry this is not a large area and of course the character of the industrial use, where the areas are large, is quite a determining factor in the value. The larger the areas the less the unit prices of those areas. The same thing is true with regard to oil refineries. It is for that reason that that class of industrial development is usually located on lands that are relatively lower level of value. The same thing would apply to a railroad yard. Yes, the stockyard tract has just as good general access from the outside areas, but trying to visualize this property as it actually is on the ground, I think some zones might have higher values if they had dedicated streets in and through them. Yes, in my judgment the highest and best use for this particular area as a whole is a stockyards use. In assuming that the land is vacant and stripped of improvements, I do not mean that it is raw land. I mean that I am stripping the land itself of all of these engineering

Not valued for stockyard use.

Lack of streets.

Highest and best use is stockyard.

Trans.

Highest and
best use.

Never
assembled a
large tract.

Power of emi-
nent domain.

improvements that are necessary to put it to the actual use that is being made of it and that those improvements are not present. I am considering, of course, that the general utility improvements like city water are at hand and available, electricity and the availability of drainage, that sewers would have to be constructed, but that the improvements themselves are not on land, so that strictly speaking I would not say that you considered it raw land because I consider it land ready for development as a stockyard location. Yes, I also thought of it as a location for any large industry, except, that in my opinion, a stockyards utility of this property would be the highest and best utility. Yes, I added an assemblage value, but I could not say the exact extent to which I added it. It is one of those intangible things that I cannot define on a percentage basis. All I can say is that my value is higher because of its availability for stockyards use and because of its being an assembled tract than it would have been had these tracts been in separate ownerships. No, I have never assembled a large tract of land, but I have considerable knowledge concerning assemblage because a considerable portion of my time with the Interstate Commerce Commission was devoted to a study of what is called the excess cost
453 of acquisition of railroad lands. In that study I compared the cost of railroad lands against the sales of property in the vicinity for individual acquisition.

Yes, the railroads have the power of eminent domain, but so far as I know the Stock Yard Company does not have that power. This does not affect my judgment of assemblage value materially for the reason that although the railroad theoretically cannot be bilked in the acquisition of their properties because theoretically the courts would see to it that any award made in a condemnation proceeding was

Trans.

a fair award, yet as a practical fact a railroad is up against the same proposition as any other large industry in acquiring its land and for that reason attempts to negotiate to a large extent rather than
 454 condemn. Yes, until the Omaha valuation case most of my work has been with railroads.

Until this occasion I have never had any occasion to appraise any land in Denver. The total time I spent in Denver on both the appraisal and structural property and the land was approximately thirty days, and about half of that time was on
 455 land and half on structures. I checked the sales shown on Government Exhibit 21 with the records as to the existence of these actual transfers, where I did not have the legal book and page records. I made a preliminary study from other sources of information in order to take advantage of prior investigations and I have some familiarity with the Denver
 456 railroad appraisal situation. In some instances I interviewed grantors or grantees or their agents. I interviewed Mr. McDougal of the Brannan Sand & Gravel Company about the transfers he had for that business. I interviewed Mr. Blayney regarding some of the transfers of his company, and certain others. I talked with others over the telephone. The information appears on the sales sheet. The Union Pacific sales, as appearing in the sales sheet, show this information, which I verified by conference in Omaha. The analysis I make of the property is the determination of the actual consideration paid, whether there were any improvements on the property that might have to be deducted to determine the naked land value and the acreage and then the unit price which one would get from that information. Yes, these sales are within the Union Pacific industrial district, and it is the general view that such sales are not a fair index of values for the reason that the railroad in making such a develop-

Never before
 appraised
 land in
 Denver.

Time spent
 on appraisal.

Trans.

ment is seeking to tie traffic to its rails. I discussed that very feature with the officials of the railroad in Omaha. I happened to know that the Union Pacific had got into trouble one time because it was thought that the railroad was doing this very thing and indirectly rebating to shippers by selling them land at less than its market value. I was assured in this instance that instructions from New York required that they get every fair penny of value. I am only familiar with the restrictions the railroad places upon this property in a general way. I, of course, know they are attempting to tie traffic to their railroad and doubt if anyone to whom the railroad is selling or leasing property can get a connection from any other railroad. Yes, I think in general the railroads require connection with and shipment over its rails and this condition might have a depressing effect upon the price, but in Denver, with a high-class carrier like the Union Pacific, and the switching arrangements, I think the shipper 459 might be as well off on the Union Pacific as anywhere else. Yes, I understand that where the lines are not competitive the switching charges are not 460 absorbed. Yes, probably portions of the Rio Grande are not considered competitive with the Union Pacific. I am not familiar in detail with the territory served by both lines.

Yes, it is certainly true that land which is serviced by several railroads is generally more valuable 461 than land serviced by one railroad. Yes, I would consider a tract of land having practical terminal facilities as of more value than a tract of land without such facilities. Yes, the stockyard land has what is tantamount to terminal facilities. Yes, even when the stockyards tracks are stripped off the land, my land appraisal shows the stockyards area is touched by the Colorado & Southern, the Union

Tract having facilities of a terminal is more valuable.

Trans.

Pacific, the Burlington, and the Northwestern Terminal and the Santa Fe has arrangements with the Union Pacific and Colorado & Southern. Yes, all of the trunk line roads reach the yards. Yes, I considered that this tract of land has in effect terminal facilities, and that this area had advantages that a piece of property located on an individual railroad would not have. I could not state the percentage of additional value, but it had a fair amount of weight.

Stockyards tract has in effect terminal facilities.

Yes, the fact that this area is well above the high water mark is an element of value. Given the same availability for the same kind of uses a low-lying tract subject to overflow would not be as valuable as the higher lying land.

Land above the overflow is more valuable.

Yes, in comparing low-lying land to higher land and valuing it, the cost of filling to make it comparable must be considered provided that the expense would be economically justifiable. In the Pere Marquette valuation case, where I appeared for the railroad, where certain land valued by the Government at 15c a square foot was worth 40c a square foot, I testified that the sales which the Government was putting forward as comparative sales were inferior to lands in any portion of the zone on account of the large percentage of low-lying lands and its deficiencies in accessibility. If I remember correctly it was waterfront property on the lake, and if you put in a bulkhead you would have to expend considerable money for filling, and for that reason I was making a comparison of the two properties on the basis of the topography and the necessity of measuring the lands that were more similar to the right-of-way. I don't know whether it was the filling alone that was worth the difference between 15c and 40c. It might have been the availability for the particular kind of use, and that in my judgment made me think that if that land

Trans.

was filled it would have brought that much more money. Not having the map before me I could not discuss the specific location.

Valuation of
Zone 3.

Yes, I valued Zone 3 north of Race Court at \$3,500 an acre. Yes, I took into account its accessibility and rail connections other than the stock-
466 yards track that is on it. Zone 3 is accessible directly on Race Court, a public thoroughfare, and I think it would be feasible to get trackage to it either from the Burlington or from the Northwestern Terminal. Yes, if Race Court were closed I think it would affect my value of Zone 3. I don't know that a dedicated highway along the north end on the County line would give it equal accessibility. Yes, if that were done the tract would be more available for what I would call uninterrupted use as against having the public thoroughfare to cross at the present time in stockyards operation.

467 I think I have some maps which show that the west portion of Zone 3 was under water during the high water period. No, I am not referring only to that part which is actually in the river bed. I couldn't state how far back this high water was, whether within ten years or not, but it is my recollection that some photostatic maps somewhere in my possession showed that a portion of this Zone 3 was under water. No, I am not referring to the
469 Local Beef and Mutton tract.

Local Beef
and Mutton
Co. sales.

The sale to the Local Beef & Mutton Company, are sales No. 125 and 126, on pages 255 and 256 of my appraisal. They occurred in 1922 and 1920 respectively at \$3,000.00 per acre. I took that from Mr.
470 Simonson's report in the 1930 hearing. The Local Beef & Mutton land is subject to overflow, in fact I understand that during the recent flood they were under water. I wouldn't be surprised if that land is about 8 feet lower in elevation than any portion

Trans.

of Zone 3. The land was purchased in 1922 and Zone 3. 1920 at \$3,000 per acre and is subject to flood, but I would not say that \$500 per acre is my estimate of the difference in the lay of the land with regard to that element.

These sales are only a part of the data I studied in arriving at my conclusion that Zone 3 should be valued at \$3,500 per acre. I considered the actual purchase of the tract by the Stock Yard Company
471 itself for \$3,000 per acre. I couldn't state the effect it would have on my opinion of purchasing a less valuable tract of land in 1920 and 1922 for the same purchase price. The purchase of two small tracts of land where an industry is to commence often causes the unit price to be materially higher, whereas the purchase of the tract by the Stock Yard Company of a larger area and one that the sellers were well aware would fit in with the plans for expansion then they could afford to dicker on a real, fair value of the land at that time. Yes, I understood that the Stock Yard Company had an option on the land prior to purchase and that there were other parties ready and willing to take part of the tract at a higher price if the yard company
472 did not exercise its option. I can't say that that means that the Stock Yard Company got a bargain. A good deal of the land purchased at that time lies in Zone 2, on which I placed a value of \$5,000 per acre. As to the Local Beef & Mutton tract, in my judgment I would say that the property wasn't worth what was paid for it. I couldn't say specifically what value I would put on it, but the \$3,000, looking at it from this date, would look to me to be more than it was worth. No, I did not make any investigation as to the value of land below the Local Beef & Mutton on the same side of the river, because it was getting more and more remote from the

Local Beef
& Mutton
Co. land.

Trans.

stockyards location. No, in point of distance it is not as remote as some of the sales I have listed, but it is in point of getting away from the developed sections and from higher levels of value. No, I don't know of any lands in the territory down the river from the Local Beef & Mutton that may be purchased at less than \$3,000 per acre.

- 473 When I thought that if Race Court were closed it would, in my opinion, be deducted from the value of Zone 3, I was assuming that no other means of access would be provided. I could not say how much it would deduct, but I would say that it would be a material reduction.

Valuation of
Zone 4.

- Yes, I valued Zone 4 at \$2,500 an acre. I think I state my reasons in a general way on pages 24 and 25 of my report. Yes, on page 25 I speak of the relative location of these lands with their possibility
474 for industrial development, and by relative location I mean relative to the rest of the development of the stockyards property and the neighborhood industries which are related to it and its relations to, topographically, the river. I would say that that property (Zone 4) is now free from flood-danger. Yes, it has had two pretty good floods in 1933 and 1935. So far as I have learned no part of the stockyard property, Zones 3 and 4, have been inundated
476 during the recent floods. Yes, I state in my report that the entire area is substantially well filled. I don't think Zone 4 fits as well in integrally with the stockyards area as some of the other zones. Yes, railroad trackage is on that land and hay barn and material yard. Yes, it is used a great deal for hay storage and trucks and wagons get in there over driveways on that road, reaching the freight cars back of the sheep barns. Yes, it can be used for fire protection as it forms an access around the yards. Several sewers go through the tract. I can't say

Fire
protection.

Trans.

as to the exact location of power lines, but I know they at least about the zone. Yes, it brings the stock-yards property out to the river so that except for the easement to the City, the Stock Yard Company owns the whole tract next to the river except the old Coffin Packing Company site.

- 478 Yes, it is my understanding that the Stock Yard Company can make whatever use they need to of the property (the river bank) provided it is open for the City to go in and repair and maintain the embankment, and to that end the well established roadway is an advantage and would be particularly so if it were a public thoroughfare. Yes, as a private thoroughfare it provides a means of ingress and
- 479 egress to the bank. Yes, it is a valuable tract for your use. On the average I would say that it is higher **Zone 4 is a valuable tract.**
- 480 than the old Coffin Packing Company site. In Zone 4 there is relatively a very small part where there is any marked decline from the top of the bank to the actual ground level. I think the Coffin Packing Plant was in the area that in times prior to the building up of the embankment was under water.
- 480 I don't know that I would agree that Zone 4 is more valuable land than the Local Beef & Mutton land. The latter has certain elements directly affecting it which all of Zone 4 does not have, namely the direct trackage at the Local Beef & Mutton Plant to the Northwestern Terminal Railway. And on the westerly end the land is available directly for the construction of buildings, while on Zone 4, or particularly those portions which have recently been filled, I think heavy construction would be necessary. Yes, the Northwestern Terminal can get on
- 481 to Track 4 by means of a connecting track, and I understand that it has mutual running rights with the Burlington. No, the Local Beef & Mutton is not a paved road. It is a dirt road from the North-

Trans:

western Terminal right-of-way, with some surfacing on it, but I would not call it an improved road. Yes, I understand that both the Northwestern Terminal track and this road are subject to flood and are frequently under water when high water occurs. Viewing the entire Stockyards tract I am frank to say that the access to it is far superior to that of the Local Beef & Mutton tract.

Zone 1 is
key zone.

Valuation of
Zone 5.

485 In discussing other zones I state in my report that on a relative basis a comparison with Zone 1, etc., I fixed the value of Zone 1 as the key zone, so to speak. More of my study and my attempt to reach a conclusion on value was centered around Zone 1, in the first instance, than any of the other zones because, in my own mind, I had reached the conclusion that there would be a step down in values insofar as the other zones were concerned. I wouldn't say that I disregarded any of the sales in that scaling down process. It was a matter of considering the sales data as being applicable to all of the zones more or less and then scaling down from Zone 1 in my own mind about the relative amount that I thought it exceeded in value these other zones. I did not disregard the Averich sales and the Local Beef & Mutton sales. I considered them confirmatory of my judgment as to what the value was.

The Averich sales are on pages 245 and 246, the first one is for 1.13 acres and a unit price of \$2,761 per acre, and the second is a sale of 2 acres at \$3,000 per acre, on September 1, 1927. Yes, I valued your tract 5 at \$2,000 an acre.

Q. Well, how can you say, Mr. Zelinski, that the Averich sale confirmed your opinion of value as to tract 5?

A. Well, because I was considering other factors as well as the actual sales themselves.

Trans.

Q. Well, what other factors?

A. Well, in a case like Zone 5, I would consider that that particular property suffered more from the effects of the depression than the main body of the yards.

Q. Well, now, as compared to the Averich tract, our Zone 5 is certainly comparable, isn't it?

A. Yes, sir.

Q. As a matter of fact, it is now well protected from flood by the river embankment, is it not?

A. It is.

Q. Has access to an improved, graded, paved, curbed and guttered road on the west, Washington Street?

A. Yes, sir.

Q. There is no railroad into the Averich tract nor into Zone 5, is there?

A. There is none.

489 (Witness continuing). I consider the accessibility of the Averich tract superior to the accessibility of Zone 4, because it runs directly on Washington Avenue, whereas Zone 4 does not have any direct frontage on a dedicated public highway. At least one of the parcels in the Averich sale faces on Washington Street; it is the parcel named in sale 490 No. 118.

(Witness was handed a map).

I would say that it had about 10 feet frontage on Washington Street, sufficient for one-way truck travel.

Trans.

- 492 The Ruedy Products Company sale to the City of Denver is on Page 247 of my report. Yes, the recorded consideration on that sale is \$12,814. I would say that I probably looked at this sale in the records of the courthouse as well as others. Yes, I state that my authority for the value of the improvements is the transcript and exhibits of the 1930 hearing, and I give Simonson's analysis of the land value at \$1,773 per acre on an acreage of .846 acres.
- 493 I don't recall the details as to how Simonson reached that value. I have on the following page the analysis by the Stockyards appraiser, showing \$3,545 per acre. I didn't use that transfer in the sense that I gave it any weight at all. My reasons were that the land was in the bed of the river and also involved the moving of the plant and other considerations. The City was armed with the power of eminent domain and I am not presuming that the City paid more than a fair value for that piece of land. What I do presume is that because of its being tied into so much plant, it would be almost next to impossible to get any real analysis out of the sale
- 494 that would reflect a land value. Yes, I know that the City did condemn land in connection with the change of the Platte River channel wherever the City felt that the price was not fair. Yes the analysis by the Stockyards appraisers show that the City agreed that the cost of wrecking and reducing the plant was approximately \$9,800, which would leave a little bit more than \$3,000 per acre for the land.
- 495 That tract has no accessibility to Washington Street, so it is lacking in the element of general utility. Yes, the Capitol Packing Plant is lacking in both elements of general utility except for the narrow tongue of land running up to the highway. Yes, since these valuations were put on these particular properties (by the appraisers in the 1930 hearing) the flood menace has been removed by the improve-

rans.

ment of the channel. Yes, that improvement would augment the value, other things being equal.

496

Q. Do you consider from the standpoint of a rate hearing that the effect which we trust is purely temporarily of economic conditions should influence the value of the land appraisal?

A. I think it should to a limited extent. I myself follow the general plan of not letting it influence me too much. I seek to get what I think would be the fair, normal level of value as of the time at which I am making the appraisal. In other words, to give the depressed conditions full effect, one could urge the very lack of markets as being so depressing an influence on land that when land does move, it virtually has to move on a foreclosure basis, and I, of course, don't believe that that is any fair measure of value. What I am trying to find as a level of value is one that I think would be disclosed by normal movement of sales at the present time if we could get a normal movement.

Yes, I would say that Zone 5 has much greater general utility value. It is available for residential utility, by sub-dividing or for the use of any industry that needed that sized tract (12 acres). I do not know the exact amount of money which has been added to the tract since the 1930 hearing by way of curbing, grading and otherwise but it is my understanding that the street has been improved into its present condition since the prior hearing. My difference in the unit value, namely \$2,000 per acre, from that of the Government appraiser in the 1930 hearing of \$3,000 per acre on this tract, is not due to economic conditions,—I simply differ with the former Government appraiser.

**General
utility of
Zone 5.**

Trans.

My report at page 242 gives the consideration for the K. & B. tract as \$3,649 per acre gross and \$3,237 per acre net. The net figure is on the
 502 assumption that you deduct \$3,000 for improvements, that is, for the old bridge. I got that figure of \$3,000, I think, from the transcript of the former hearing. It may have been from Mr. Simonson's report. I made no inquiry as to the condition or value of the bridge at that time. Yes, that tract is considerably removed from the main stockyards
 503 area unless by bridge. There is no bridge connecting it now. No, it does not connect with 46th Avenue but fronts on 48th Avenue which is not improved, just a dirt road. It does not front on Washington Street.

Yes, practically all of Blocks 3 and 4 is in the bed of the river. No, I do not know the price that was paid by the City in condemnation of those two parcels.

Q. What I am interested in, Mr. Zelinski, on this particular Zone 5 right now, is the fact that to the north of the tract there are numerous sales at say \$3,000 or approximately \$3,000, and there is this sale of K. & B. tract at \$3,000 or \$3,600, depending upon the value of improvements or lack of improvements, and determining how, in the face of these comparative sales, you reached a value of \$2,000 on Zone 5.

A. Well, I think that I explained as far as Zone 5 was concerned and that was one zone where, in my judgment, the effect of the depression would have been to establish a more or less permanent lower level of value.

505 (Witness continuing). I cannot give any indication of the extent to which the depression has so operated, in point of percentages or in point of dol-

Trans.

lars. The figures would indicate a 33-1/3% decrease, but I could not say that the depression has had that effect because I don't know whether I would have put as much value on the land as Mr. Simonson did, had I made the appraisal in 1929 and 1930.

I can't tell you the amount of weights which these adjoining sales have in my mind in reaching my conclusions. They are evidences of value to me of those particular tracts that were transferred, but they are not necessarily controlling as to what my judgment would be on the value had I made the appraisal, we will say, at about the date of the sale. Yes, the price at which the particular parcels were actually sold is the best index of actual values, other
506 things being equal. I agree that none of those parcels has any greater accessibility than Zone 5, nor any greater utility value, general utility value. Yes, I state that they have less general utility value.

511 I think one of the reasons I gave a higher valuation to Zone 7 than to Zone 4 was because it was located on 46th Avenue and was alongside the Burlington. Yes, Zone 7 is the tract south of 46th Avenue. It is reasonably well filled. No, I don't believe the Pitkin sale in 1888, shown on page 269 of my appraisal, affected my views in regard to Zone 7. I describe it as having 12 acres with an actual consideration of \$52,500, followed by the statement that it is unallocable. The deeds showed that there were improvements on the property and there was no way of determining what, if anything, was the value of them. I listed this sale solely as one of the historical sales in the acquisition of the stockyards land. It received no weight with me as an indicator of value whatsoever. I don't know whether it took in the present Zone 7, Zone 6 and Zone 8. I don't recall the limits of it because I didn't use it as an
Valuation of Zone 7.
The Pitkin sale.

Trans.

indicator of values. Yes, the City has grown since 1888, but I did not take it as an indicator of value because there was no way for me to break down the value of the improvements. No, I did not attempt to find out the value of these improvements; I made no inquiry whatsoever. Even if, by reasonable testimony, it could be established that the value of the improvements was such as to leave a value in 1888 of around \$4,300 or \$4,500 per acre, excluding the improvements, that would not be any index of present value because it would be too remote. I draw the line between the sales 15 years ago, in 1920, and ones 50 years ago, in 1880, because 15 year ago I was already doing considerable valuation and land appraisal work and have been more or less familiar with real estate markets as of that time. Special conditions which may have surrounded a sale 50 years ago I can't determine. Yes, this is true even though a community has been constantly on the upgrade. Sometimes properties have gone down even though the community has gone up, and that sometimes happens even in an industrial district. I couldn't say whether that has actually happened with regard to this particular property. No, I am not aware that industrial properties have gone up rapidly in Denver within the last two years, so far as my inquiries disclose.

Burkhardt
offer.

Valuation of
Zone 6.

The Burkhardt offer of \$10,000 an acre for acreage in Zone 6 did not affect my viewpoint with regard to the value of that tract because the divergence was too wide from the value the Western States Packing Company carried its property adjoining on its books.

516. I refer to that conversation on page 235. No, I don't know what the Burkhardt Packing & Provision Company showed for the value of the land at the time of sale. Yes, I know the vendee of land can

rans.

and frequently does allocate the purchase price as he sees fit. I placed the value on Zone 8 on the basis of its availability for general utility. It is a very small acreage, approximately three-fourths of an acre or about eight city lots, bounded on one side by the Colorado & Southern right-of-way, on the west side by the Colorado & Eastern right-of-way, on which there is no trackage, and on the south by 46th Avenue. Truckers use it for cleaning their trucks. From the standpoint of stockyard use it is just an isolated parcel. Therefore I feel the best measure is from some alternate utility.

Valuation of Zone 8.

Yes, I stated earlier that the center of activity is in Zone 1 around the area of the Exchange Building. My observation was that the flow of traffic in the vicinity of the Exchange Building was quite large. I have treated the subway as a dedicated street, a public thoroughfare. Not from the standpoint of the trading activity in the stockyards, which is out in the yard, but from the standpoint of the flow of pedestrian traffic and general activity, I would consider that the Exchange Building area was the center of activity. In other words I consider there are two types of activity at the yards, the marketing activity of course is more active out in the pen areas but there are miscellaneous activities and miscellaneous demands for the traffic of people to and from the yards into the Exchange Building area. Well, from the standpoint of marketing activity, I think that is a fair statement. I am, of course, not a very good judge of the real market activities, so to speak, I know that the activity is greatest around the section where stock is being weighed, wherever there is a scale location there is a pronounced activity, and, of course, the Blayne-Murphy viaduct so-called passes over the vicinity of a large marketing activity of that kind. Yes,

Valuation of Zone 1.

Trans.

physically both Zones 4 and 2 are within easy reach of that center of marketing activity.

Valuation of
Zone 9.

As to Zone 9, I would state that general utility 521 had a more powerful influence on me than the stockyard activity alone. I felt that Zone 9 was one piece of property owned by the Stockyard which might be very well devoted to an alternate business utility semi-retail and small commercial. That, of course, goes only for the street frontages. Yes, in reaching my conclusion on that property the sales of adjoining lands affected my decision to a considerable extent.

Murphy barn.

522 (It was suggested to the witness that his sale on page 78 of the so-called Murphy barn for a consideration of \$22,000 should be \$16,000 for land and \$6,000 for improvements, and that he had reversed the figures, and that this was shown by Mr. Simonson's appraisal in 1930 as well as by the stockyards appraisal then and now).

(Witness continuing). I couldn't state as to that but my recollection is that there was an analysis with the figures reversed, but I think the Simonson breakdown was on the basis of \$6,000 for land and \$16,000 for improvements. Yes, I have inspected the barn and at the present time it is not a very well constructed building,—it is more of a shed, with a brick front but the rest is frame with a galvanized iron roof. I don't know the exact dimensions. Yes,

524 I will look up Mr. Simonson's report. No, I made no inquiry either from Mr. Murphy or Mr. Hollis concerning this transaction.

Present use
not considered
in valuing
land.

With regard to the difference in value between Zone 1 and Zone 2, to begin with I am not considering the market activity that is on those zones at the present time as a gauge of values because stripped of its improvements I don't know whether

Trans.

- 525 the stockyard arrangement would be rebuilt the way it has been even though I am valuing the property from the standpoint of the highest and best use. In other words, my shading down of the values from Zone 1 to Zone 2 is not on the basis of the actual use which is made of that property. I feel that the higher levels of values would exist at the southerly portion of the zone because it has a more direct access closer to the zone itself, and that the southerly portion would lend itself to such a development even for a stockyards use as might require the construction of such things as the Exchange Building. I feel strictly on the relationship of Zone 2 being more remote from the center of the related activities of all of the district, that it should have a lower value than Zone 1. No, I can't say
- 526 that Zone 2 has closer accessibility. The way I look at it stripped of all improvements the only access which Zone 2 has is through Race Court and the north end of Franklin Street. Viewed as naked land.

Although I stated that in valuing property it is necessary to raise the comparable property to a level of the property being valued, yet I did not carry over into the sales comprising the Blayney-Murphy or Cudahy tracts the cost of the viaduct from that plant across the railroad tracks to the stockyard area. I do not think that is tantamount to the cost of either lowering the Cudahy tract to the level of the stockyard or raising the level of the stockyard to the Cudahy tract because I regard that viaduct strictly as a plant facility. Yes, it was necessary to make that tract usable in connection with the stockyards, but I think if the tract had been on an exact level, the Cudahy people would still have built a viaduct to get the stock up to their killing floor, and that makes it a plant facility and has no connection with the land itself as an element

Blayney-Murphy viaduct.

Trans.

528 of value. No, I don't think the viaduct is for the purpose of making the land as usable as the Swift land. I think it is to get the livestock into the place where the Cudahy people think it would be most efficient for them to operate their plant; it is not the same as building a subway because I got the distinct impression from the Manager of Cudahy that they considered bringing the livestock to the top of the plant more efficient. No, I don't know whether the manager was here when this viaduct was constructed. The Blayney-Murphy people were, of course; the constructors of the viaduct.

529 I have the Interstate Commerce valuation in my
531 working papers.

Interstate
Commerce
Commission
valuations.

Zone 2 of the Burlington extends from the County line to the quarter line west of Race Street, and was appraised by the Interstate Commerce Commission at \$1,000 per acre in 1917, and \$750 per acre in 1934. Zone 3 extends from the last described line to the center line of Franklin Street and was appraised at \$1,875 per acre and in the latest appraisal at \$2,500 per acre. Zone 4 extends from the projection of the center line of Franklin Street to the projection of the north and south alley through the center of Block 2 in West Elyria, and was appraised in 1917 at 7½c per square foot and in the latest appraisal at 8c per square foot, or roughly \$3,500 per acre. Zone 5 extends from the
532 projection of the alley to the center of Block 2 West Elyria to a distance approximately 185 feet southwesterly from the center of the subway, and was appraised at 70c per square foot in 1917 and 25c per square foot in the latest appraisal. Zone 6 of the Burlington extends from the last named line in Zone 5 to the northerly line of 46th Avenue, and was appraised in the 1917 appraisal at 12½c per square foot and in the latest appraisal at 6.9 cents

Trans.

per square foot. Zone 7 extends from 46th Avenue to the section line between Sections 22 and 23 to the bank of the river, and that was appraised in 1917 at \$800 per acre and in the latest appraisal at \$1,000 per acre. These valuations have not been litigated but in spite of the decision in the O'Fallon case and the repeal of the recapture clause, the valuation is a very important thing to most of these railroads on account of the money they are borrowing from the Government and the reorganization possibilities, with the power of the Government to force the revamping of the capital structures. So far as I know the Burlington has not borrowed any money, but I think the Colorado & Southern has. I don't know of the Union Pacific having to borrow any money. No, I could not state that the Burlington has agreed to these 1934 valuations. The Union Pacific has agreed to them.

I think it is almost impossible to compare the former Government appraisal with my appraisal. The former Government appraiser reached different values than I did for land in Zone 2, but I couldn't say that it was due to the existence of a lack of any element of value. I have zoned the property differently and he must have placed a lower value on some of the land than I have or else our total results would not be so close together. Yes, I would say that the general utility value of Zone 8 is why I gave it a higher value per acre than I put on any of Zone 2, 4, 6 and 7. As to Zone 7, one of the things I considered in the decreased value of that zone is the fact that 46th Avenue intersects and isolates this from the rest of the stockyards area. On the other hand, I have considered and given more weight to the general alternate utility on Zone 7 as against the use for stockyards purposes because it is attached and available for use by some alternate

Valuation of
Zone 7.

Trans.

utility or industry. No, I can't say that I recall any of the provisions and reservations in the deed 537 to the City for 46th Avenue. No I was not aware of the fact that the Stock Yard Company has the full right to cross that street with tracks, roadways and by any means for the ingress or egress of livestock, although the ordinary highways of the City are not available for the driving of livestock, but I don't think that would make any difference because I still believe that the alternate utility on Zone 7 would control.

Murphy barn.

I have now checked the Murphy barn sale and I would say that insofar as the sale in the report is concerned, I am satisfied it is a transposition of the figures, but in the course of the check-up on the thing, I had the benefit of an inspection jointly out there with Mr. Chase of the Interstate Commerce Commission who also has that piece of information listed, and there is some doubt but what the improvements on that property as they exist today were not the ones that were on there when the sale was made, and for that reason I am not prepared to state what the effect of the use of that sale ultimately would be. Insofar as its use in my report is concerned, of course, if I had reversed the figures according to the way they were used by the Stock Yard Company appraisers in the prior hearing, it would reflect a materially higher unit value for the sale and that in turn would have some effect on the unit value of the zone. You realize that it is only one of the pieces of information which I have considered:

Reflects a
higher value
than used in
govt. report.

Did not study
other large
industrial
tract in
Denver.

539

No, I made no special study of the industrial area around the Gates Rubber Company plant. I just investigated such data as had been used in the other proceedings and some supplemental information further down towards town which I got from

na.

the Interstate Commerce Commission to get the perspective of value. The same comment would apply to the Denver Sewer Pipe & Clay location on the north side and the Burlington Yard industrial district. Yes, until my work in connection with the appraisal for this hearing, I had not appraised any property in Denver.

No previous
experience
in Denver.

0 The records show that the 16 inch main running from the meter box on 46th Avenue and Lafayette was completed in September, 1920. There was quite a serious break in commodity prices following 1920. I was told at the City Hall that the pipe cost \$8,292.49 installed.

2 Government Exhibit No. 32 is my tabulation of condition per cent. The water system is on an adopted condition per cent of 79% and that reflects the so-called 50% ownership of the 12 inch main. I did not figure any separate condition for the 12 inch main, but it was considered in conditioning the entire water system. Of course, the water system as a whole was not visible and the same is true of the sewer system, and both are governed to a considerable extent by the condition visible at the connections and in the manholes. We inspected the meter boxes and manholes and the pipes in the pen areas where they come out of the ground. No, I do not have any knowledge as to the condition of the 16 inch main as compared to the 12 inch main and did not make that inspection myself at the meter boxes. Assuming that you do have title to the 16 inch main, I cannot say what amount would be added to your reconstruction new value as found by the Government. I would have to make further inspection, or have one of our engineers make further detailed inspection.

Condition
per cent.

Water system.

Opinion based
on inspection
of visible
connections.

3 The other meter boxes are scattered in various places throughout the yard. I do not recall offhand

Trans.

544 where they are. There are meter boxes where the Swift & Company mains come off to measure the amount of water taken by Swift and Armour. I inspected certain ones of the meter boxes but I don't know whether I saw them all. No, I wouldn't say that my estimate of the condition per cent of the water system is a blanket estimate without regard to the time of installation. I knew the age of a considerable portion of the water system from a review of the investment account. It is a cast iron main. Yes, I am familiar and have seen the advertisements about cast iron pipe in perfect condition after about 150 years. No, I don't think you could take into account in figuring the condition per cent the lapse of time that cast iron pipe is in the ground only to the extent that the lapse of time would give a general indication of how long that

545 pipe might last. The condition per cent that we sought to fix would be what it would have been had we seen the pipe and given consideration to the going out of service of that pipe in connection with the going out of service of the connecting units which it was serving. The main itself would suffer from obsolescence or from straight abandonment and functional depreciation if the service connections had worn out and were no longer usable. Yes, when I speak of functional obsolescence I am getting into the realm of serviceability to some extent.

Opinion based solely on estimate, without inspection.

Only inspection was of faucets and fire hydrants.

When I spoke of making inspection of the mains where they come out of the ground, I meant the galvanized iron faucet pipe and connections in the cattle pens and trough and places like at the fire hydrants.

546 If you have full ownership of a 12 inch main then the figures shown in the detailed exhibit on the water system covering that portion of the system would be double. In Government Exhibit 30,

Trans.

at page 497, and in Government Exhibit 28, being
 547 the summary statement, taking the figures there,
 there would be added \$5,062 for material and labor.
 548 The amount of the additions including general over
 head would total something over \$6,000.

In the material and labor figures, the manholes
 and other fittings and connections are listed sep-
 arately, and so far as I can observe there was no
 breaking down of the percentage on the fittings,
 but they were included at the full 100%. The 50%
 549 has to do with the pipe itself. The reconstruction
 new cost of the 16 inch main, including all overhead,
 is \$13,818. The details as to the unit prices on the
 material and labor are in my working papers. Yes,
 it would be possible to get up a schedule for the
 record.

551 MR. BOSWORTH: Now at this time the respond-
 ent states that it will accept the Government recon-
 struction new value for all items shown in Govern-
 ment Exhibit 28, subject to the additions testified to
 by Mr. Zelinski in yesterday's hearing, contained
 in Government Exhibits 26 and 27, and subject to
 the determination of the legal question concerning
 the title to the 16 inch main and the 50% equity
 in the 12 inch main.

**Respondent
 accepts govt.
 figures on
 reproduction
 new value.**

MR. MILES: You wouldn't want to stipulate,
 would you, that your figures or the Government
 figures, either one, could be accepted following the
 1930 stipulation?

MR. BOSWORTH: We would prefer not. We
 could not do so at the present time because our
 figures are not in evidence. We prefer not to do
 so because we are willing to accept these figures, and
 I think that is the best way of handling it.

Trans.

MR. MILES: And of course, the depreciation, you have not considered; it is simply the reproduction new?

MR. BOSWORTH: Simply reproduction new.

MR. MILES: Plus the things that you mentioned?

MR. BOSWORTH: Plus the items which I have mentioned.

One year
construction
time
required.

553 (Witness continuing). Yes, I estimate that it would require about one year within which to build the plant under the theory of reconstruction new.

554 I haven't got any estimate of the total number of men because I had that worked up in detail. I would have to make a summary of that to determine the total number of men. I considered that it could be done in one year's time by dividing the men necessary to construct different portions of the project simultaneously. In my opinion, it could be done in that way. Yes, if simultaneous construction could not be had, it would extend the time.

Use of Com-
pany labor.

Such a newly organized entity would not necessarily be able to employ its own labor at the start, but I believe it could arrange, when properly organized, to employ its own labor. Of course, if the entity went out and did the work of construction itself with its own organization it would have to go into the general labor market to obtain the men necessary, but I had assumed that the construction would be performed on a contract basis by a contractor on bids received. No, I wouldn't say that the amount I figure in Government Exhibit 31, that could be done with company labor, is a large part or even a material part of the work compared to the total construction project. I do not have the details before me as to the difference in wage scale as I found it on company labor from the going wage

Trans.

scale, but which is a material difference on most of the classes of skilled labor particularly. Yes, my \$50,000 of difference as shown in Government Exhibit 31 means that the total labor bill might be many times that amount. The \$50,000 is the saving. No I could not state the percentage of difference in the wage scale. No, I do not consider the use of company labor in that computation is inconsistent with the entire theory of reconstruction new, because the company itself, in the past, in constructing the

556 sheep barn, used company labor on some pen construction. Yes, it is my understanding that the history shows that the major portion of the plant has been constructed by contract and that only incidental construction, which was handy and reasonably possible to do, was done by company labor.

557 Yes, in 1917 it is my recollection that you built a large section of the cattle division, or pen area, and the loading and unloading chutes. Whether it amounted to 29% of the total pen area I don't recall, but it was a very large proportion of the plant. In 1928 there was a further extension of a material portion of the cattle division. No, I did not figure whether it was 16½% of the entire present pen area, but I knew it was material. No I did not investigate as to whether or not in either of these construction jobs company labor was used in the construction.

Amount of
1917 and
1928 construction in
cattle division.

558 Yes, I am familiar with labor union rules to some extent. I understand that your force at the yards is not unionized. No, I am not sure there would be a refusal to work on the part of the union men with the non-union men. I have observed conditions in other places and the union rule is not stringently applied.

Labor Union rules.

559 I do not know in detail your force of men. I don't remember whether there were only four carpenters

Company labor small repair force.

Trans.

Sheep barn
1929.

Method
pursued in
determining
reproduction
new value.

or not, but there were not many. Yes, it is a small repair and maintenance force. No, that force would not be sufficient to do the work I had in mind in Government Exhibit 31. It would have to be expanded. Yes, I think even though the work was temporary it could be expanded by hiring men on the same scale as you hire permanent labor. The sheep barn, which was a major construction, was made in the year 1929. My understanding was that

560 while the contractor's work was still in progress some work was done by the company force. No, I did not investigate the work because I just took Mr. Reno's (the company engineer) statement that the company did do some work in the pens in the sheep barn. Yes, I would say, from the history of the yard, that the management has not engaged upon the use of its own force to do any large amount of what I call capital expenditure work.

561 Taking for example Hay Barn No. 3, which is listed in Government Exhibit 28, page S-6, under item Y-3, with a total reproduction new cost of material and labor of \$13,372, that reproduction new cost was arrived at by taking the inventory which was assembled and pricing out the various classes of material on a basis of unit cost per yard on thousands and feet of lumber, per thousand of brick and then priced out separately the labor which it would take to install that quantity of materials. Yes, "CY" means cubic yards and "SF" square feet. The prices for the material are taken from a schedule which we built up, by sending out price lists to local dealers to give us an estimate as to what they would deliver us material for on the site of the job either by truck or rail. In lumber, due to the different sizes, etc.

562 we worked out a weighted average price per thousand and feet. The abbreviation "m b m" means thousand

563 board measure.

Trans.

On page 395 common brick is given at \$18.80 a thousand delivered on the site and that includes some labor of loading and unloading as well. The labor incident to moving the brick, for example, from where it was unloaded to the job, is priced in the labor and is not included in the material cost.

- 565 Yes, the labor cost of \$13.95 is the labor cost per thousand brick and is worked out from our formula in the working papers. It does not include superintendence or any of the general overhead or construction overhead. No, my inventory or detailed inventory is not in the record. Yes, our staff did actually inventory the number of two by fours according to their best judgment, and the number of various sizes of lumber, the squares of brick, etc. When it came to the cattle pens, where a typical pen could be used we figured the lumber in that, the paving and the drains, and then multiplied all that by the number of typical pens in the same area. Where we couldn't do that the special measurements for the particular pen were taken and the quantity of lumber computed for that. We made up a schedule of the lumber or any material to build a typical pen or a typical gate, and then priced out all that we thought were typical on that basis, and then multiplied that by the number of typical pens or typical gates to get the re-
- 568 construction new cost. The same applies to the sheep barn and to other units of property.

Yes, we added to the actual labor and material costs certain construction overhead and then in the general summary we added our general overhead. That is found on page S-2.

- 569 Yes, omissions and contingencies are an overhead for which we allowed 5%. Organization expense is
- 570 not included in any of these overheads. It does include the item of salaries of officers and clerical help and hire which would be necessary to look after the

Unit prices
and unit costs
determined.

Organization
expense not
included.

Trans.

**Schedule of
Depreciation
and Composite
Life.**

payment of vouchers and checking up on the performance of the contracts during the period of the construction, that is to say, during the one year period of my estimate. The item of taxes during construction is both on land and on structures. It is equivalent to one year's taxes paid by the company just preceding the date of valuation. We have no method of determining what the taxes might be during the period of construction. The interest during construction (on the buildings) is on the theory that all of the money would not be used until the year period was over, and therefore it would average one-half of the 7% allowance on the full year basis, or $3\frac{1}{2}\%$.

The schedule on page S-10, caption "Depreciation and Composite Life" is the estimated expectancy of life for the average of the entire property. It is determined by taking the weighted average of the annual life expectancy of each of the individual units, which is my judgment as to how long the individual would last under normal maintenance with due regard for obsolescence and inadequacy. For example, I believe that the average annual life one would expect for the Exchange Building under normal maintenance conditions would be 50 years, making due allowance for obsolescence and inadequacy which might develop over that interval of years, from the time in which the building was constructed.

573 Yes, the average expectancy of a brand new building is 50 years.

Q. Well, then, with that in mind, if this new Exchange Building has the expectancy of life of a brand new building, how is it that you give as condition per cent 84%.

A. The reason for that is that on inspection we find that the condition of the building is better than one would expect to find just on av-

Trans.

erage, ordinary maintenance during its period of existence, and for that reason I reached the conclusion that either the building has been maintained better than the average or for some other cause its present condition is superior to what the average would show.

(Witness continuing). Yes, my column B is the estimated life from the date of construction of the unit and not from the date of my appraisal, so that column C represents the percentage that should have been taken all along on the straight line method from date of construction down to the end of the useful life of the structure. Yes, the theory on which my straight line depreciation schedule is built, is totally different from my theory in Government Exhibit 32 concerning condition per cent. Yes, I used 575 mortality tables and my own experience, in determining the per cent of depreciation. The tables I use have been prepared by the Railroad Presidents Conference Committee and books and pamphlets on "life expectancy" of buildings. Yes, I considered the peculiar climatic conditions in Denver affecting rot, rust and decay and I felt that for certain portions of the plant, the special condition at Denver might apply, but on the average, the figure which is used here for the life of any structure is that taken from these mortality tables throughout the country. No, I have had no experience with your climatic conditions prior to 576 coming here in January. I think Wichita is about the same as this property so far as special conditions are concerned.

No previous Denver experience.

Yes, in making my inspection for the purpose of Condition determining the condition per cent, I analyzed the per cent. work which has been done in maintenance and repairs to keep the pens, for example, up to condition. In determining condition per cent I went up and down the alleys and looked into each of the pens

Trans.

very carefully and walked into all of those pens where from the alley I could see that there was some special thing I should look at. If the pen were clean and it was quite clear I could see everything from the alley, I didn't bother to go into it. In conditioning the pen area in the cattle yards, for example, I made a special note of the condition of the paving and the condition of the woodwork and
 578 fixtures, such as watering troughs. No, I did not pay any attention to the year of the construction only to the extent that I was aware of the time that certain of the area had been constructed. As to the 1928 construction, I do not recall the details of it and I don't remember whether or not in that construction there had been a large number of new gates added to the pens within a recent time, but if it were apparent from a visual inspection I was impressed by it or possibly even made note of it. No, I did not notice whether the 1917 construction in the triangle south of the Exchange Building was in better condition than the 1919 construction in the same area, because I inspected each pen in that area and the inspection paid no attention to the date of the
 579 construction of any of the areas. As to 38 new gates being put on the main alley in 1934, if the condition of those gates were such as to have that stand out, I observed it. No, we have none of that detail in our working papers. All of that is in Kansas City. I
 581 think my staff followed much the same method. The figures were weighted as to areas, but not as to units of construction. Yes, my notes as to the cattle area are also in my working papers at Kansas City

Witness was requested to obtain notes and introduce them, if necessary, out of order.

582 In determining the condition per cent, the age was taken into account to the extent that it was observ-

Trans.

able. Of course, I myself knew the age of certain of the units of the property, but this condition per cent was not figured on the basis of age.

Condition per cent. not based on age of structures.

Q. Well, now, I think you referred to the fact that it is impossible to observe, or was impossible to observe, the condition of the water system and the sewer system, but in your condition per cent statement you have the sewer system, in at an average or your adopted value of 75%, I think, and the water system at 79%, how was it that you reached that conclusion with regard to those items unless it was in some manner upon the age, that is the length of installation or time of installation?

583

A. Well, that would be one place where the age might be working unconsciously. What we attempted to do, or what I, myself, personally attempted to do, as I said, was to gauge what must be the condition of those portions that I could not see based upon what I could see.

Age did affect condition per cent. estimate in water and sewer system.

584

(Witness continuing). Yes, vitreous tile pipe itself has almost an indefinite life, but in a sewer, in addition to such life, there is a mortar joint and settlement or impact above the thing would have a tendency to jar loose the joint. No, I did not make any investigation of the history in this particular locality of breaks due to settlement, but I did investigate the surface condition to satisfy myself whether such a thing would take place, and I understood from stockyard people that some of these sewers had blocked up from time to time due to settlement, and that together with the inspection that was possible at the manholes and other places where the sewer might be looked at, such as at the head walls on the river and things of that kind, indicated a 26% deduction for condition.

Sewer system condition per cent.

585

Trans.

The witness was asked if it were not true that the head walls had all been constructed brand new within the last year.

(Witness continuing). I couldn't exactly state as to the condition of the individual head wall, but I could look into the sewer from it.

Q. Yes, but as a matter of fact, due to the change in the location of the channel of the Platte River, every sewer there for many feet is brand new, is it not, the outlets?

A. The outlets themselves are, but there has been some disturbance of those head walls even since they have been constructed. Now, I couldn't state with regard to each individual head wall, what the condition is, but it seems to me that at least one of those has been replaced since it was constructed. I don't recall the details on that, but in the course of the inspection that is a thing that I noted, and of course where the condition is new or where it is possible to observe the new condition, that portion of the sewer would be considered as in much better condition than that which was in another part of the property and was older.

(Witness continuing). Yes, I might have depreciated certain of the sewer lines elsewhere say 35%.
586 Yes, that was based only on such inspection as I could make. No, I couldn't state that I recall any particular locality or any particular sewer which was depreciated in my opinion less or more than 26%. I don't recall. In my own inspection there were some but I wouldn't know what sewer it was. Yes, that was based upon my inspection of the manholes.

Much the same difficulty applies to structures such as the new Exchange Building, because we didn't tear out any plaster to see the condition of the walls

Trans.

or rafters. No, I wouldn't say that we took into account the so-called mortality tables. The condition per cent of a structure like the Exchange Building took into consideration such repairs as were apparent and such replacements.

I gave no consideration to the estimate of the remaining expected useful life of any of the items in Government Exhibit 32 or Government Exhibit 28. That was a separate and distinct estimate. Of course I knew as an engineer what in general might be the average life for certain classes of the property. Yes, unavoidably there was some relationship in my mind between the remaining useful life and condition per cent, because those are things that one can hardly divorce from his mind.

With regard to the railroad trackage relay rail sells somewhere in the neighborhood of about two-thirds of the cost of new rail and sometimes a little less on occasion. Yes, in Exhibit 28 and in Exhibit 30, at page 482, I specify that some 450 tons of rail was all relay rail and I gave it a condition per cent of 79. No, I do not think, as a matter of fact, that the depreciation in that construction has already taken place and been actually taken into account by the fact that it is relay rail. Relay rail is a distinctive commodity by itself and takes a classification virtually the same as new material on a lower price basis. The relay rail is in its second cycle of life.

Government Exhibit No. 37, being the schedule of prices of material and labor requested of the witness previously, was offered and received in evidence. Govt. Ex. 37 received.

(Witness continuing). Yes, in Government Exhibit 28 I show straight line depreciation as a total of \$95,020 per year. That is the amount of money that would be set aside each year to recoup on an annual depreciation allowance.

Trans.

nual basis the total cost of reproduction of the plant. No, if interest on land during construction were to be added, I do not feel that there would be any additional allowed for depreciation added to the \$95,000 figure, because interest on land is an element of cost that is tied up to a class of assets which is not depreciable.

598 Yes, in a way my system does force the regulated utility to take the speculation on an increase in the land value rather than recognizing that interest as part of reproduction new cost, but there are certain things the industry gets the benefit of which the regulatory power cannot control and I think that the interest on land is one item.

Yes, I would agree that to the extent of the additions which I have made in Government Exhibits 26 and 27 concerning the 12 inch main and the 16 inch main, there would be an additional straight line annual depreciation allowance to be added to the \$95,020 figure. It would be on the basis of 2% per year of the additional cost.

Additional depreciation allowance should be made.

599

Re-direct Examination

No relation between condition per cent and period of remaining life.

No, there is no relation between the condition per cent and the period of remaining life as set up in my percentage tables, the reasons being that the condition per cent is based on observation of the plant units while the composite life has been arrived at by use of the life expectancy tables and the normal experience which one would expect to have on the plant in the course of normal maintenance. All these factors for composite life may or may not work if given time, and therefore what one has worked is seen on inspection and observation. Hence the two approaches are entirely different and independent of each other. Yes, obsolescence is considered a factor in condition per cent while it is observed which it

Trans.

may or may not be, but it is always considered in life tables. That is one of the reasons why there is no relationship between the two.

601 I think I can best explain that in the steps again.

To determine condition per cent of a tier of pens, we will say, those on both sides of an alley in the course of inspection, I took note of the condition of the component parts of the pens, we will say, the paving and the fences and the watering troughs and the other fittings, that are in the particular pens. Having looked at all of the component parts of the pens, the condition per cent arrived at, in my mind, now, for the individual pens, was based upon the condition per cent which I thought was applicable to each of those component parts, and in carrying that a step further to arrive at the average condition per cent of a tier of pens, that is pens on either side of an alley. I then bore in mind the average condition per cent of each pen and that enabled me to place a condition per cent upon the tier of pens which was, of course, the units into which we had broken down the pen area for the purpose of conditioning. Now it was from those units, — and by the way, those are the units which Mr. Bosworth has asked us to submit the tabulation from our working tables, — we worked out the average condition per cent for each pen for the entire cattle division. I only took into account the age, where I think it was an observable thing. Either a pen looks very old or looks relatively new, and to that extent I gave consideration to age.

Condition
per cent.

602 Zone 5 is the colored plat shown on respondent's Exhibit 1 on the west side of the Platte River separated from the Platte River.

I. C. C.
valuations.

When I gave the Interstate Commerce Commission valuations yesterday I referred to the Chicago, Burlington & Quincy Railroad. The other railroads in

Trans.

close proximity to the stockyard land are the Union Pacific, the Colorado & Southern and the Northwest-
 603 ern Terminal Railway. The Northwestern Terminal Railway has only one zone joining directly stockyard property and it adjoins Zone 3 and 2 as listed in my appraisal on the west and is I. C. C. Zone 4 appraised at \$2,000 per acre approximately in 1934. There is a Union Pacific zone listed as Zone 14-a on which the concrete roadway from 46th Avenue is located in part. It adjoins Zones 1 and 4 and just barely reaches to Zone 2. In 1919 it was appraised by the Interstate Commerce Commission at 23c per square foot, and in the latter appraisal, which is about 1934, at 8c per square foot.

On the Colorado & Southern, I. C. C. Zone 11, extending from the east and west section line dividing sections 15 and 22; to a point approximately 300 feet west of the center line of the Burlington right-of-way, is appraised at 21½c per square foot in the latest appraisal.

604 Zone 12 of the Colorado & Southern extends from the last mentioned boundary line to 46th Avenue, was appraised by the Interstate Commerce Commission at 6.9 cents per square foot.

Zone 13 of the Colorado & Southern does not really adjoin any of the stockyard property, but it is close enough to have some influence. It was appraised at \$2,500 per acre and runs up to Brighton Boulevard. There are some Union Pacific zones bordering on 46th Avenue virtually across the street from the horse and mule division. These zones are irregular in shape and one of them, 15-B, is appraised at 6.9 cents. That is the same as sale 35, 36, 37 and 38 and also the triangle across Brighton Boulevard hooked with an arrow on the sales map. There is also Zone
 605 15-NC, meaning "Non-carrier," which is at the intersection of Brighton Boulevard and 46th Avenue,

Trans.

appraised at \$3,500 per acre in 1919, and \$1,800 per acre in 1934. It is my understanding that both the Interstate Commerce Commission and the Union Pacific people have agreed to these valuations. The Burlington has not agreed to the latest appraisal.

- 606 Yes, I testified that I valued these lands from the standpoint of the highest and best use and also consider the value as based upon some alternate use. In general if I were valuing the property from the standpoint of other types of industries, the presence of the packing houses might influence my values down. Yes, I have considered this tract as an assembled area, which added to my value. No, I could not state how much. **Highest and best use.**

607

Re-cross Examination.

Yes, I testified that I had appraised this property in accordance with my interpretation of the Minnesota rate case, which is with all the packing houses and other related industries in place, but with the stockyards and the improvements which themselves constitute the underground and superficial structures of the stockyards removed. No, I do not think it is inconsistent to say that with this interpretation of the Minnesota rate case the presence of the packing plants would influence the value downward to other industries, because in seeking to fix the upper limits of value on the property one of the controlling things, of course, is to determine what the land might be worth for an alternate industry, which is of a higher character than the stockyards company, and if it were so available I would then have to look for the values of that higher use. In this case I reached the conclusion that a stockyard utility would be its highest utility. Yes, in this case the lessening in price due to the packing plants being there is more than offset by the fact that the zoning law of the City **Basis of land valuation.**

Not valued for stockyard.

- 609 conclusion that a stockyard utility would be its highest utility. Yes, in this case the lessening in price due to the packing plants being there is more than offset by the fact that the zoning law of the City

~~Trans.~~

and County of Denver requires that an industry of that type and of the type of the stockyards be in this section, but I still had to look to see if the property under the circumstances could be used for a higher utility. I can't say that I know why this area was set aside for stockyard and packing house use under the zoning law, but it would occur to me that the location was one where it was desirable to restrict a nuisance type of industry so that it could not affect other areas in the city. By nuisance type of industry I mean that this industry, due to the smells incident necessarily to the slaughter of animals and their keep, is not attractive. Yes, I think the fact of the prevailing winds influenced the establishment of this zone, and I so stated in my report.

- 610 Yes, Sale 35 as shown by the map and on page 97 of Government Exhibit 23, had a sale price for the naked land in 1922 of \$11,600 for about an acre and a quarter, or 20c a square foot. No, I don't believe that the value of that tract of land has gone down from that point from the standpoint of general utility to 6.9 per square foot, but in the acquisition of so much land, as the Union Pacific acquired in this industrial territory, the 20c which they paid per square foot for a specific parcel may not have been what it was worth.

(Witness excused).

- 612 MR. CHARLES E. COLLINS, a witness called by the Government, testified as follows:

I have lived at Kit Carson, Colorado, for 29 years and my principal business is ranching. I am also President of the Kit Carson State Bank and have several other interests. I am president of the American National Livestock Association, whose activities are in the seventeen Western States, and the organ

rans.

zation has been recognized as representative of the cattle industry in the West. I would say we have 13 three or four thousand active paid members, and most of them are producers and shippers of livestock, shipping to all of the principal stockyards. A good many of them would ship to Denver. Besides raising cattle, I farm. I do not raise either hogs or sheep. I produce about twelve to fifteen hundred calves a year. Some of them when I feed them up I ship to some terminal market, but when I don't have corn to fatten them I usually sell them direct to stockers and feeders. I hardly ever go to the market with any stockers and feeders.

(The witness was asked if he had any general statement that he wanted to make. Witness continuing).

Well, about all I have to say is that the American National is claimed or thought to be the father of the Packers and Stockyards Act. In the beginning the American National started out to try and see the hole card of the big packers but found that was a difficult job, but whether we are the father of a law or not it has been a law and we have really felt that it was a useful and necessary Act, and it has been the policy of the American National for a number of years at their conventions that they have repeatedly resolved 15 that they favored a reduction in market, in stockyard charges and commission rates. I believe that the stockyards and commission men have a right to make profits above anybody in the whole country. I have paid a great deal of attention to these hearings and it seems that they resolve simply upon the values of the property. I don't feel that I am competent to make any statement about that because I don't know as to the value of the property, and I have felt that if there was any part of the stockyard business that was useless to the marketing of producer's cattle,

All users of facilities should pay.

Trans.

that the burden of that expense should not fall upon the producer. I stated in the St. Joe hearing several years ago, and I still think it is right, that everybody that uses any part of the stockyards property should pay their proportion so that the burden of the whole expense would not fall on the original shipper of the livestock.

The Stock
Show.

Show
beneficial.

- 616 It would be a mere guess for me to say just how much difference there should be between the yarding rate on cattle and hogs. I know there is a difference. Yes, I know the stockshow property and am thoroughly familiar with it, and in a way with the show. As to its being a benefit to the industry, that is a controversial question. I am one of those fellows that has opposed many of the activities of anything to promote livestock and farming in this country. I have opposed this county agent business and this ex-
- 617 tension business and agricultural college, and any activities that I thought tended to broadened the field of agriculture and livestock. I have felt that with the exception of a few periods we have had a surplus of the product and we didn't need any encouragement to go on, but that is my own opinion. There are a good many smart people who disagree with me. From the betterment of livestock and the promotion of the industry and the building up of a better grade of livestock, there isn't a bit of doubt that these shows are helpful.

- 618 Yes, I travel around the country quite a lot from ocean to ocean. I have been in practically all of the western states the past year and a good many of the eastern states. It would be pretty hard to arrive at any conclusion of the population of livestock in this country by driving through the country because you don't see very much that way. The only way I arrive at that is the statistics that the Government puts out in regard to the livestock population. For

Trans.

example, the crop and market report which we get daily and weekly through the Bureau of Agricultural Economics is one of these publications. These figures show that this year there are 8 or 10 million less cattle on the farms than on January 1, 1934, and a couple of million more than we had on January 1, 1928. I would think we had the normal number of cattle on the market or at least the amount that were marketed in 1928 or 1929 or 1930. Of course if the price doesn't justify, there is a tendency to hold them over, but over a period of years they have to go to market and we ought to have a normal supply of cattle over a period of years. As to sheep, there might be a tendency to hold back the ewe lambs for a year or two to build up and there might be less coming to the market, but it is just kind of a guess because there are many things that could happen, such as the drought or the operation of a Taylor act cutting down on cattle. As to the hogs, the Government figures show something like 20 million less than normal, and it would be hard to tell how long it would take to build back the hog population, and this Government hog-corn regulation might delay it considerably. If everybody in the country having a little corn could buy a couple of sows and hold them, it might put us back in a couple of years, but it will all depend upon prices.

621 No, I don't think our Association adopted any resolution directing some of us to report at these hearings and testify. I presume it was overlooked. It has been kind of a stereotyped resolution that was passed so often I think it was not passed last year.

Cross-examination.

Yes, I think our organization has been of benefit. As to expenses of \$135 for entertainment of the American National at its annual meeting, which was made by the stockyards company, my version of that

Trans.

is the same as any kind of business, I don't care whether it is the stockyards business or my business, I feel that anybody ought to have the right to donate or contribute a little if they want to or feel like it. I know I have a business out here at the stockyards, the Blackleg Company, and we make quite a few contributions to different things, and strictly speaking maybe we shouldn't do it, but we feel as public-spirited people we ought to kind of go along with those things in a way. Yes, it figures in our cost of doing business, and people ought to have that right if they don't abuse it.

Shipper does not question donations, if not excessive.

Yes, my statements about the hog, cattle and sheep population are taken from the Government reports. Yes, New Mexico, Colorado and Wyoming have been pretty hard hit. New Mexico will probably not ship as many cattle as they did last year or maybe in these drought years. I know here in Colorado it seems like when this Government program started in we must have had more cattle in the whole entire western country than we thought we had and there is no doubt that we did make quite a cleanup last year, and probably will not repeat the number of cattle for some time that we shipped last year, but I kind of feel that things will be fairly normal in the next year or two or three years as they were three or four or five years ago. Yes, in my own case, due to feeding conditions, the drought and other things, I shipped 1250 cattle to Ohio last fall, and that was about my last year's calf crop. It is true that those cattle when and if marketed are not available to the Denver market. There is no denying that there are a great many cattle sent on to the territory in the corn belt or farther East in Ohio, that is, there was an abnormal number that went out of the country to various eastern States because that was where the feed was that year. Yes, while that may

rans.

keep up the national picture, you would naturally expect to find that there were less cattle in the western country than there would be normally. This applies to Colorado, Wyoming and New Mexico chiefly. Most everybody, however, kept back enough cows and stuff, and if conditions are right we can build up our cattle population fairly rapidly because most everybody kept their breeding stock. Yes, as I remember it the Government figures show that 75% of the cattle purchased were female cattle.

Yes, the tremendous reduction in the producing end of the livestock business is bound to have its effect in that the high peak of cattle population we had on January 1, 1934, was a very high peak. We had entirely too many cattle in the country, and if the Government program hadn't been put into operation, why, no doubt the stockyards receipts, in 1934, would have gone up there tremendously. Of course, they did go up and a good many were handled through the stockyards, but we were at a tremendously high peak in 1934 of 67,000,000 or 68,000,000 cattle. Yes, that was the accumulations of several years holding back. Low prices caused a lot of cattle to be retained. People did not want to take the price and the cattle were held at home. The low price was tied into the depression, and the holding back did not help because we had to go to town with them sometime. Yes, as a banker, I know that a good many forced sales were made. A good many of the loans we turned over to the Government Regional to work out, and they are still working on them. Yes, that required a good deal of liquidation during those years of 1930 to 1934, but I think that these Government agencies aided to prolong the liquidation of these cattle. I think we might have been better off to have taken it on the chin in 1933. Yes, I think any of these

Trans.

Government agencies will be more lenient towards the borrower than any commercial institution would be.

- 629 Yes, I generally sell my stockers and feeders direct. I don't know that it is due to the fact that there is an 85% rate on stockers and feeders around the market. I have a pretty good herd of cattle and it is pretty well known throughout the country, and when I wanted to sell my cattle I had enough buyers so that I could always sell them at home. I don't think that applies generally to very many herds. There are quite a number of herds throughout the western country that have got a very good reputation among the buyers and I think the quality of the cattle and the people knowing it has more to do with it really than the 85% rate because there are a whole lot of buyers that do not know much about the 85% rate, do not know there is much advantage to it. Oh yes, there are a tremendous number of head of cattle that are not within such well known herds. Yes, I think there is an increase in the marketing direct of stockers and feeders. I think that probably, due to the feed conditions in the East last year, more cattle moved direct, but that is a pretty hard thing to determine year by year.

- 631 Yes, the purpose of the Taylor Act is to control the grazing on the public domain. In the past, as a rule, it has been free to the public. Of course, the idea of the Taylor Act is to conserve the public domain and to build up the ranges. It is my opinion that the Taylor Act, even though they do not get the amendments through at the present time, there are 80,000,000 acres, as I understand it, and if they get control that is going to reduce the number of cattle and the number of sheep that have been running on those ranges. That is the purpose of it.

rans.

Yes, I have a pretty good herd and have been in the business ever since I can remember in the western country, in Texas, New Mexico and all over the West. Yes, I remember the days of the old Texas longhorn. There is no question about the difference in quality and grade of the cattle between that and now. There is no question but
 632 what that has been improved. And you have an early maturity of such better grade cattle per pound of feed. Yes, in those old days when the longhorns rustled for their own feed there was plenty of grass, —lots of it. They could range farther and find
 633 better grass conditions than they get now. Yes, there has been over the years a marked improvement in the quality of the animals, and while I am not familiar with sheep, it goes without saying that all the western herds have been bred up tremendously from what they were in the old days. My recollection is mostly of the Mexican long-haired sheep, but there is no doubt that the quality has been improved. I presume that hogs are better too.

634 Yes, my idea is that the whole industry would be better off with a reduced supply, if you could regulate your supply of cattle down to about fit your consumption, but I don't think that is possible at all, as I told Secretary Wallace in February. I told him that I thought it was all hooey trying to regulate the supply of the commodity to the demand for the commodity.

Yes, I am interested in the Blackleg Company. Yes, I feel that the activities of that Company are beneficial to the industry.

635 As to whether or not the space rented in the Exchange Building to the serum company is used and useful property, I feel that as long as the Stock Yard Companies have buildings and facilities for these purposes and rent them and they pay the

Trans.

636 way, I don't see why it would be objected to, if they were not a burden to the business at all. If you have built a livestock exchange and have the buildings it is part of the capital investment of the company. Yes, I feel that my company should pay the full rent necessary to carry the load on the particular space. I presume that my companies are doing that, but if in the beginning the Stock Yard Company had possibly built and acquired properties that were not necessary to the industry, I would question whether they would be justified in making the shippers carry the load, but when you come down to renting a room in the Exchange after you have already got the Exchange built, why, I don't see how you could limit it at all. From a convenience standpoint it would look as though it would be proper and good for the industry to have at one central place the railroad offices, the post offices, the serum companies and other companies dealing with livestock disease as well as the commission man. Yes, there are other buildings that could be rented up on 47th Avenue. There is a serum company in the old location of the Drovers National Bank, but people in business naturally like to get where the business is, and are willing to pay a little bit more for it.

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Re-direct examination.

I could not say that it would help the Stock Yard Company in yarding cattle or livestock or in feeding the cattle or livestock to send out serum, but as to whether or not it would be proper for the shipper to pay for any deficiency, I don't see how you can get away from all these little things. As I stated, after the yard company has once built a livestock exchange and gets the money invested in it, it looks like it would be much better for the industry to make the space in that building help

Trans.

carry the load. No, I do not understand that the Government is objecting to that.

638 In regard to the Texas longhorn, there is absolutely no question that the education among the farmers and the changes in the economic conditions, would have caused the Texas longhorn to disappear. I have always contended that if you let the farmer and cattleman alone he will do all the improvements in this country without any education boosting at all. He will advance rapidly enough to take
639 care of the demand for the product.

As to whether or not an item of \$137 for entertainment of the American National Livestock Association, and similar items, should be included in the rate base, I have always thought that any kind of a business, if they did not abuse, should have the right to donate or spend a little money for things that tend to help their business. Now the Stock Yard Company's contribution of \$137 to the American National brought in a lot of cattle and no doubt they felt it would bring them in contact with people and in a way help the business, and it seems like to me that any sound business should be permitted to use items of that kind along to help the business. As to the Stockyards bowling team
644 and the Greeley bowling team tournament, off hand I cannot see why those items should be included.

Donations and subscriptions.

Re-cross examination.

Of course those items are too small to quibble about. I have always thought a stockyards company was very much like a public utility and a little different from some individual business. It is not so much of a monopolistic sort of a concern as the public utilities are and the chances are that they probably should be permitted to have latitude that
645 some other concern should not have. I appreciate

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Donations not
excessive.

the stockyard claims that they are not in any way a monopoly, and perhaps they are not, but if a person comes to Denver he has only one market to go to, and I think it can be more strictly supervised than some other types of business. As to these recreation items of expense, I presume that is done in a great many large corporations, but it seems to me that I would just donate that out of my own pocket. Yes, I expect that many utilities figure such recreational items as operating expense, but as I say, whether it is proper or not I would not be competent to state. As to the whole question of donations and as to whether or not the total amount spent by the Stock Yard Company is only 3/10 of one per cent of the income, I would say 646 that if it is not abused practices of that kind would not be items of great importance, but I don't think the charge would be so heavy that it would particularly affect anybody. Yes, I think the regulatory power should go to the question of abuse rather than to the particular item.

648 H. E. BUFKIN, a witness called by the Government, testified as follows:

Direct examination:

I live in Kansas City, Missouri, and am senior accountant for the Packers & Stockyards Division, Bureau of Animal Industry, U. S. Department of Agriculture, and have been such since September 18, 1924, when I first entered the employ of that Division. My qualifications are as follows:

I am a high school graduate and received my public accountant training from the International 649 Accountants Society of Chicago, Illinois. I was connected with the Mississippi Central Railroad Company at Hattiesburg, Miss., for two years; I spent nine years as accountant and chief accountant

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for the joint general offices of the Missouri, Kansas & Texas, the International & Great Northern and the Galveston, Houston & Henderson Railways at Galveston, Texas. For thirteen months I was chief accountant for the Galveston Terminals, which included five rail carriers, and the Galveston Wharf Company. As a result of the civil service examination held in 1924 for senior examiner of accounts, Interstate Commerce Commission, I received an appointment to a position as accountant with the Department of Agriculture September 18, 1924.

Since my connection with that Department I have audited stockyard corporations located at Sioux City, Iowa, Sioux Falls, South Dakota, Kansas City, Missouri, St. Joseph, Missouri, Fort Wayne, Indiana, Oklahoma City, Oklahoma, Wichita, Kansas, Cleveland, Ohio, Seattle and Spokane, Washington, Ogden and Salt Lake City, Utah, Omaha, Nebraska, Denver, Colorado and other smaller yards. The audits made at Omaha, Kansas City, St. Joseph, Denver, Cleveland, Wichita and Sioux City were in connection with rate investigations. In addition to auditing stockyards, I have audited numerous commission firms, dealers, brokers, etc. throughout the United States and have also conducted various examinations and investigations of registrants under
650 the Packers & Stockyards Act. I am not a certified public accountant but have made arrangements to take the examination in the State of Colorado. About December 1, 1934, by virtue of my employment in the Packers and Stockyards Division I was directed to make an audit and report at the Denver Union Stock Yard, which audit I completed in about 2¾ months. I began work on December 2, 1934. In making the audit I had the assistance of Mr. Harry Baughmann and Mr. Gerald B. Svoboda, who were also Bureau accountants. I was assisted by

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- 651 no one else. As a result of that investigation I prepared a written report, a copy of which was furnished to the stockyards by the Department of Agriculture some time around the first week of April, 1935, as well as I recall. I may have talked to representatives or employees of the Denver Union Stock Yard with reference to the contents of the report, but I do not think I discussed its accuracy
- 652 or correctness with any of them. No representative of the stockyards has pointed out any errors therein to me.

I secured a trial balance from the records for each of the five years, 1930 to 1934. The trial balance is not shown in the report, but a summary thereof taken from my work papers is. It appears on pages 1 to 9 of the report, as numbered in Washington.

- 653 After securing the trial balance we analyzed all the accounts for accuracy and of course we made an analysis of the balance sheet accounts and searched for any information that was not clear in the records. To illustrate: Where the Stock Yard Company may have charged an item of expense to one account through error in posting, and we would find that was in connection with another account, we made the switch to the other. If the mistake was not apparent before making the switch we consulted with the stockyards representative.

After we analyzed all the accounts, both income and expenses, and balance sheet, we then reconciled the book surplus to the audit surplus, a summary of which appears on page 9 of the audit report.

Q. I wish you would make clear, please, what you mean by that statement.

A. The differences between our completed audit profit and loss figures were reconciled

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to the book profit and loss figures. In a great many cases we found where an adjustment was necessary, due to the fact that the Stock Yard Company would make an adjustment, for instance, in 1931, and the expense would be applicable to 1930. Under those circumstances, of course, we adjusted the expense back to 1930.

654 (Witness continuing). In making such adjustments we frequently consulted with stockyards officials to get the facts. The report on our audit covers a five year period through 1934 and does not take up any of 1935. I believe that about covers this audit report, so far as the work is concerned, in arriving at the final figures. A summary of the balance sheets for the five years is contained in the reports. January 1, 1930, which is the beginning balance sheet is shown on page 1 of the audit. A summary of the gross income for the five year period is shown in the audit on page 3. A summary of the gross expenses for the five year period is shown on pages 4 and 5 of the audit report. Gross
655 income and gross expenses are shown on those pages.

Page 2 shows the net income for each of the five years and pages 7 to 8 is an analysis of the surplus account since 1912 by years.

The figures on page 2 were reached by us after making adjustments. We eliminated certain items that were charged to expense on the stockyards records, and page 2 represents the figures after making these eliminations.

In a single sentence the analysis of the surplus account just referred to shows the changes between our figures and the book figures. To illustrate: On page 9 under additions, there is an item of \$22.00; it is the first item "Cigar Stand Equipment" transferred from operations. *That item is shown*

Trans.

on the books of the Company as an expense and covers equipment purchased for the cigar stand.
656 We transferred it and set it up under cigar stand equipment. Another instance is taxes adjusted to actual expense. That would be the fourth line under additions 1934, 1933, 1932, 1931 and 1930. We adjusted the taxes to the actual amount of expense for each year. Of course, the Stock Yard Company set up an amount each month and charged off the tax expense. The purpose of this adjustment is to show that the actual expense was either over or under the book figures, whichever the case may be.

To the best of my knowledge and belief all this work, done under my direction, correctly reflects
657 the records of The Denver Union Stock Yard. Our working papers show all the details that we obtained from the records of the Stock Yard Company books which were summarized in this typed audit report.

Government Exhibit 38, which was the report of the audit just identified by the witness, was then offered in evidence.

MR. BOSWORTH: Just a moment. Well, Mr. Examiner we don't question the accuracy of his figures and in not objecting to the admission of this exhibit for what it shows, we of course are not binding ourselves to the approval of the method followed by Mr. Bufkin in certain instances. With that understanding we have no objection to the Exhibit.

MR. MILES: The understanding is all right.

THE EXAMINER: Government Exhibit 38 received.

It was then arranged between counsel that the working sheets be left in the custody of either Mr.

Trans.

Christensen or Mr. Krake (Government representatives at the stockyards), and be available to representatives of the stockyards at all reasonable hours.

MR. MILES: Mr. Bufkin, the working sheets before you, are the separate folders identified so they can be separated any way or described?

A. Yes, sir, they are separated by years with the exception of one package, which contains balance sheet and miscellaneous other information contained in the typed report, but all of the other packages here include the balance sheet and detail of income and expenses by years, and are so marked on the outside.

Q. And the details shown on these detail working sheets are really the basis for this audit report?

659 A. That is correct.

The first folder of the working sheets, identified as Government Exhibit 39, was thereupon offered in evidence. This folder was described as covering the balance sheet analysis and miscellaneous data included in the audit report. The second folder, identified as Government Exhibit 39-A, was offered in evidence and described as covering the year 1930, the detail of the profit and loss figures and a summary of both with a balance sheet for that year.

Govt. Exhibits
39, 39A, B, C,
D, and E
admitted.

Government Exhibit 39-B was then offered in evidence and stated to contain the same data for 1931 as Government Exhibit 39-A contained for 1930. Government Exhibits 39-C, 39-D and 39-E, described as covering the years 1932, 1933 and 1934, were thereupon offered and received in evidence.

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(Witness continuing). Just to make everything clear my compilation which has been called Government Exhibit 38, is a summary of the working sheets which have been called Government Exhibits 39 and 39-A, B, C, D and E.

Government Exhibit 40 contains the deeds, leases and agreements in connection with The Denver Union Stock Yard Company for the various years and shows leases and agreements with different concerns over a long period and the deed of property 661 to and from The Denver Union Stock Yard Company. We obtained this information from the files of The Denver Union Stock Yard Company. I did not furnish a copy of this volume to the stockyards and I am not sure whether one has been sent to them from Washington. However, the original of these copies are in the files of The Denver Union Stock Yard Company.

Govt. Ex. 40
received.

Government Exhibit 40 was thereupon received subject to objection, if any, hereafter to be made on account of materiality of any of the documents contained therein.

(Witness continuing). In Government Exhibit 38, on the fourth page of the index at the bottom of 663 the page, is the caption "Statements." Under that caption we have indexed certain subjects. Statement No. 1, which appears on pages 266 to 275, shows the preferred stockholders of The Denver Union Stock Yard Company as of November 30, 1934. It also shows their addresses and the number of shares held. The information was taken from the records of The Denver Union Stock Yard Company. In fact all the information under that caption was obtained from that source. Statement No. 2, on pages 276 to 285, shows the same information for the common stockholders as of December 20, 1934. Statement No. 3, which appears on page 286, shows the maxi-

ans.

64 mum receipt of livestock for one day, one week, one month and one year. Statement No. 4, on pages 287, is a statement of gross payrolls for the calendar years of 1930 to 1934, inclusive. Statement No. 5, on pages 288 and 289, shows the detail of the inventories for the years 1930 to 1934, inclusive, by months. Statement No. 6, appearing on page 290, shows the dividends for common and preferred stock from 1913 to 1934. Statement No. 7, on page 291, is an analysis of construction labor. By analysis of construction labor I mean the number of men, occupation, hours worked, rate of pay, total compensation, as taken from the Denver Union Stock Yard payroll. Statement No. 8, which is on page 292, shows the repairs from 1918 to 1934, inclusive. Statement No. 9 is a summary of scale performance 1932 and 1934. By scale performance I mean the total number of head weighed, total drafts, days the scale was operated, and in this computation I have shown the average draft per head and the average draft per day. On page 293 is a typographical error. In the next to the last column the words "average draft per head" appears. It should be "average head per draft." I should like to have that changed.

MR. MILES: Let the records show that page 293 of Government Exhibit 38, next to the last column reading now "average draft per head" is changed to read "average head per draft."

(Witness continuing). Statement No. 10, on page 294, is the livestock receipts by years, 1896 to 1934, 65 which statement is separated between cattle, calves, hogs, sheep, horses and mules. Prior to 1906, however, there was no separation between cattle and calves. This statement also shows the receipts by rail and truck-ins. Statement No. 11, on pages 295 to 300, is the statement of total livestock receipts, separated by species, by months, for the years 1930

Trans.

to 1934, inclusive. Statement No. 11 is divided into Statements 11A, 11B and 11C. 11A is the summary of 11B and 11C. 11B covers rail receipts and 11C covers truck-ins.

Yard Traders.

- 666 The report of "trader livestock," that is, livestock purchased and sold by the traders, is being typed today. We are working with the Stock Yard Company officials in arriving at figures which have been taken from the trader records and order buyer records by both myself and two assistants and Stock Yard Company employees. We both had compiled this information some time ago, just subsequent to the completion of this audit report, and in checking it, that is, in checking the stockyards statements with the Government statements, we found some differences and it was necessary to go back to the records in an attempt to agree on the correct figures. It was mostly due to the condition of the trader records. In so many cases we found the records were not accurate. For instance there would be an order slip destroyed where we were attempting to check the order buying business. From records such as that we attempted to iron out all of our differences and balance the figures and the books. Now that we have all those differences ironed out, and the statement is being typed today, it will show the total number of head handled by these concerns and the disposition of the livestock. That is, the total number of head shipped and the number of head resold on the Denver Union Stockyards and the number of plants sold through commission firms. This statement will be ready tomorrow and if correctly typed, will agree with the stockyards records.
- 668

The "throw
out" schedule.

Now with respect to the compilation entitled "Report Supplementary to Audit for Rate Making, December 31, 1934," this is the summary made from Government Exhibit 38 and covers the adjustment for rate making purposes of the net income over

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the five year period. I prepared this report and to the best of my knowledge and belief, it is correct. There is a second compilation marked "Report on Working Capital Requirements," which I prepared 669 and which is also correct to the best of my knowledge.

MR. MILES: Now I would like to show on the record that there was a delay in the preparation of these two volumes. I handed them to Captain Bosworth only yesterday, did the best I could, but I realize that is not satisfactory.

Government Exhibit 41, being the report supplementary to audit for rate making, just referred to, and Government Exhibit 42, being a report on working capital requirements, were thereupon offered in evidence.

MR. BOSWORTH: We do not question the accuracy of these figures but we do object to the exhibit from the standpoint of the theory on which it is based and the conclusions reached therein. So far as the compilation goes, we have no objection to the introduction of Exhibit 41. As to Exhibit 42, I think the same thing is true except that I would want to check somewhat the accuracy of the figures as to the supplies and inventories against the other volume and against our records.

MR. MILES: Certainly, that is reasonable in view of the delay in handing these volumes to respondent's counsel.

Government Exhibits 41 and 42 were thereupon received in evidence.

(Witness continuing). The first column of Exhibit 41 entitled "Gross Income Per Audit" is taken from Government Exhibit 38. By that title we mean the gross income arrived at as the result of our audit. 670 In arriving at that figure there would be no elimina-

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tions other than those which have been testified to, adjustments between years, etc., and the third subject "Adjusted Total Income" is the gross income per audit less eliminations. That same method was used right through the compilation and also with respect to expenses.

In the third group I have recomputed the Federal taxes on the adjusted income. On the second page of Government Exhibit 41 appears the heading "Income Eliminations." The first item thereon is yardage on drought receipts, that is, yardage received by the Stock Yard Company as the result
671 of the drought cattle arriving at Denver. I eliminated that item because it was an abnormal income to the Stock Yard Company due to the receipt of Government cattle. For the same reason I eliminated the income relating to hay sales, corn, loading and unloading and weighing of drought cattle. To counter-balance this elimination of income I eliminated the expense items referable to Government cattle. There were also the following items: Income from railroad tracks, feed lot rentals, stadium livestock show rent and miscellaneous stadium rentals. I eliminated both the income and the expenses referable to these items on the ground that they were
672 not used and useful property.

I eliminated interest on investments made by the Stock Yard Company for the reason that the current assets are eliminated from the balance sheet and the working capital substituted therefor, and of course the income received from the investments would also be eliminated. This applies to dividends
673 also. The horse and mule division and stock show property were eliminated on account of not being used and useful property per Mr. Christensen's report. Miscellaneous income facilities at the stock show for feeding were also eliminated for the same reason.

Christensen's
schedule of
used and
useful prop-
erty adopted
by Govt.
auditor.

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There is also the item for branding and dehorning, and miscellaneous yard revenue which was eliminated for the same reason that the income and expenses on drought cattle were eliminated.

- 675 Under the caption "Insurance" appear five items which were eliminated on account of not being used and useful property as per Mr. Christensen's report. There is also the item "Federal Tax on Bonds" which covers the federal tax on bonds of The Denver Union Stock Yard Company. This item was eliminated because the interest on bonds and bond discount was eliminated. I am referring to the bonds issued by the stockyards. There also appear certain real estate and property tax eliminations, eliminated for the reason that they were on property not used and useful as per Mr. Christensen's report. The elimination "Depreciation Per Books" was made because an adjustment was made in this expense and appears at the lower section of the page. "Interest Miscellaneous" was eliminated because it is a premium on the purchase of securities, or accrued interest on the purchase of securities, and the income interest was eliminated, and this expense is in connection with the income interest, hence the interest was eliminated. "Bond Discount and Expense" is in connection with raising capital and of course was eliminated for the same reason as interest on bonds. "Repairs to Railroad Tracks" was eliminated on account of not being used and useful property as per Mr. Christensen's report. "Federal Income Tax By Books" was eliminated and an adjustment made to cover the Federal tax on the adjusted income. "Horse and Mule Division and Stock Show Property" expense was eliminated as not being used and useful property as per Mr. Christensen's report. "Dues, Donations and Subscriptions" were eliminated wherever I could not see there was any benefit to the patrons of the market. The details of this ap-

**Railroad
Trackage
Repairs
eliminated.**

**Dues,
Donations.**

Trans.

10-year amor-
tization of I.
C. C. expense.

P & S ex-
pense elimi-
nated.

pear on pages 4, 5, 6 and 7 of Government Exhibit 41. "Cleaning Expense account of Stock Show" was eliminated as not being used and useful expense.

677 "Physical Agents, Registrar and Trustee" expense is in connection with the raising of capital and is taken care of in the return. As to "Rate Hearing, I. C. C." expense, I eliminated 50% of that and spread it over a 10 year period instead of charging it all out over a 5 year period. I did that because in my judgment 10 years was a fair basis for the spread of this expense. It is a large expense and should be prorated over a long period, and 10 years is not unreasonable. That is so since the effect of these rates as established in rate hearings carry forward over an indefinite period. If we allowed them the full \$19,000 at once it would be the same as allowing them \$19,000 for each and every year thereafter.

678 The next item covers "Rates and Charges P & S" in the amount of \$43,934.48, which was prorated over a 5 years' period. I eliminated that entire amount because it was not, in my opinion, a charge against earnings. Of that \$43,000 the stockyard records set up \$9,000 in 1932 and \$6,000 plus in 1933 and 1934. I did not amortize this expense because it is an extraordinary amount and an extraordinary amount in my opinion should not be charged against current operations. It is not, in my opinion, a recurring expense. In my opinion it should not go against earnings. If it were to be charged any place it would go against surplus amortized over some ten or fifteen years, but I did not charge it against surplus in that way. I eliminated it completely. The item "Less Adjustments Depreciation Expense Rate Hearing I. C. C." is the amount of the depreciation expense account of used and useful property that I have determined from my conclusions. I have eliminated the not used and useful, and the balance

681 amounts to \$33,200 a year.

ans.

Referring to the page headed "Dues, Donations and Subscription Expense," I have set this page up in two columns. In the first column is shown the expense and in the second column is shown the amount allowed out of total expense; in other words, the difference between the two columns is the disallowance. Wherever I could not see that the patrons were receiving any benefit I disallowed the amount.

Dues, Donations & Subscription expense.

MR. BOSWORTH: Now, Mr. Examiner, if that is the witness' only basis we object to the testimony and ask that it be stricken on the ground that this matter has already been decided by the U. S. District Court of the District of Colorado in the case entitled "Denver Union Stock Yard vs. the U. S. and the Secretary of Agriculture," being the decision of this Court in the 1930 hearing in which it was held in effect that that was not the basis to follow and merely a question of whether there is a reasonable or an unreasonable expenditure as to amounts. We therefore object to this testimony upon the basis that the witness has indicated.

Objection of Respondent re testimony on Dues & Donations.

THE EXAMINER: Objection overruled.

(Witness continuing). In addition to considering whether or not the expenditure was a benefit to the stockyards patrons, I considered the size of the expenditure. There are various contributions listed to organizations like the Denver Community Chest, the Chamber of Commerce and the Volunteers of America. I know their functions in a general way. I disallowed the donation to the Denver Community Chest because all the shippers or patrons whom you might say would be living in Fort Collins might have a community chest fund of their own, and if they have to support the one at Denver and the one at Fort Collins, they are paying in two places, and in my opinion this is a charge to be paid

Trans.

by the stockholders and not the patrons of the market. In a general way the same theory accounts for all the rest of the eliminations.

Referring back to Government Exhibit 42, which is entitled "Report of Working Capital Requirements," on the first page appears the caption "Working Capital," and under that, "Inventories." Hay is inventoried at \$52,000. By that I mean that the amount of hay inventoried for working capital has
685 been allowed in the amount of \$52,000. Over the last five years the Denver Stock Yard has purchased approximately \$13,000 worth of hay per month. That is shown on the second page headed "Purchase Supplies and Feed Turnover." The next to the last page has the caption "Working Capital, Cash Requirements Not Elsewhere Provided." That is the total expense as shown by Government Exhibit 38, and from that I have deducted the cost of sales, of hay and grain and bedding, depreciation, interest on bonds, bond discount, rental of offices, insurance and gross payrolls. The reasons these deductions are made is because they are taken care of in other places and provided in the working capital total and included in the provisions for working capital total. The last page is entitled "Gross Payroll." It is the gross payroll of The Denver Union Stock Yard Company for each year from 1930 to 1934, inclusive. I have reduced that to a weekly basis amount to \$3,926.05 per week.

Referring back to Government Exhibit 41 following the caption "Dues, Donations and Subscription
686 Expenses" is the caption "Summary of Gross Retirements." That is the detail of gross retirements and replacements as shown in the asset account of The Denver Union Stock Yard Company from 1912 to 1934, inclusive. The book cost of all retirements over this period amounts to \$139,065.11. By retire-

ans.

ment I mean where the property has actually been taken out of use.

88 For example, take the first item which happens to be marked 1912, under building and improvement account \$82.31. That means that in 1912 that amount in the asset account was retired.

The material on the next page is a summary of retirements charged to depreciation reserve from 1916 to 1934, that is to say the property which was actually taken out of use and charged to property depreciation account. The totals of that can be found in Government Exhibit 38.

The next page is called "Summary of Depreciation Reserve and Retirement as per Books." That covers the period from 1917 to 1934, and is separated between building and improvements and equipment. It also shows the total reserve and retirements charged against the reserve. Also the net balance per audit, which is Government Exhibit 38 as of December 31, 1934. All of these figures are taken from Government Exhibit 38. The last item states that the net amount remaining in the depreciation reserve as of December 31, 1934, is \$918,018.06.

The next page covers the "Summary of Retirements and Replacements" of property charged or credited to the surplus on which depreciation allowance has been made from 1923 to 1934, inclusive. That is to say, that where an asset is retired or traded off or sold, and there is either a gain or a loss, this statement shows the net between the loss and gain for a twelve-year period.

The next page is simply my summary of repairs as taken from the books and the next page is Mr. Christensen's report of the property not used and useful. I used this sheet to determine the amount for not used and useful property in calculating the

**Christensen's
Used and Use-
ful Property
Schedule
adopted.**

Trans.

**Sinking fund
basis of
Depreciation
Reserve.**

taxes to be eliminated, and in calculating depreciation.

The next page, with the exception of the last column, is taken from certain exhibits already in the record. The last column is my own computation of a 5% semi-annual sinking fund.

Two or three pages later is the schedule of "depreciation eliminations." That shows the value set up by the engineers' report plus the overheads upon which I have computed the depreciation upon the 5% semi-annual basis to be deducted from the computation appearing on page 17. In other words, the figures on page 18 support the deductions as shown on page 17. Of course the basis for the not used and useful property is taken from page 13, that is to say, on Mr. Christensen's report.

The next page is entitled "Comparison of Book Cost of Reproduction New, Government Engineer." For example, there I have given the new Exchange Building a book cost of \$158,700 as of the date of construction. Those figures were taken from the records of the Stockyards and is approximately the cost as nearly as I could determine from the records. The reproduction new column was taken from Mr. Zelinski's report.

The last typewritten page is marked "Comparison of Straight Line and Sinking Fund Method of Depreciation." There I have illustrated the difference in effect between the sinking fund and straight line methods of depreciation applied to a \$100,000 book value structure.

On page 18 I used 5% against the reproduction new value to determine what the amount of depreciation would be if the sinking fund method were used. This is computed on a semi-annual 5% basis. This figure does not represent the actual physical

rans.

depreciation of the property but the depreciation if computed on the sinking fund method.

693 On page 3 will be found the amount of depreciation to be allowed annually on the used and useful property set at \$33,200. It is the third to the last item on that page. That figure represents the allowance for depreciation to replace the property at the end of its used and useful life.

I arrived at that figure after giving consideration to a number of things. I used the engineers' report, considered the age of the property, book values of various structures, the amount of observed depreciation as allowed by the engineers, condition per cent of the property, and perhaps some others that I don't recall.

The witness then read into the record the following statement setting forth his view as to the depreciation reserve account:

695 "Depreciation being a very complicated subject, naturally it is difficult to define. It is sometimes explained as the 'exhaustion of capacity for service,' 'lessening in worth of physical property,' 'loss in value,' etc.

Statement of
Govt. witness
re depreciation.

"The general subject of depreciation may be divided into two sections, i.e. the actual which accrues in the physical asset itself and the provision which the company makes on its books for the replacement of the asset when it has reached the end of its service life.

"Actual depreciation is a result of rust, rot, wear, tear, decay, inadequacy and obsolescence. It accrues in the asset, until it reaches 100% and the asset is retired. We may say that actual depreciation is related to repairs and replacements and in some instances the life of an asset may be extended indefinitely by repairs and replacements. Actual ac-

Trans.

crued depreciation can be determined by observation if an individual is qualified for this type of work. Of course, when an asset has depreciated 100%, a person with any degree of intelligence would recognize it.

"Mr. Zelinski, the Government engineer, made an appraisal of the buildings and structures of The Denver Union Stock Yard Company as of January 1, 1935, which shows that the observed depreciation of the property inventoried amounted to \$586,622.

696 "The second section of the general subject of depreciation has to do with the provision which the management of the company makes on its books to provide for the replacement of the assets or to reimburse the stockholders when the assets have become fully depreciated. The problem with which we are confronted, is to determine the amount that is reasonably necessary to be allowed the company annually as an expense so that it may replace its structural assets as they reach the end of their service life. In arriving at the amount to be allowed the company as an expense against earnings, careful consideration has been given to a number of factors.

"As stated above, the observed depreciation determined by inspection by the Government engineer amounts to \$586,000.

"I would like to mention here the condition per cent of The Denver Union Stock Yard Company property as determined by the various engineers. Mr. Hyder of the American Appraisal Company found the condition per cent in 1930 to be 95%, Mr. Henrici for the Government in 1930, 84%—Mr. Hyder in 1934 approximately 89% and Mr. Zelinski in 1934 80.5.

"Gross retirements of depreciation property as disclosed by Government Exhibit 41, page 8, amounted

ans.

to \$139,065.11 from 1912 to 1934, inclusive, or an annual average of \$6,046.11 for all of the property over a period of 23 years. Included in the total of \$139,065.11 is an amount of \$35,000 for partial retirement of old Exchange Building and approximately \$20,000 for dismantling to make way for construction of new sheep and hog barn. In my opinion the observed accrued depreciation existing in the structural assets plus the retirements which in this instance cover a period of 23 years, should be given substantial weight in determining the amount necessary for this company as a reserve for depreciation.

97. "In this connection let us give consideration to what is shown on the books of the company in respect to the depreciation reserve account. It has been the policy of the company to set aside an amount for depreciation reserve based upon the straight line method. The rate has been determined by the life expectancy of the various structures and applied to the book values to determine the amount of depreciation to be set up annually. For example, if an asset had a book value of \$100,000 and an estimated life of 25 years, a rate of 4% would be applied to the \$100,000 and \$4,000 would be set aside annually for depreciation. On this basis the company has accrued on its books an amount of \$918,018.06. Comparing this with the observed depreciation determined by the Government engineer it appears that this observed depreciation is only \$586,622, or 64% of the amount which the company has set on its books. It is therefore apparent that the provision which the company is now making for depreciation is greatly in excess of the actual accrued depreciation. While it may not be expected that the depreciation a company sets up on its books will exactly coincide with actual depreciation as it accrues, it is obvious that in this instance where the deprecia-

Trans.

tion set up on the books is 56% in excess of the actual accrued depreciation as determined by the engineers, the provisions made by the company are far in excess of any reasonable requirements.

698 "Further illustrations of the effect of the present policy of the company in setting up depreciation with respect to various structures is disclosed by the audit and other historical data that I have been able to obtain.

"The Stadium building was constructed in 1908, or 27 years ago and depreciation is being charged against earnings at the rate of 3% annually. In other words, the company believed it had an expected life of 33-1/3 years and is now about 5/7 depreciated. According to the Government engineer it has a condition per cent of 79 and a reproduction new value of approximately \$211,000 including overheads as of January 1, 1935. Another example is the old Exchange Building constructed in 1898, or 37 years ago. On the same basis this building has a condition per cent of 76 and a cost of reproduction new value of approximately \$120,000. It is, according to the books, accruing depreciation at the rate of 3% annually. Using the straight line method over the life of the building to date, there would be accrued depreciation of 111% of the cost of reproduction new. In other words, the company would have a building constructed 37 years ago, possessing a present cost of approximately \$120,000, reproduction new less depreciation of approximately \$91,000, an amount in the depreciation reserve fund of \$72,000, and in addition, the interest on the money in the reserve which has been in excess of proper charges to the reserve. Other buildings and their respective dates of construction, are as follows: New Exchange Building. 1917, New Hay Barn \$3

Trans.

1908, Hay Barn #5, 1917, Chute House, 1919, Club
699 Building 1911 and Blacksmith Shop, 1911.

"I have previously referred to the straight line method of setting up depreciation. The application of the use of this method is set out on the last page of Government Exhibit 41, which is the supplement to the audit. While the straight line method is commonly used by accountants in setting aside depreciation on the books of corporations, I have given it relatively little weight in determining the amount of depreciation to be allowed annually as an expense to this company for the reason that the company receives interest on the installments which under the straight line method is ignored.

Straight line
depreciation
not
considered

"The use of the sinking fund method is also illustrated on the last page of Government Exhibit 41. The theory of the sinking fund method is that an amount should be set aside annually upon which interest is accrued, which at the end of the composite life of the structural assets will produce a sum equivalent to the base cost of those assets.

Sinking Fund
method of
depreciation.

"As a test of the amount which would be reasonable to be allowed the company as an annual charge to expense for depreciation, I have made a computation using the sinking fund method. Interest has been compounded at 5% semi-annually. It will be noted as shown on page 17 of Government Exhibit 41 that an amount of \$42,558 set aside annually during the composite life of the property as determined by Mr. Zelinski will produce the cost of production new.

"Mr. Zelinski has determined the observed depreciation on all the property as of January 1, 1935, to be \$587,000 in round figures. Incidentally the cost of certain major structures as reflected in the plant account of the company amounts to approximately \$668,200, whereas the cost of reproduction

Trans.

new of those same structures as determined by Mr. Zelinski is approximately \$1,040,000 as shown on page 19 of Government Exhibit 41. In other words, the cost of reproduction new of these structures as determined by the engineer is 55% greater than the actual cost as reflected by the books. ▶

"A study of the plant account is shown in the audit report which is Government Exhibit 38 and discloses that the cost of construction since August 1, 1912, is approximately \$1,285,000. This covers construction during the past 23 years. Giving consideration of the ratio between the book cost and the cost of reproduction new and also to the amount of construction since 1912 as reflected by the plant account, it appears that at least 1/3 of the structural property has been in existence for more than 23 years. As previously stated some structures have been in existence for at least 37 years. From the basis of all the information I have been able to obtain, it is my opinion that the average age of respondent's structures is at least 20 years. Therefore on the straight line basis, the existing depreciation has accrued at the rate of approximately \$29,300 per year. Had provision for this depreciation been set up on the sinking fund method it would have required an annual amount of \$17,406 had interest been accrued at the rate of 5% compounded semi-annually.

"The retirements, details of which will be found on page 8 of Government Exhibit 41 have amounted to approximately \$6,000 annually. If the straight line method had been used, \$35,300 annually would have been required to provide for observed depreciation and retirements. If the sinking fund method had been used \$23,406.00 would have been required.

701 "In addition to the observable depreciation determined by the engineers in which consideration

Trans.

has been given to obsolescence, the company may have unobservable obsolescence not reflected in the accrued depreciation determined by the engineers. Such obsolescence may be illustrated by improvements or remodeling made necessary as a result of livestock arriving in trucks rather than by rail. Furthermore, the retirement history of the company covers a period of 19 years. It may be that over a longer period some retirement of major structures may occur that would somewhat increase the yearly average of retirements. These two factors should be given consideration in determining the annual amount necessary for depreciation expense.

"After giving careful consideration to all of the above factors and giving to each such weight as in my opinion is proper, and also giving consideration to all the information that I have been able to obtain which in my opinion has any bearing on the amount necessary to provide for depreciation, it is my conclusion that an amount of \$40,000 is sufficient for the company to set aside annually as a depreciation reserve to provide for retirements and replacements and, in addition to this amount, the company should be allowed an amount of approximately \$18,000 per year for repair expenses. This latter amount is substantially equivalent to the average amount expended by the company annually during the past 17 years as per page 12, Government Exhibit 41."

Govt. witness' conclusion re depreciation.

702 (Witness continuing). My recommendation is a depreciation allowance of \$40,000 for both used and useful and not used and useful property. On page 3 the figure \$33,200 appears which is my depreciation figure applicable to the used and useful property only, eliminating that which is not used and useful as based upon Mr. Christensen's report. If the Secretary should accept his report in part and reject his report in part, then the depreciation reserve found would have to be recomputed.

Trans.

Yes, I made an investigation to determine how the depreciation reserve fund of the respondent was actually invested. I found that as of December 31, 1934, 28% of the depreciation reserve was invested in securities and the remaining 72% was invested in the plant and hence that 72% would be earning whatever the stockyards earned.

704

Cross examination.

Yes, we adjusted the company's balance sheet as received from the company, placing certain expenditures in one year, although they appear on the company's books in another year. These changes are not summarized except on page 9 of the audit, Government Exhibit 38. The transfer of these individual items between years is in these figures, the reason being to show the amount of net income applicable to that year. For example, on page 9, the item of taxes in 1933 may have been up or down on the books from what it should have been and we adjusted it so that it is buried in the amount of \$10,781.10 and the working papers show exactly the amount in items between our figures and the book figures in a summarized form. For example, the net profit per book in 1934 amounted to \$288,040.86, while the net profit per audit amounted to \$287,595.47. We added \$1,873.83 to the book figures and deducted \$2,319.21. The item of \$1,873.83 is made up of 15 items, which are adjusted between the years. We eliminated losses and gains on capital assets from the income account and picked them up in the surplus account. The item of rent, A. H. Langman, February 1934, in the amount of \$40 is in the stockyard profit and loss amount for the month of February, but \$40 of that we eliminated from the 1934 profit and loss and included in the 1933. It consists of a cancellation in February of \$10.00 a month for six months. It is as though a

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lessee was delinquent for six months and reached a settlement on a basis of \$10.00 less a month, so we deducted an item of \$40.00 from 1934, and included it in 1933, although the settlement was made in 1934.

07 The loss on saddle horse shed of \$339.50, which we charged back from 1933 to 1934. These additions to surplus are shown in the audit report on pages 7 and 8. We charged them into surplus because it is a loss on capital assets not pertinent to current
08 operations of the stockyards. Under my system the company does not get back those losses in depreciation reserve, nor under obsolescence; they are an absolute loss on capital assets not deductible from
09 operations. Yes, it is my understanding that when, in the management of a business it becomes necessary or advisable to part with a capital asset which has not been fully depreciated, the stockholders have to take that entire loss, but the accumulation in the surplus account takes care of that.

Surplus must absorb losses.

Q. Well, now, that could only be so if we are earning more than a fair return upon our property and didn't pay it out in dividends, isn't that a fact?

If earnings are declared in dividends, no surplus.

A. I think the fair return takes care of that, Mr. Bosworth.

Q. Well, now please answer my question. I said that this only occurs where we have accumulated a surplus either by an amount over a fair return or have failed to declare out our return fully in dividends, if we declared out our return fully in dividends, there wouldn't be any surplus, would there?

A. There wouldn't under that assumption, no.

Q. And it is your understanding that a fair return includes a profit to the company over

Trans.

and above the amount necessary to sustain the stock structure at current market, or at an amount, I should put it this way, at an amount such as to interest capital in the business?

A. My understanding of that is this, that the allowance for risk in the rate of return takes care of such items as that.

710

Must be a "cushion" allowed in the rate.

Q. Well, do you think the element of risk . .

A. In other words, Mr. Bosworth, the cushion in the return will take care of just such losses as we have been talking about.

Q. Then you feel that a rate of return must have a cushion in it over and above the amount necessary to maintain your bonds, your stock and your capital structure at par?

A. Yes, there must be some allowance there.
711 (Witness continuing). Yes, there may be some instances of obsolescence in that, but not all of them are due to obsolescence: There may be an obsolescence feature but where there is a direct loss, I don't think the question of depreciation would enter into it. If you take the example of a fire where the insurance, which was believed to be adequate, proved inadequate and there is a \$15,000 loss. If the asset had been in existence such a short time, the depreciation reserve would be insufficient to take care of the loss and it would have to be charged
712 against surplus.

Effect of fire risks on depreciation.

Straight line method covers risks.

Q. Isn't that one of the reasons why straight line depreciation has been certainly the accepted principle, namely that it recognizes that it does build up more rapidly, and a greater amount than is perhaps necessary but that excess is due to the hazards inherent in the business which cannot be accurately forecast; isn't that the theory of straight line?

ans.

A. That might be in a commercial organization.

MR. BOSWORTH: (continuing) Well, wherein do we differ from a commercial organization?

A. You mean between the commercial organization theory of depreciation and the sinking fund?

13

Q. You said that might be true in a commercial organization. Wherein do we differ from a commercial organization?

A. Well, I was speaking thereof the practice as used by any commercial organization, under your assumption.

Q. Well, do you feel that that is an improper method in commercial organization?

A. Not if they want to use it, no, sir.

Govt. Witness
approves
straight line
method.

Q. Well, why do you feel it is improper then with regard to the stockyards company?

A. I don't think it is if they want to use it.

Q. Well, certainly —

A. In other words I am not trying to find any fault with the straight line depreciation so far as the stockyards company is concerned.

Q. Except that you say it shouldn't be allowed and charged to the rate payer. Isn't that in effect what you say?

A. I don't think I have said that.

14

(Witness continuing). The fact that Mr. Zelinski (the Government engineer) found straight line depreciation to be ninety-five thousand some odd dollars annually while I recommend approximately

Trans.

\$40,000, is no criticism of the straight line method, but it is just not my method of figuring depreciation to be allowed in arriving at the amount to be incorporated in the earnings against a rate base.

Returning to Government Exhibit 38, yes, under the item of losses I have a Remington typewriter at \$17.50, and the loss is on the theory that it is a capital asset and it is assuming that a portion of it might not have been depreciated. I don't recall the circumstances. Yes, capital assets are assets that are generally speaking subject to depreciation. An automobile has from 25 to 33-1/3% annual depreciation. It is the function of the depreciation reserve to take the proportion of the asset undepreciated when the asset has been disposed of. In other words, if an automobile with a five year life was disposed of in four years, we wouldn't credit the asset account with the full amount of the cost of the automobile and charge the depreciation with the unexpired portion and charge the surplus for the loss. On a five year basis a thousand dollar automobile would have two hundred dollars per year depreciation reserve on the straight line basis and in four years that reserve would amount to two hundred dollars. If the automobile was then sold for two hundred dollars it would wash out the transaction, but if it were sold for three hundred dollars, there would be credited in the surplus account the difference. The one hundred dollars would not go to profit. If it were sold for one hundred dollars the loss would go into the surplus account. We would charge the depreciation reserve with \$800.00 and surplus with \$200.00 and credit assets with \$1,000. No, when the saddle horse shed or the car or whatever it might be as shown on the list had been disposed of, there would not be any more depreciation to be taken and no further additions to the depreciation reserve on account of those items. The item

rans.

of \$30,793.88 for feed and yardage transferred to operations and eliminated from 1931 figures, is not spread over the years because the company took that into its earnings later on. That is why it is eliminated from my statement here. The difference of the whole period is for the year 1934. 1934 is all I am using or need in the reconciliation.

Referring to Government Exhibit 41, page 2, income elimination, horse and mule division, the details of those eliminations appears in Government Exhibit 38, page 109, and 110. Yes, the eliminations were made because of Mr. Christensen's recommendation. Discussion occurred as to whether or not Mr. Christensen had recommended the elimination of the horse and mule division, or limited his recommendation solely to the stock show property. It was agreed between counsel that the recommendation was as to the stock show property only, and witness agreed to prepare a new exhibit showing correction.

(Witness continuing). Government Exhibit 41-A was offered and received in evidence, the same being an exhibit showing the corrections as witness understood them.

(Witness continuing). The changes which I have made in Government Exhibit 41-A from Government Exhibit 41 are that I have eliminated the income and expense covering loading and unloading and added back to our adjusted income, as shown on Government Exhibit 41, the income and expense covering the Colorado Horse & Mule Company barn, or barns on Lafayette Street, as well as the barns used by the horse and mule division on the so-called stock show property. To the best of my knowledge it eliminates the income from the stadium property, if any, and from the stadium itself, the hook-up shed and those purely stock show buildings according to Mr. Christensen's view, and also the club building.

Trans.

Exhibit 41 contains four pages. Page No. 1 is the profit and loss statement; Page 2 is the income elimination; Page 3, expense elimination and Page 4 is headed "Basis for restoring the income and expense which is eliminated in Government Exhibit No. 41." Yes in eliminating income I have also eliminated expense. My method was to take the cost of reproduction new of the horse and mule facilities on which income had been eliminated in error on Government Exhibit 41 and in doing so I arrived at a per cent of 45 which I used against the horse and mule division and stock show property expense for each year 1930 to 1934 inclusive. Yes, if any of those items on the first tabulation on page 4 which are not included in the second tabulation are found to be used and useful, it would change the per cent. No, I do not know whether the bulk of the expense was in connection with the horse and mule division, and very little perhaps with the property eliminated. My figure is based upon a percentage of the reproduction new value. We attempted to analyze the repair account from the records of the stockyards company but found it was impossible. Yes, the records show the expense of repairs on a building, but to analyze the repairs from the records completely, I found was impossible.

730

Q. Could you use or give some weight to the use of the different buildings as to their likelihood, based on use, to cause expense?

A. That might enter into it, but I know of no way that you could use service in determining the cost of repairs. I would say that is a physical impossibility.

731

Q. But doesn't it stand to reason, Mr. Bufkin, that a property which is composed very largely of wood, so far as the interior is concerned, at least, stalls and so forth, occupied 50

rans.

to 51 weeks in the year, would cause more expense than a concrete steel-girdered structure used at a maximum two weeks during the year?

A. You are comparing the use of the stalls against the maintenance of the building, is that it?

Q. The maintenance of the whole structure?

A. You mentioned stalls.

Q. I certainly did.

A. In the use of the stalls, of course, there would be a good deal of wear and tear and I don't see where that would effect the building itself, though.

732

MR. BOSWORTH: (Continuing) Well, doesn't the expense on the upkeep of the stalls in the building figure in this expense restoration?

A. Yes, but not to such an extent as the cost of the building.

Q. Well, now, how far are you going to carry that? Take your doors that go into the building, opened constantly, bumped against by livestock, wagons and so forth, don't they have a greater tendency to wear than we will say the stadium doors, for example?

A. Oh, yes, I admit that the doors and stalls themselves if of wooden construction would wear quite rapidly perhaps, but when you take the small proportion that the stalls and mangers are in proportion to the cost of the entire structure, I would say that it would be very small.

Q. Yes, we are not dealing here with depreciation, Mr. Bufkin, we are dealing here with expense items.

Trans.

A. Maintenance.

Q. Maintenance items?

A. Correct.

Q. Well, now, isn't it your experience, or have you had any experience in stockyard operation, let us ask that question first?

A. Not operating a stockyard.

(Witness continuing). Maintenance items consist of material, labor and supplies to maintain the property. Yes, material, labor and supplies that go into stalls, doors, in a constantly used building are what lead to the expense items.

Take Barn No. 3, described as unit Y-8 on page 4. Yes, I know what that structure is, it is a one-story wooden-constructed building. The Government engineer tells me it is a three-story brick building. I had forgotten which building it was. I don't know whether each of those floors are occupied or not. If it is occupied the cost of maintaining a three-story barn fully occupied would be greater than the maintenance of a one-story barn. No, my computation does not take into account the service use of the building at all.

Income from
Stock Show
sales of
livestock in
yards not
eliminated.

734. No, my elimination of income does not eliminate any of the incomes due to stock show sales of livestock at the yards, nor any of the expense incident to such sales. That would be impossible from my viewpoint.

Q. And as an accounting proposition were the respondents able to prove income in the yards due to the stock show, that should be eliminated should it not, assuming that we can prove that?

A. Well, a lot depends on that, I would say,

Trans.

as to whether or not the livestock would have arrived at this market regardless of the stock show.

Q. Well, now, you are begging the question. I am asking you to assume that we can prove that fact of income due to the stock show and traceable to the stock show as an accounting proposition, should that also not be eliminated?

A. Under your assumption if the stock show property is eliminated, I would say that that income should be eliminated, provided of course that your computations would show that the expense and income was due to the receipts in the yards account of the stock show.

The loading and unloading income which I have eliminated in Government Exhibit 41-A is that portion of said income which is due to the drought, as specified on page 2 of Government Exhibit 41.

The "throw out" schedule.

Referring to what you call the throw-out schedule on Government Exhibit 41, that is the so-called dues, donation and subscription expense, yes, so far as I know the Denver Community Chest is a local charitable organization covering practically all of the charities in Denver. Yes, it is a community endeavor. As far as the patrons of the market are concerned, I would not think that the prosperity of the market is tied in to any appreciable extent to the community in which it is located. I think The Denver Union Stock Yard should stand some portion of that expense. In other words, The Denver Union Stock Yard could hardly ignore the Denver Community Chest.

Dues and donations.

Memberships in Chambers of Commerce.

Yes, the Denver Chamber of Commerce is a local organization in the community, largely devoted to business and the United States Chamber of Commerce is a similar organization, nation-wide. Also

Trans.

the Junior Chamber of Commerce. No, I did not know that the Denver Chamber of Commerce for years has maintained a livestock committee who does not limit its activities solely to Denver. I did not know that the Junior Chamber of Commerce has or has not interested itself in the livestock industry 740 from the standpoint of statewide prosperity. No, I have not heard anything since I have been in Denver of the so-called trade trip into all sections of the State by the Chamber of Commerce and the Junior Chamber of Commerce. Yes, I think the Junior Chamber of Commerce is composed of junior executives.

As to items tickets and boxes at the stock show, averaging perhaps \$395 or \$400, for the five year period, I don't know how those tickets are used or why. I have a notation that these tickets covered donations on account of the stock show and I presume they mean donations of tickets on account of the stock show. I don't know what becomes of the tickets, or whether they go to patrons of the yard who come and request them while at Denver with shipments.

American
Stockyards
Assn.

741 The American Stock Yards Association started in the year 1933, because I find no reference to it prior to that time. Yes, I found that the organization was created because it was believed to be necessary by the late NRA, and the reason that that item of expense was eliminated was because I did not consider it a recurring expense, and if we should allow it, it would be the same as allowing it for all 742 the years to come. If it is an organization like a chamber of commerce or stockyards, whether or not I would allow the expense would depend, I believe, on whether or not the organization continued. I understand its Washington office has been closed. No I wouldn't say that no organization is existing

Trans.

743 unless it has a Washington office. My understanding is that this organization is not in existence. If it be in existence, whether or not I would allow the expense would depend upon whether it can be proven that there is a benefit to the patrons of the market. Yes, I take the position that an organization beneficial to the industry as such may not be a benefit to the patrons, because it might be an organization that is a benefit to the stockyards but not a benefit to the patron as far as the expense is concerned. Yes, I would eliminate it on the same basis as I have eliminated the expense for the Denver Chamber of Commerce.

744 Yes, I inquired about the item of church donations and was informed by Mr. Shoemaker (the President of the Stock Yard Company) that it covered donations to churches in the vicinity of the stockyards. Yes, it was mentioned in our conversation that those churches are attended in a large part by yards employees or that they exercise a moral influence in the little community out by the yards. Yes, I think the welfare of the employees is some concern of the patron, but just how much I cannot separate it in the case of donations to churches and welfare organizations.

Patron is concerned with welfare of stockyards employees.

Q. Well, your Community Chest maintains charities out at Globeville, Elyria and through there, does it not?

A. Well, there might be a different proposition where the welfare is a welfare organization.

745 (Witness continuing). Yes, a church is a welfare organization, but a welfare organization in Denver being supported by the Stock Yard Company in comparison to a similar organization being supported at Fort Collins, is two different things so

Trans.

far as the patron of the market is concerned, because in this instance the Stock Yard Company, in my opinion, is an agent of a patron for the welfare organization. The patron would have to pay in his own town and also pay through the rates at Denver, that is my position.

Q. Well, now, did you make any investigation checking up on Mr. Shoemaker's statements or are you willing to accept his statement that these church donations were made solely to churches in and around the stockyard area?

Admits lack of knowledge.

A. Oh, I didn't discredit Mr. Shoemaker's statements, but the question is as to how much was on account of the stockyard employees. I would assume a very small proportion, however, I know nothing about it.

The United Appeal was something similar to the Community Chest relating to Jewish charities. I don't know whether you have Jewish employees on
746 your payroll or not. Yes, the Volunteers of America is a community effort.

As to the Firemen's Protective Association and the Policemen's Protective Association, my position is that they are officers and an officer is supposed to do his duty regardless of the gratuity. Yes, so far as I know these associations are protective organizations for these men, but I would not say that they had any effect on the question of fire and police protection at the yards if the officers are doing their duty.

Traffic club dues excluded.

I don't recall now the exact circumstances in regard to Denver Traffic Club and Commercial Traffic Club. Their name implies that they have to do
747 with traffic, but I don't know whether that means

Trans.

rail traffic, automobile traffic or any other form of traffic.

I don't know how many brand inspectors there are at the yards. Yes, there are brand inspectors from various states, and their function is to keep a record of branded cattle and to inspect shipments arriving on the market which may have been stolen.

Q. Well, it is simply shipments that may have been stolen, and why is the Stock Yard Company or the stockyard industry interested in brands?

A. Well, I am familiar with that movement, which I know is getting more popular throughout the United States, particularly in the western section,—in order that the ranches or owners of ranches, can identify their cattle when they are being moved to market.

Says brand movement getting more popular.

Q. You say that is getting more popular in the west?

A. So far as I know, yes.

Q. As a matter of fact, hasn't that been since time immemorial the only way that livestock was kept track of, by means of brands, or ear brands, notches?

A. Well, yes, but I mean that the movement is making more headway.

748 (Witness continuing). Yes I know that on branded cattle the reason for the brand inspectors being on the market is to insure proper settlement to the patron who sends his livestock to the market, and this is true of sheep also. So far as I know the item which I have eliminated of expense to the Denver Livestock Exchange may be an assessment and perhaps were dues on the membership. It is an organization of commission men, dealers and mar-

Brand inspection is for benefit of shipper.

Trans.

750 ket agencies at the Stockyards and they are the people to whom the livestock is sent. Oh, yes, it is an organization which in the very nature of things is rather intimately tied up with the patron and the livestock industry.

Yes, I would take the Y. M. C. A. as a community effort.

I eliminated the item of expense in 1930, 1931 and 1932 for the Christmas party at the Exchange Building, because I did not feel that was a proper expense to be allowed for reason that this party, as I understand it, is a general party for the entire Exchange Building and members of the livestock organizations and *their friends in Denver*. Even if it were shown that it was a party for the employees of the stockyards and perhaps commission men, there again the question of how much is allocable to the stockyard employees in my opinion is 751 very difficult to determine. No, the fact that some girl employee might want to invite some young man as an escort does not detract from the party as a stockyards activity for its employees.

Q. Did you, as a matter of fact, make any investigation as to the attendance at that party and its makeup?

A. Yes.

Q. Well, what did you find out and from whom?

A. I do not recall who the party was, someone connected with the stockyards company, and as I understand it, it was quite an elaborate party.

Q. For \$24.00 worth, is that it?

(Witness continuing). The item of \$5.00 a year for each five years on the average for the stockyards

Elaborate
party for
\$24.00.

ans.

bowling team and an item of \$7.50 expense to the Greeley Bowling Tournament have been eliminated because I cannot see where the Stock Yard Company would have to make expenditures on behalf of the employees' recreation. I would not consider it proper to install a gymnasium out there for the employees.

52 The Old Folks' Home is a community endeavor to which you contributed \$10.00 in 1934 and \$5.00 in two other years.

In 1931 you gave the American Red Cross \$50.00 which I have eliminated. I may not know the nature of that appeal, but regardless of what the organization stands for, the position is the same. I take it that the donation in this case is similar to that of the Community Chest, and again the Stock Yard Company is an agent for the patron in making this donation. That is the reason for its elimination. He may have to make similar donations in his own community, and if through rates he assists the Denver Union Stock Yard in contributing \$50.00 to the American Red Cross, I would say that he has paid more than his share. The resident in Kit Carson, Colorado, who is a patron of the yard, may have some interest in Denver as a community and in the community activity. My same viewpoint would go to the National Jewish Hospital, Little Sisters of the Poor and the Rescue Mission, all of which are community activities and to which there have been small donations made in one year or another.

55 I have no notation in regard to the item of \$88.30 covering the dinner for market agencies which expense I have eliminated. However, if it can be shown that it is a benefit to the patrons of the market, it should be included in the expense.

55 The donation to the Veterans of Foreign Wars of \$5.00 is excluded on the same basis as the Jewish

Trans.

National Hospital, and the donation to the Rev. Bridwell I accepted as a church donation and threw it out for the same reason as the other donations. The same is true as to the Church Messenger. Yes, I realize it was an advertisement.

Q. And that that goes all over the State of Colorado among church people?

A. I don't know where it goes.

Made no
study of
meat
traffic.

756 After the contribution of \$100 in 1934 to the Denver Tourist Bureau I would not consider that the patron is interested in bringing to Denver and Colorado tourists. Yes, it may be from a truly selfish standpoint that the consumption of meat in Denver does increase during the tourist season, and I don't know whether that means there is more cattle purchased and slaughtered locally than at other seasons of the year. No, I made no study of the amount of fresh meat which moves out of Denver. The patron may be interested in the Denver Tourist Bureau but I cannot see how that has any bearing upon rates, even though it means, perhaps, more business, and perhaps more inhabitants and residents of the State of Colorado in the long run. I feel that the patron would get just as fair a price for his product at The Denver Union Stock Yard regardless of the size of the city. That is very evident because there are other markets smaller than The Denver Union Stock Yard located in various cities of the United States, and the comparison of sales prices is right in line with those at The Denver Union Stock Yard.

Population not
a price
factor.

Veterinary
Congress
excluded.

758 I eliminated the expense or donation to the International Veterinary Congress. Yes, in a certain sense it is an organization sponsored by the Department of Agriculture, and so far as I know its chief purpose is the elimination of disease in livestock.

ans.

The donation of \$25.00 to the Police and Sheriff Association is eliminated on the basis that officers do their duty. Yes, I think it was for an advertisement in their journal which goes rather widely through the western states, but I don't see where such advertisement is any benefit because it is in reality a donation. Yes, I allowed the advertisements in the Denver Post and the Denver News because that is the usual channel for advertising. No, I don't know whether the Tax Payers Review has a state-wide circulation. I made no inquiry as to that. Yes, the donation to the letter carriers is on the same basis as the donations to the policemen and firemen. The donation to the Guldman Community Center, the American Legion and the advertisement in the Western Legionaire and other items are all excluded on the basis I have indicated. No, I do not know what percentage of the membership of the Legionaires are engaged in the livestock industry who receive that publication. Yes, a good many of them are engaged in the industry. Other items appearing on pages 6 and 7 are eliminated for the various reasons I have already stated. No, I did not know that the Colorado Association, which is an organization to advertise the resources of the State of Colorado does or does not have a livestock committee and a livestock department of that movement. Yes, I think the contribution to the Citizens Employment Committee in 1932 was for relief work limited solely to Denver. Yes, it was occasioned by the crisis due to employment, and I feel that it is an improper expense.

No inquiry
made re
certain
advertising.

No knowledge
re livestock
activities of
Colorado
Assn.

Q. And you eliminated 50 cents we spent to get a copy of a publication called Sixty Years in Cheyenne, in which we had an advertisement, did you? That is on page 6 about ten lines from the bottom.

A. Yes.

Trans.

Q. That was issued, was it not, in connection with the annual rodeo up there which is, as a matter of history, an outburst of the livestock industry very largely?

A. I understand it is in connection with the rodeo.

764

Total 1934
Dues, Dona-
tions, and
Subscriptions
3/10 of 1%
of gross
income.

Q. Now, the total of these expenditures in the year 1934, including allowed and disallowed, is \$3,823.84, is that correct?

A. That is correct.

Q. And looking at Government Exhibit 41, page 1, the gross income per audit for the year 1934 was what?

A. For the year of 1934 —

Q. Yes.

A. — is \$1,031,507.96.

Q. Of which figure \$3,823.84 is what percentage, approximately?

THE EXAMINER: When you get to a stopping place, let us adjourn.

MR. BOSWORTH: *Just a moment.*

THE WITNESS: It is a very small per cent.

MR. BOSWORTH: (Continuing) About one-third or three-tenths of one per cent, is it not?

A. That is about right.

Q. And you have allowed us \$223.25 out of that total which, if your pencil is fine enough, I wish you would tell us the percentage.

A. One-half of one per cent.

Q. Oh, oh! Please figure that again. If your audit is on that basis —

rans.

A. Are you speaking about \$223.25 as compared to — **Allows 1/50th of 1%.**

Q. The gross for the year, ~~gross~~ income per audit for the year 1934.

A. Oh, I was using the wrong figure.

Q. It is about one-fiftieth of one per cent, is it not?

A. That is right.

66 (Witness continuing). In 1933 with a gross income per audit of \$769,188.88, and total donations ~~of \$3,143.62~~ a little less than one-half of one per cent of gross income was given as donations, of which I allowed \$248.40. In 1932 there are relatively the same percentages. In 1931 with total donations of \$2,958.04, that was between one-fourth and one-fifth of one per cent of the gross, and of that I allowed \$353.48 for the year. Both percent-
67 ages hold practically for the year 1930.

The proportion of expenses for dues, donations and subscriptions in comparison with the gross income **Admits amount is reasonable.**
68 I would say was reasonable so far as the operations of the Stock Yard Company are concerned and the criticism is not in any way directed along that line. The eliminations, of course, were made for the reasons I stated in previous testimony.

Yes, the packers and buyers of livestock, as well as the producers of livestock, are patrons of the market.

69 When I testified previously that items of loss like on the Ford car should go against the cushion and the rate, I now think that the proper way that it should have been handled would have been to charge
71 it against the depreciation reserve. In proper accounting they should have been so charged, but in transferring those items on page 9 of Government

Trans.

Exhibit 38 from operations to surplus, they were not charged by us against the reserve, where they should have been charged, and to that extent my analysis of surplus would be changed if I had followed the accounting method. This would apply to all the items on page 9 except the loss on the City of Twin Falls bonds.

773 I eliminated the stock show income and the rail trackage income as I saw it on the basis of Mr. Christensen's report as not used and useful. No, it is not on the basis that it is outside income. I didn't even consider that. I have eliminated these distinctly on Mr. Christensen's report. My basis is simply that Mr. Christensen recommended it and I am following it.

Depreciation
Reserve
money belongs
to Company.

The money represented by the depreciation reserve belongs to the Stock Yard Company. It is a reserve capital account. Yes, any earnings that the company makes on its reserve belongs to the company and would be excluded just the same as earnings on bonds and securities. Yes, the theory of reproduction new value is determining what it would cost to duplicate the present structures. No, a new company starting out would not have any depreciation reserve, but would have a certain useful life of its structures from the outset.

The straight line depreciation method is built on a fixed percentage basis. In other words, if property has a life of 25 years against a valuation of \$100 you would charge out 4% annually or \$4.00 a year on the theory that at the end of that useful life there would be \$100 in principal. The earnings on each installment would also be in that account. Yes, I testified a moment ago that the earnings belonged to the owner of the property, but the depreciation reserve is increased to the extent of the earnings on the installment. Yes, the owner can

Trans.

spend those earnings in any way he sees fit. On the straight line method you have charged off the full value of that property over the full period of its useful life. Yes, it is true that the straight line method as applied in accountancy is based upon the best engineering experience which many years of compilation of figures has given my profession.

Straight line method is based on best engineering and accounting experience.

Yes, in Government Exhibit 28, starting in with page S-10, the second and third column represent Mr. Zelinski's estimate as an engineer of the useful life of the structure and the annual rate per cent of straight line depreciation, and on Page S-16, total depreciation, straight line, is shown as \$95,020. That is the total of the annual allowance that Mr. Zelinski found reasonable and necessary from his engineering experience. Yes, the determination of the useful life is an engineering problem, coupled with general experience.

- 778 The generally recognized annual rate of depreciation of a Class A fireproof building is 2% a year, based on a useful life of 50 years. Yes, the building might last longer than 50 years, but it is assumed that so far as utility is concerned history shows on the average that obsolescence generally pushes such a structure out at 50 years maximum. If you suppose a million dollar building, Class A, fireproof, the annual depreciation is 2%, or \$20,000.

Effect of straight line method illustrated.

Q. Now let us suppose, as an extreme example, that the owner was willing to let that building run along with just normal maintenance for the 50 years until it was wiped out in that manner, the \$20,000 is certainly his money, isn't it?

A. Yes.

Q. It is a replacement of capital, as a matter of fact isn't it?

Trans.

A. Yes.

Q. The tenants have no ownership or right in that \$20,000, do they?

A. No.

Q. Now, he has an option, hasn't he, as to whether he will put that in his pocket or whether he will utilize it for replacement?

A. He can do whatever he pleases.

779

Q. Now, if he wanted to be sure of having the million dollars at the end of 50 years, he or his heirs, he would place that money in as safe an investment as he could find, would he not?

A. I suppose he would, yes.

Q. Or having the option, if he wanted to speculate with it, he could buy common stocks or anything he wanted with it, couldn't he?

A. Yes.

Q. Or put it into some other business or some other property?

A. Correct.

Q. Now, if he put any part of that money back into the building by way of replacements, it would still be his money, would it not?

A. Oh, yes, if he —

Q. And any earnings due to that money which he replaced would be his earnings, would it not?

A. Yes, provided he still owned the property, of course.

Q. Of course, and really as a matter of fact, how would those earnings, if put back in the building, be visible or be expressed?

A. Read the question.

Q. Perhaps that is a little blind. I will ask it directly. Isn't it a fact that in such case the earnings derived by him from the replacement, that is, the utilization of this fund in replacement is really expressed in terms of continued life of the building rather than in any additional earnings?

A. In replacements, that is, if he uses it in that sense, yes, it would extend the life of the building in all probability.

Q. And there would be no additional earnings except the maintenance of earnings, isn't that a fact?

A. There would be additional earnings to the extent that the building had outlived its 50 years of life.

Q. Yes, but I am not talking about the end of the 50-year life. I am talking as it runs along, Mr. Bufkin. In other words, isn't this as a practical matter the situation: If he didn't put that money into replacements, the building in the normal course of events, in spite of maintenance, would tend to have decreasing earnings?

A. That is correct.

Q. By putting in the replacement, he builds back the earnings to where they were and keeps them at the normal earning life?

A. That is right.

Q. So that the earnings due to the, you might say, investment of this fund in replacements is best expressed, is it not, in terms of continued life?

Trans.

A. That is right.

781

Q. Rather than in any 7% or anything else directly traceable to the \$50,000 he may have put back in the building?

A. Correct.

No knowledge
of effect of
investment of
depreciation
reserve.

Investment of
depreciation
reserve in
business
increases
condition
per cent.

782

{Witness continuing}. I testified that the depreciation reserve is 72% invested in the business. No, I do not know to what extent it has prolonged the life of your property. No, I don't think that is the reason for the difference between the observed depreciation and the amount of depreciation as carried on your books because I think the depreciation as carried on your books is in excess of your requirements. No, I can't tell how much the investment of 72% of \$918,000 in your property has extended the useful life in terms of years or time. Yes, it must have done so, but to just what extent I don't believe that I can tell. Yes, the moment you put \$50,000 in replacements, not only is the useful life extended, but the condition per cent of the structure would go up. It is true that the depreciation reserve on the observed depreciation will never be in balance, but I would say that it should be somewhere within reasonable bounds of one another. No, I wouldn't say necessarily that because you take \$50,000 out of the reserve and put it in a structure you only build back \$50,000 of the useful life of those structures. Yes, Mr. Zelinski found that the annual allowance for depreciation on the straight line method was \$95,020, and that was found for the separate items, and separate amounts, which total that figure. Yes, that represents a return of capital and would be money belonging to the company which might be invested in United States bonds or United States Steel Company bonds or any other type of investment. Yes, the income from those investments would be ex-

783

784

Trans.

cluded by me (as not being income produced by rates).

785 Yes, on my sinking fund 5% semi-annual method, The sinking fund method.
the annual depreciation allowance is found to be \$42,588, which is the amount of money which, if taken each year during the useful life of those properties, with interest compounded thereon at 2½% each 6 months, would return to the yard company the reconstructed new value of the property as found by the Government engineer approximately. It would return that much money if the installments were invested to earn 2½% semi-annually, or 5% annually, during the composite life of the property.

786 Q. But, Mr. Bufkin, a moment ago you testified that the earnings made from the investment of the depreciation fund are to be excluded from income. Why, then, do you not exclude them here as they come up, but insist upon adding those to the fund?

A. Because this is a sinking fund set aside to take care of this particular depreciation reserve account and to replace this property.

Q. But is there any distinction between the income derived in the one case and in the other? Isn't it equally our money?

A. It might be your money; that is your money, but the money invested in this instance is set aside for a particular purpose and is not to be used in any other manner.

Q. But if it is our money, by what right do you say that we must set the earnings as well as the principal aside?

Government counsel objected on the ground that this line of questioning constituted an attack upon the sinking fund method. Objection overruled.

Trans.

787 (Witness continuing). You would have to set the earnings aside in order to build up the fund that would be required at the end of the composite life, and under those circumstances income would not be eliminated because it would be accumulated in the depreciation reserve account for this very purpose. In order to be certain of getting 5% the money might be invested in the plant or it might be invested in high grade securities of some type. I don't know what you would invest it in. No, I have made no investigation as to what high grade securities on present levels net 5%.

788 Yes, a depreciation fund must be reasonably liquid. If you take out of a depreciation fund fifty or a hundred thousand dollars and invest it in the plant, it is frozen to that extent. I pick 5% because 28% of the depreciation reserve of the Stock Yard Company is invested in securities earning approximately 3%. I assume that the rate of return will be somewhere in the neighborhood of 7%; it may be a little over; it may be a little under. I don't know what it will be, but the ratio between that 3% and the approximate rate of return makes 5% very conservative. Yes, apparently on the best judgment of the Board of Directors, the investment of 28% of the depreciation fund nets the Stock Yard Company only 3%. I considered that 72% of the depreciation reserve is invested in the plant, upon which the yard company is earning.

If the sinking fund method were computed on a 4% semi-annual basis the annual allowance would be \$50,030, and on a 3% semi-annual basis, would be in the neighborhood of \$60,000 annually, and on a 6% semi-annual basis, would be about \$36,000.

**Sinking Fund
Method.**

791 A sinking fund is an amount set aside to take care of some investment or to arrive at some figure

Trans.

in future years. In other words, it is an amount to be credited to meet some obligation.

Q. And under the theory of public service, that obligation in this case is to return to the people who devoted their money and business to the public service, the amount of principal that they have invested or devoted to the public service, isn't that a fact?

A. That is right.

Q. Now, you have spoken of investing the money, sinking fund, in the business.

A. That is right.

Q. Have you ever heard, as a matter of fact, of a sinking fund to meet an obligation being rendered subject to the same hazards as the business which gave rise to that money and to that obligation?

**Involves
subjecting
fund to risks
of business.**

A. Of course, it is subject to risk, yes, if I understand your question correctly.

Q. Well, as a matter of fact, does not the very nature of a sinking fund imply safety apart from the risk of the source of that money.

A. That is right.

(Witness continuing). No, I do not do violence to a sinking fund theory by investing the money in a business, if it is a going business, and if the concern is earning money. I think that money invested in the stockyards is about as safe as invested in Government bonds. Yes, it was the element of safety incident to the Government bonds and savings banks that in times past forced the requirements that sinking funds be invested as a matter of business practices in either of those two ways. No, the stockyards business is not altogether free from hazard. Any investment is subject to risk.

Trans.

No, I don't know whether, as a practical matter, the rate of return is the measure of the risk.

Sinking fund
theory
applied.

- 794 Assuming that on July 1, 1935, we deposit \$42,558 in the sinking fund which is the annual amount I have found under the 5% semi-annual sinking fund method. $2\frac{1}{2}\%$ of that is \$1,063.95. Yes, under my theory, that \$42,558 must start earning immediately, and then as it does six months later on January 1, 1936, the \$1,063.95 is to be added, making a total then in the sinking fund of \$43,621.95, which is our new base. On July 1, 1936, there would be \$1,090.55 interest to be added and
- 795 another \$42,558, making the sum of \$87,270.50. The following January there would be interest of \$2,181.76, which would then make a total of \$89,
- 796 452.26. The following July there would be interest of \$2,236.31 and the principal payment of \$42,558, making a total of \$134,246.57, which would be the new base for compounding interest as of July 1, 1937.

If the company took out \$50,000 and put it into replacements, that would come out of the fund.

Q. That would then leave after that expenditure of \$50,000 in your fund?

A. \$84,246.57.

Q. And up to that point of the \$134,246.57 on July 1, 1937, your fund would have to be liquid, would it not, to provide at least the \$50,000 going into replacements, would it not?

A. Correct.

Q. Now, that base of \$84,246.57 becomes your new base of your sinking fund, does it not, from that time on?

A. That is right.

Q. And since the \$50,000 has gone into re-

Trans.

placements, purely throughout the yard, does it earn anything?

A. Only on the return on the investment in the plant.

Q. Now, please explain that a little bit.

A. I might say it doesn't earn anything from the viewpoint that you have there, it is in the same category as replacements we have talked about previously. It extends the life of the structure but does not earn.

Q. Well, now, your sinking fund, then, by reason of the fact that the interest is cut down through that reduction in principal is going to fall off correspondingly, is it not?

A. That is right. There is no method of depreciation that would take care of the base continued figure, under such circumstances as you mentioned, though, regardless,—

Q. Why not the straight line method? Why won't that, if the straight line method has been applied? Take Mr. Zelinski's exhibit 28.

798 The witness' attention was called to the item of annual depreciation allowance on straight line method on open pens as shown in Government Exhibit 28 of \$24,477 appearing on page S-11.

**Straight line
method
contrasted.**

(Witness continuing). In the example given above we have presumed principal payment for three years. If you take \$24,477 you would have, on the straight line method, in the reserve fund, \$73,431 after three years to cover the open pens. Yes, if \$50,000 were taken out for the replacement of pens the principal of the reserve would be intact because there would be \$23,431 in the reserve remaining for the open pens and \$50,000 of replacements gone into the pens.

Trans.

799 The straight line method not only takes care of the situation but does more. It not only charges off the cost of the investment but it accumulates interest. No, on your assumption that the \$50,000 is put into replacements it does not charge off any investment. It is the interest feature where I think
 800 it does more. Yes, if the \$24,477 had been invested by the company in United States Treasury notes for each of the two years, it would have had approximately \$49,000 of Government securities on which it would be earning approximately 2%. No, I would not have excluded that income if the money had been invested for the purpose of a sinking fund against depreciation reserve. Yes I excluded your earnings on the 28% of your depreciation money invested in securities and that money would not have been eliminated if it was found necessary in maintaining your reserve fund to take care of renewals and replacements of the property. Another thing which is overlooked is the fact that when we take our \$50,000 for the pens, it doesn't mean that our base has gone down to the extent of \$50,000 because over the composite life of the property some items will be in service or last longer than the estimated life.

801 Q. Now let us try to straighten you out on that, Mr. Bufkin. In the straight line example which we used, we were dealing with one particular property?

A. That is right.

802 Q. Under your sinking fund method we cannot deal with one particular property because by virtue of the lessened amount of annual allotment of funds for each unit being so reduced, there would not be any \$50,000 which you could take out of the fund in three years if you kept each element separate; now, you don't intend to keep each element separate in

Trans.

this, do you? By that I mean our depreciation fund when deposited or invested would not be so much for pens, so much for chute house, so much for Exchange Building and so much for this, would it?

A. Well, in actual fact it wouldn't, but of course it is figured under those circumstances, but here is the problem, we differ on this: you are talking about an individual asset. I am talking about the whole business, the whole pot that is there. All this money goes into one pot and you are taking out just the pens. I think that is —

Q. Not on your first example, Mr. Bufkin. May I differ with you? I have taken the whole pot, which is \$42,558, starting July 1, 1935?

A. That is right.

Q. And the whole pot after three years amounts to \$134,246.57, doesn't it?

A. Yes, sir.

Q. And out of that whole pot, I have taken \$50,000?

A. That is right.

Q. And that leaves a new base for your sinking fund of \$84,246.57, doesn't it?

A. Yes, sir.

Q. Well, now, maybe we are in agreement on this, Mr. Bufkin. Take under the sinking fund method, unless the full fund runs to the full length of its expected life, there are only two points in the entire cycle where the fund on hand can equal the actual depreciation. And that is at the beginning and at the extreme end?

Trans.

A. That is right.

Q. If you break in anywhere in the middle —

A. — you have upset your figures.

Q. You have upset the figures completely?

A. That is correct, regardless of the method.

Q. Now, wait a minute. That is where I differ with you. Will you explain to me how that breaks it up under the straight line method?

A. You are still taking \$50,000 away from them and you have upset the —

Q. But, Mr. Bufkin, will you kindly take your pencil. Under the straight line method, all that is returned by your percentage is principal, isn't it?

A. That is true.

Q. All right. Now, if you have at all times on hand up to the point where the money is taken out 100 per cent of the principal which should be due at that point, you are not breaking it in the middle or upsetting anything are you?

805

A. If it runs the entire life of the property?

Q. I did not say that.

A. Read the question.

(Whereupon the question was read).

Q. I mean by that, I will explain, I will make the question a little clearer. Under the straight line method, whether it is at the end of one year or at the end of two years, or at the end of three years, you have on hand in principal amount the exact equivalent of that lapse of time multiplied by the engineers' estimate of

Trans.

the amount which should be annually set aside on the basis of useful life, haven't you?

A. You have the principal, yes, sir, that is, you have the use of the money as you go along, where, under this other plan, you don't.

Q. Well, isn't the money ours as you testified earlier?

A. Yes.

Q. Why shouldn't we have the use of the money, Mr. Bufkin, as an accountant?

A. You have the use of the money.

Q. So I still would like to have you explain to me where the straight line method breaks down upon the extraction of \$50,000 or any other amount for replacement?

A. If you take the money out of the fund for replacement of \$50,000, you have certainly lowered the total reserve to that extent.

Q. I haven't lowered the principal of the reserve, have I?

A. No, you haven't lowered the principal at all.

807 (Witness continuing). Yes, the earnings of a company are subject to income tax and if the company earns 5% there is, at the present time, a 13¾% income tax due on those earnings. If your depreciation of loss is \$42,558 that is all the depreciation deduction which the Income Tax Department would permit you to take. The earnings of \$1,063.35 are subject to the 13¾% tax and the following year the earnings of \$2,181.76 are subject to the 13¾% tax if invested in the plant, that is, if the money is invested in the plant. If invested in securities

Trans.

not subject to the tax, there would be no income tax to pay.

Q. Well, now, do you know whether or not there is any tax exempt security upon which you can earn 5 per cent?

A. I haven't made any investigation along those lines.

Q. And you will admit, will you not, that if any amount is taken out of these earnings for tax or otherwise, you would have to have more than 6 per cent compounded semi-annually in order to reach your ultimate result, wouldn't you?

A. Yes.

Q. Have you made any computation as to how much more?

A. No, sir.

809 Q. Have you ever done any income tax accounting, Mr. Bufkin?

A. Only with railroad companies.

Q. Don't you know as a matter of fact that the Internal Revenue Department has consistently and still insists upon the use of the straight line method?

A. Yes, sir.

(Witness continuing). In connection with my statement concerning the cost of the company's structures contrasted with Mr. Zelinski's finding of reconstruction new value, I did not make any study of the labor scales and material prices at the time those structures were built. I took those figures as being the book cost. No, I don't think there is any record of cost back of 1912 or 1913.

**Internal
Revenue
Department
insists on
straight line
method.**

Trans.

811 On page 6 of my statement I say that if the straight line method had been used \$35,300 annually would have been required to provide for observed depreciation and retirements. No, it is not enough for a depreciation reserve to provide for observed depreciation. There is an element of obsolescence to be taken into consideration, which is very difficult to determine. Yes, this company was started in 1886. There is no record to determine what was done prior to 1912 with regard to depreciation reserve.

812 The figure of \$35,300 annual depreciation of loss on the straight line method which I used in my statement, is an approximate figure based on 20 years life of the building to arrive at an amount necessary that would be required to maintain this property. Yes, the engineer finds the composite life to be 31.75 years, but on all the information I think the 20 years is a very conservative period to use. No, I don't know what the plant and appraised

813 value of your property was 20 years ago: Yes, since 1916, which is almost 20 years ago, about \$1,200,000 has been added to the structural property. No, I haven't any figure in my working papers from which I could subtract this approximate figure of \$1,200,000 to show roughly the plant value 20 years ago. Assuming, for purposes of argument, the January 1, 1935, reproduction cost of \$3,000,000 of the structural property, and deducting \$1,200,000, that would leave \$1,800,000.

814 Q. Now, you don't mean to say that on \$1,800,000 we would have, we should have been able to take a depreciation of \$35,300, do you?

A. On the basis of all information I have, including the retirement record, I would say that that would be approximately correct.

Q. Well, now, Mr. Bufkin, you as an ac-

Trans.

countant, do not take the position do you, that we must start, we will say, with \$1,800,000 worth of assets, and take a depreciation reserve on that, and then irrespective of what we may add to the property, we can never take any more depreciation annually, do you?

A. Well, my figure of \$35,300 is based upon what has happened and would have happened upon the straight line method.

Q. Well, now, let us see if you are right even in that statement, Mr. Bufkin, do you know what depreciation we took in the year 1916?

815

A. I don't recall at this moment, no.

Q. Do you know whether we took \$10,000, \$15,000 or \$50,000?

A. In 1916?

Q. Yes. I would think it would be in your working papers or in one of these exhibits somewhere, haven't you an analysis of depreciation reserve in that amount, Exhibit 38?

A. Yes, they are in the working sheets, I think, I have it here. During the year 1916 the records show that you took depreciation --

Q. What page is it please?

A. Page 58, Government Exhibit 38, the depreciation amounted to approximately \$17,000.

Q. So that in the year 1916 we were taking less than your estimate of \$35,300, were we not?

A. That is right.

816

By agreement of counsel the Government introduced Government Exhibit 43 and 43-A, the first sheet of Exhibit 43 being entitled "Comparative Statement, Dealer Purchases and Disposition, Den-

Government
Exhibits
43 and 43 A
Admitted.

rans.

ver Market, for the years ending December 31, 1930, to 1934 inclusive." The second sheet shows the detail of livestock shipped to other markets and also the detail of livestock bought on order. Government Exhibit 43-A, which is the third sheet, shows the number of plants, that is to say, the number of livestock that have been planted with commission firms for sale by traders.

317 Government Exhibits 43 and 43-A received in evidence.

(Witness continuing). Yes, in 1916 the Stock Yard Company was taking approximately \$17,000 depreciation, which is less than my estimate of needed depreciation, straight line, of \$35,300, as given in my statement. About \$1,200,000 was added to the plant since 1916. Yes, when additions are made to the plant the annual depreciation allowance necessarily goes up. No, a depreciation of \$35,300 per year would not be proper on a base of \$1,800,000 if it was a proper depreciation on a base of \$3,000,000. My estimate of \$35,300 is calculated against 318 the age of the property that is out there now, while you were talking of an estimate of 20 years' life against a base of \$1,800,000. I don't know what 319 the base was at the time the company depreciation was \$17,000. I don't think we spoke of a base at 22 that time.

23 The step-up is shown in Government Exhibit 38 25 at page 222 and 220. It occurred in 1928. The old Exchange Building, for example, while starting out as \$30,000 is stepped up to \$64,800 in 1928.

Q. Well, did you make any investigation on the books or the records of the company as to why that property was stepped up, and, at whose demand and at whose request it was stepped up?

Trans.

A. Yes, sir.

Q. What did you find out?

A. That was due to an agreement with the Internal Revenue Department based—and the base was the March 1, 1913.

Q. Value?

A. Value.

Q. In other words, we had been under-depreciating and under-valuing that structure according to the Internal Revenue Department, had we not?

A. Well, they base their depreciation as straight line on cost, and these figures were agreed to at that time.

835 (Witness continuing). No, I don't agree 100% with the sinking fund theory. I don't agree with the straight line either.

Yes, I stated that the Stock Yard Company had 72% of the depreciation reserve invested in the business. That appears in exhibit A in Government Exhibit 38, and shows total assets in the amount
836 of \$5,524,948.57. The plant account amounts to the gross figure of \$5,035,574.49. The construction account amounts to \$17,637.12; those two items total \$5,053,211.61, which total was financed by \$1,134,000 of bonds; capital stock of \$1,843,500; surplus of \$1,520,555.68, depreciation reserve of \$546,155.93, and those four items total \$5,053,211.61.

837 The plant assets, deferred assets, less the current liabilities total \$114,787.37, which is financed by the depreciation reserve. The balance sheet shows investments in the sum of \$257,974.76, which was also financed by the depreciation reserve. No, I haven't any test or measure of what individual facilities

Increased
depreciation
reserve
required by
Government
Department
in 1928.

Trans.

this money was invested in; I couldn't attempt to segregate it, but in my estimation the entire depreciation reserve is invested in the plant and the 28% invested out of surplus, because I think my explanation proves this effectively.

- 840 If a rail is knocked off a fence by a steer and so broken that a new rail has to go in, strictly speaking a new board on the fence is a replacement, but it depends upon this, that where the life of this board is so small that it is not taken up as a replacement, it is not a capital item. If it is one of the main boards it is a replacement and would go
841 to maintenance. It is very difficult to draw the line between repairs and replacements.

Q. Well, then, we are together on this, that in normal stockyards operation it is exceedingly difficult to segregate repairs, which come as an expense item —

A. That is correct.

- 844 (Witness continuing). Oh, yes, maintenance prolongs the life of the property. Repairs also extend the life of the property, that is evident. No, I don't think that is the answer to why observed depreciation is always out of line with the depreciation reserve, if you take into consideration the expense of the repairs. Yes, page 12 of Government Exhibit 41 shows total repairs for the period 1918 to 1934, inclusive, of \$311,388.36, or an annual average of \$18,317, which I don't think is excessive. Yes, this is added to my recommendations on depreciation,—\$18,000 for repairs and \$40,000 for depreciation. No, the \$40,000 which I recommend will not return the reconstruction new value on the 5% semi-annual sinking fund basis.

Repairs not excessive.

Amount recommended will not return investment.

- 846 The depreciation allowance is to maintain the property on which you will earn, and is not a return

Trans.

Theory of depreciation is return of invested capital.

Working capital.

Accounts Receivable excluded from working capital.

of the cost of reconstruction new to you. No, the depreciation fund does not become a maintenance fund, it is set up for renewals and replacements on this property and the repairs are taken into consideration which insures the continuity. Yes, in my previous testimony I admitted that the depreciation reserve was the company's money and that the company had an option whether it would put it back into the plant or let the property run down, but if the company does not intend to cease business, certainly it will need this money for the maintenance of the property or for renewals or replacements. Yes, the theory of depreciation and of your option to put the money either into the plant or in our books, is that the depreciative reserve will return to the owners the reconstruction new value of the property one way or the other if it is going to reach just exactly the end of its service life, but it is not anticipated that you would quit business at the end of that service life. No, the \$40,000 which I have recommended on the 5% semi-annual basis will not return \$3,015,222 and was not intended to do that. No, I am not adopting the estimated life of the properties as found by the Government engineer. I am not adopting the sinking fund 5% semi-annual method at all.

848 Returning to the working capital exhibit (Government Exhibit 42) I recommend \$117,000 working capital. Yes, it is better in accounting practice to include in working capital an amount equivalent to the quick assets. No, I have not included accounts receivable, which are generally quick assets, 849 because the stockyards company have not anything to sell other than service, which is labor and material and supplies and feed which are taken care of in other places, and to have included in accounts receivable items of that character in the working capital would have been a duplication. Yes, it

Trans.

costs money to carry accounts, and the balance sheet shows that on December 31, 1934, the yard company had accounts receivable of \$23,233.52, and in 1933, \$20,551.46, and December, 1932, \$10,892.54; in December, 1931, \$22,138.72; December, 1930, \$18, 850 469.17, and on January 1, 1930, at the commencement of the period, the yard company had accounts receivable of \$25,727.13. Yes, I suppose it has cost the yard company money to carry those accounts because the yard company is out of the use of the 851 money. I made a study of the age of some of these accounts. No, I haven't a memorandum of it because I did not think it was necessary. The item of \$78 accounts receivable from the Bureau of Animal Industry was probably about 30 days old, but that is for rent. The yard company has the right to charge interest on deferred accounts and on accounts which get so old. Yes, altho quick assets are generally included in working capital, I have eliminated this quick asset for the reasons stated.

858 Generally speaking I am acquainted with the replacements, improvements and betterments on new structures made at the yards since 1916. I didn't know that 16½% of the total cattle area was put in in 1928 because I didn't know what the percentage was at that time. The total of the additions in 1928 amounted to approximately \$115,000, \$2,000 in 1929, about \$307,000 in 1930, about \$1,000 in 1931 and 1932 and approximately \$4,000 in 1933 and about \$1,000 in 1934. Yes, I will agree that the younger a structure is the less maintenance and 859 repair and the less replacement is necessary. No, I don't think for that reason that in the early life of a structure a depreciation reserve should greatly exceed the amount deducted from the reserve on account of maintenance, repairs, replacements.

Q. I don't think you and I are thinking along the same line. If you have no repairs,

Trans.

no maintenance, relatively speaking, in the first years of a structure's life, but you are making your annual allowances and allocations to reserve, your reserve will greatly exceed the deductions made from that reserve on account of maintenance, repairs, replacement, will it not?

A. In other words, the installments, Mr. Bosworth, in the early part of the years will not be necessary at that early period that certainly will be necessary later on.

Q. It will be there to be used later on, won't it?

A. Yes, sir.

Q. But in the early years, they pile up as cash or as investments pending their use in later years. Isn't that a fact?

A. Yes, sir.

863 John A. Zelinski, a witness called by the Government and having been previously sworn, was recalled for further testimony.

Direct Examination.

I have prepared an additional exhibit at the request of counsel. It is entitled "Condition Per Cent of Cattle Division, Open Pens."

The said exhibit was marked Government Exhibit 44 and was offered and received in evidence.

As indicated on the bottom of the second page with a double asterisk, the meaning of the first column "length" shows the basis upon which the computations were made to get the relative weight that should be attached to each of the alley subdivisions and the weighted average. For the purpose of easy computation the exhibit was figured on the proportionate length of the alleys in inches

Govt. Exhibit
44 admitted.

ans.

on our 50-foot map Exhibit 8, so that this scale expressed in feet one-fiftieth of the length. In order to get the length of the particular alley of the exhibit you would multiply by 50. For example, taking the first item, 5.0 length, multiplying that by 50 means 250 feet, which is the length of the alley for which the particular condition per cent was taken of the pens facing on that alley. Next the condition per cent found by Cushing, by Galbreath, next by Johnson and by the term "next" I mean every alternate column, and then Mr. McClintock who made the actual inventory of the open pens. The column 66 "weight" is the multiplication of the condition per cent of the individual engineer by the length column. That is the way we reflect the weight which should be given to his observation in the computation of the average weight. Double weight is given to the estimate of the man who made the inventory. If all the weight columns on the first item are added together they total 2300, which would then be divided by 30, because the weight for length is 5 and the number of items is 6, because of the double weight attached to the estimate of the man who made the inventory. The condition per cent of that particular tier of pens determined in this way is 68 76.66%. Yes, my method became my rule of thumb, the condition per cent could have been multiplied by the number of pens, but I and my engineers thought that the better division would be to establish a whole tier of pens facing on an alley of the unit which we would use in setting up the separate conditions.

71 Howard D. Dozier, a witness called by the Government, testified as follows:

I am economist for the Packers & Stockyards Division, Bureau of Animal Industry, Department of Agriculture, and have been such for nearly eleven years. I am a native of Tennessee, a graduate of

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Vanderbilt University at Nashville, and did graduate work at Yale University. I graduated from Vanderbilt University in 1908, was at Yale for four years from 1914 to 1918; thereafter at the University of Georgia, where I became head of the School of Commerce, later at Dartmouth as professor of economics. I then went to Washington, was with the Treasury a short time and for the past ten and a fraction years have occupied my present position. My work has to do with preparation of information in connection with stockyard rate hearings and commission rate hearings, particularly with matters of finance, a study of investments and the general economic situation. Yes, I have written magazine articles for several publications on some phase of finance. Some of the magazines are: The South Atlantic Quarterly, The Railway Age, the publication of the American Federation of Labor—I do not recall its name, The Atlantic Monthly, Journal of Public Utility and Land Economics. I have testified in all of the rate cases held by the Department for almost ten years.

873 Yes, I have two exhibits. One relates to corporation earnings and the security yield and the other to live stock population and the receipts of livestock at certain markets. One of them, the first page of which is entitled "Public Utility Bonds, Yield at Maturity" has to do with yields on securities and corporate earnings, and is marked for identification Government Exhibit 45.

The next proposed exhibit is a statistical setup of livestock population in certain States and receipts of livestock at certain markets, the first page of that exhibit being a percentage summary based upon the pages which follow, said exhibit being marked for identification as Government Exhibit 46.

874 Yes, in preparation for testifying in this case I

Trans.

have prepared a statement covering my views upon the subject of rate of return.

Thereupon the following statement was read into the record:

875 When I testified in the former hearing held in the early part of 1930, I gave it as my opinion that a schedule of rates which would have produced a rate of return of from $7\frac{1}{2}$ to 8 per cent in the year 1929 would have been reasonable. I was speaking of the year 1929 only, and not of the average rate of return over any particular number of years. I stated on cross-examination that a schedule of rates which would have produced this return in 1929 might produce a return of as high as 10 per cent in unusually good years in the future and it might produce as low as $5\frac{1}{2}$ or 6 per cent in some other years when business was poorer. Up to the time of the hearing held in 1930, 1929 was the best year except one, namely 1928, in the history of the company. Since that time, there have been years which were not so good and others which were better. Nineteen hundred thirty-four was the best year in the history of the company, due to the unusually heavy receipts incident to the handling of government cattle. A rate of return for the year 1934 of above 8 per cent would not prove that the rates which produced such a return were unreasonable. The high earnings were due to the abnormally high receipts, which can not be reasonably expected to continue in the future.

**Doxier's
statement on
Rate of
Return.**

**High return
in 1934 not
proof existing
rates un-
reasonable.**

875 In giving my opinion in this hearing as to what constitutes a fair return, I am speaking of the return covering a period of 4 or 5 years. Based upon all the information which I have been able to gather and on the study which I have given the question, it is my opinion that a schedule of rates which would produce over the next few years a rate of

**Rates
effective for
4 or 5 years.**

Trans.

Reasonable
rates $6\frac{1}{2}\%$
to 7%.

876 return varying from $6\frac{1}{2}$ to 7 per cent would be reasonable. I should like, however, to make this one qualification: I do not think such a schedule of rates would be unreasonable if, in the year 1935, the current year, it should produce a rate somewhat below this zone of reasonableness. I make this statement because I think that the year 1935 will be one of subnormal receipts and that a schedule of reasonable rates could not be expected to yield a normal return in a year of subnormal volume, and, by the same token, if there should occur within the next five years a year of abnormally high receipts and the rates should produce a return of above 7 per cent, I should not for that reason alone judge the rates to be unreasonably high.

Since the last hearing we have passed through the trough of a severe depression. Financial and economic conditions have undergone a marked change, and with these there has come a very great change in the attitude of investors and in the type of securities which they demand. By and large, this can be described by saying that securities which offer safety and liquidity have sold at unusually high prices and low return. Good bonds of longer maturity have gone up in price and down in yield. On the other hand, securities of doubtful character have not been popular. This is almost precisely the reverse of the situation which obtained immediately prior to the fall of 1929. The general trend is a matter of common knowledge, but, for the benefit of those who may review this record, I have made an effort to ascertain the extent to which the yield on high grade bonds and high grade preferred stocks has declined.

878 The basic interest rate in the United States is that received by investors who put their funds in government bonds. The following table shows by

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months from January, 1926, to May, 1935, inclusive, the average annual return on all Government bonds having a maturity of eight years or more. (The yield used at each date for each bond called before maturity is the lower of the two computed yield figures, the one based upon redemption at the earliest call date and the other based upon redemption at maturity. For bonds selling above par and callable at par before maturity, the yields computed on the basis of redemption at the first call date are the ones that are used, while for bonds selling below par yields to maturity are used).

Month 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935

Jan.	3.77	3.51	3.18	3.52	3.43	3.17	4.28	3.19	3.50	2.83
Feb.	3.71	3.48	3.19	3.62	3.41	3.27	4.07	3.29	3.32	2.73
Mar.	3.71	3.37	3.17	3.74	3.29	3.26	3.88	3.44	3.21	2.69
Apr.	3.70	3.35	3.20	3.63	3.36	3.24	3.66	3.43	3.12	2.64
May	3.67	3.31	3.24	3.64	3.30	3.13	3.71	3.31	3.01	2.61
June	3.67	3.34	3.29	3.69	3.24	3.10	3.73	3.22	2.94	2.59 (1)
July	3.68	3.36	3.42	3.64	3.23	3.11	3.55	3.20	2.85	.....
Aug.	3.70	3.32	3.49	3.70	3.25	3.13	3.42	3.21	2.99	.....
Sept.	3.70	3.30	3.46	3.68	3.23	3.24	3.38	3.20	3.20	.....
Oct.	3.68	3.29	3.48	3.60	3.20	3.62	3.39	3.22	3.08	.....
Nov.	3.62	3.23	3.39	3.36	3.17	3.59	3.39	3.46	3.06	.....
Dec.	3.56	3.17	3.46	3.37	3.20	3.92	3.31	3.53	2.97	.....
Year	3.68	3.34	3.35	3.60	3.28	3.31	3.66	3.31	.....	.....

(1) June 14, 1935.

79 These figures are compiled daily in the office of the Actuary of the Treasury of the United States, and published periodically. Before leaving Washington, I ascertained from this office the yield as of June 14, 1935. It will be observed that the average yield for the month of January, 1926, was 3.77 per cent and that for the month of May, 1935, 2.61 per cent, and that as of June 14, 1935, was 2.59 per cent. I do not wish to be understood as saying that the yields shown in this statement constitute a fair return upon the fair value of public utility property. The purpose of the table is to measure the decline in yield which has taken place in high grade bonds during the past few years. This decline has been approximately one per cent in the yield on long time government bonds.

Trans.

In order to ascertain on my own account the trends in the cost of money as represented by various types of securities, I began, a number of years ago, the compilation of the price of public utility and industrial bonds, preferred stocks and common stocks and the earnings of the issuing corporation. The results of this study were introduced as an exhibit in the former hearing. Information with respect to the same corporations has been compiled from year to year since that time, and for the purpose of this statement are given in what I shall call "Exhibit 45." Summaries of the result of this study occur on pages 1, 8, 11 and 14. The other pages in the exhibit, with the exception of page 18, which speaks for itself, contain the supporting data. At the left hand margin of page 1 there has been set up a series of yields stepped up by one-quarter of one per cent 880 to 7 per cent. Two other classifications are indicated: Yields below $4\frac{1}{2}$ per cent and those above 7. The yields of the bond issues of the public utility companies and industrial companies shown have been computed on each issue and the number whose yield fell in the designated classifications has been set opposite for each year from 1927 to 1934, inclusive, and as of May 10, 1935. For instance, in 1927 there were 32 issues of public utility bonds out of 80 issues of the public utility corporations studied which yielded to the investor, if held to maturity, from $4\frac{1}{2}$ to $4\frac{3}{4}$ per cent, and on May 10, 1935, there were 6 out of 68 issues which had a yield of from $4\frac{1}{2}$ per cent to $4\frac{3}{4}$ per cent; or, to go to those bonds which yield below $4\frac{1}{2}$ per cent, it will be noted that in 1927, 7 out of 80 issues yielded less than this and on May 10, 43 out of 68 yielded less than this. The same explanation holds good with respect to industrial bonds and the details are set forth in the right hand half of page 1. In the last line of this summary, there is shown what is termed the

rans.

"average annual yield." For the years 1927 to 1933, inclusive, this average is arrived at by a weighing in accordance with the total market value of the entire issue. This is not the case with respect to 1934 and May 10, 1935. The averages there shown are simple arithmetical averages and are not influenced by the size of the issue. If these averages were weighted they would be considerably lower than those shown. I make this statement in order that those who review this record may not be misled. The conclusion which I draw from these 381 yields is that within the period since the last hearing the yield on high grade public utility and industrial bonds has declined by about one per cent.

The situation with respect to public utility preferred stocks is set forth in page 8, and that with respect to industrial preferred stocks at page 11. The yields there shown are on the basis of dividends received. It will be observed that from 1927 to 1930, inclusive, no public utility preferred stock listed sold so as to yield more than $6\frac{1}{2}\%$. From 1931 on there were a number of issues of public utility preferred stocks which did sell so as to yield above 7 per cent. The yield on industrial preferred stocks has shown a trend contrary to that of public utility preferred stock. For instance, in the year of the security price panic of 1932, there were some 32 out of 50 industrial preferred stock issues which sold to yield above 7 per cent. In 1933 the number showing such a yield was 13, and in 1934, 5. It will be observed that in 1934, 11 out of 41 issues sold to yield between $4\frac{3}{4}$ and 5 per cent.

On the basis of the information at my disposal, I am of the opinion that the yield obtainable on good preferred stocks at the present time is approximately one per cent less than that obtainable at the date of the last hearing. Preferred stock yields 1% less than in 1930.

Trans.

**Except in
Public Utility
stocks.**

I think an exception ought to be made to this statement in the case of public utilities. Public utility stocks—both preferred and common—have declined in value until recently. While I have no exact measure in this exhibit of the decline in common stocks, it is a matter of common knowledge 882 that common stocks of public utilities declined to a lower point in 1935 than they did in 1932. This decline was due, in part at least, to special causes, and I do not think should be taken as typical of the general investment market. The information with respect to public utility common stocks is set forth on page 8, and that with respect to industrial common stocks on page 14. From 1927 to 1931, as shown on page 8, a comparatively large number of public utility common stocks sold to yield the investor on the basis of dividends actually paid, less than $4\frac{1}{2}$ per cent. During 1932 and 1933, the yield obtainable from public utility common stocks was greater than this. In 1932, for instance, which was the security panic year, 12 out of 13 sold to yield above 7 per cent; in 1935, 6 out of 11 sold to yield above 7 per cent, and in 1934, 6 out of 9 sold to yield above 7 per cent.

It will be observed, at page 14 of this exhibit, that from 1927 on through 1934, a comparatively large number of industrial common stocks sold to yield to the investor on the basis of dividends paid less than $4\frac{1}{2}$ per cent, and that the majority of them have sold to yield less than $6\frac{1}{4}$ per cent. This general statement is true with respect to industrial common stocks, since mid-year of 1924, except the period immediately preceding, during and for a short time following the security panic of 1932. Attention is called to the relationship of earnings to price, shown at the bottom of page 14 in the lower left hand corner. It will be observed that for the year 1927 the earnings were 7.26 per cent of the average

Trans.

market price, while the dividends paid were 4.98 per cent of that average price. To put it otherwise, out of every \$7.26 these industrial corporations earned in 1927 they paid out \$4.98. Up to the year 1931 earnings in each year exceeded the dividend payments, but for the years 1931, 1932 and 1933, the earnings were less than the divided payments. This statement applies to this group of corporations as a whole.

The common stock situation has been abnormal for many years, and it is difficult to draw any conclusion from facts relative to it which is thoroughly reliable in forming an opinion with respect to what is a normal yield on common stocks, but we do know this,—that for much of the time for the last ten years the purchaser of common stocks has not been able to get as large a yield in current cash dividends as investors in bonds of the corporations issuing the stocks. On the basis of all the information I have been able to get and of the study which I have done, I am of the opinion that the reasonable rate of return for the Denver Union Stock Yard for the next few years will be one per cent less than would have been reasonable for it during the past few, and as I stated above, it is my opinion that that reasonable rate of return for the next few years will be from $6\frac{1}{2}$ to 7 per cent, with the reservation that there may be unusually poor years in which the return will fall somewhat below this zone, and unusually good years in which it will go above.

**Common
Stock
situation
abnormal.**

884 After having formed a tentative opinion upon my own investigation of the earnings and the yields on the various types of securities issued by corporations, and after having reached a tentative conclusion with respect to the matter of yields, I checked this opinion by ascertaining the yields as

Trans.

computed from other sources. The following table is that compiled by Moody relative to industrial and public utilities as they were quoted on the market from day to day.

AVERAGE BOND YIELD (Moody).

885	Year	Industrial	Public Utility
	1919	6.18%	6.21%
	1920	6.94	7.19
	1921	7.04	7.17
	1922	6.04	5.93
	1923	6.04	5.84
	1924	5.90	5.61
	1925	5.61	5.29
	1926	5.37	5.11
	1927	5.10	4.96
	1928	5.10	4.87
	1929	5.31	5.14
	1930	5.25	5.05
	1931	6.08	5.27
	1932	6.71	6.30
	1933	5.34	6.25
	1934	4.52	5.40
	1935		
	January	4.33	4.98
	February	4.29	4.78
	March	4.28	4.68
	April	4.31	4.65
	May	4.29	4.52

886 Another check on security yields and their trends is ascertainable from the prices of new capital issues.

Trans.

The following table is that compiled by Moody.

887

Average Price of New Capital
for
Industrial and Public Utility Companies
(Moody)

Year	Bonds		Preferred Stock	
	Industrial	Public Utility	Industrial	Public Utility
1921	7.57%	7.31%	7.93%	7.54%
1922	6.62	6.02	7.00	7.09
1923	6.37	5.98	7.21	6.85
1924	6.43	6.03	7.20	6.97
1925	6.05	5.61	6.85	6.85
1926	5.83	5.50	6.83	6.77
1927	5.62	5.26	6.51	6.09
1928	5.64	5.20	6.36	5.80
1929	5.76	5.21	6.09	6.11
1930	5.57	5.20	6.11	6.08
1931	5.26	4.71	6.27	5.21
1932 ¹	6.12	5.74	6.00	6.90
1933 ¹	5.56	4.98	7.23	...
1934 ¹	6.04	4.86	6.88	...
1935 ¹	3.86	4.37	...	6.38

(1st qr.)

² No publicly offered issues.

¹ While these averages are computed on the same basis as for preceding years (1921-1931, inclusive) they must be regarded in most cases as nominal in view of the small volume of new financing.

888 An important factor bearing upon the matter of return is the stability of the industry whose rates are being regulated. For the purpose of comparing The Denver Union Stock Yard Company, stockyard companies generally, public utilities and industrials, I have compiled figures from 1928 onward, in all

Trans.

cases, and from 1927 onward in some cases, showing the relative stability of the various types of industry.

The following table gives the information:

889

Industrials (General)				
No.	Year	Net Worth January 1	Net Profits	Per Cent Return
1435	1934	23,195,751,000	1,051,266,000	4.5
1435	1933	23,867,791,000	640,128,000	2.7
1410	1932	26,578,332,000	105,489,000 (D)	
1410	1931	28,226,271,000	726,230,000	2.6
1560	1930	35,485,424,000	2,346,137,000	6.3
1560	1929	32,186,570,000	4,063,496,000	12.6
1520	1928	30,378,183,000	3,549,154,000	11.7
	1927			(D) Deficit

Public Utilities				
138	1934	9,389,980,000	410,850,000	4.4
138	1933	9,479,901,000	423,529,000	4.5
125	1932	8,546,352,000	445,796,000	5.2
125	1931	8,377,959,000	598,949,000	7.1
75	1930	7,917,711,000	752,931,000	9.5
75	1929	6,853,773,000	758,972,000	11.1
	1928			
	1927			

Stockyard Companies
Net Worth, December 31

83	1934	119,478,135	6,734,542	5.6
82	1933	118,524,497	5,471,264	4.6
80	1932	122,464,326	4,563,510	3.7
67	1931	124,500,562	6,584,477	5.2
70	1930	125,947,530	7,069,624	5.6
69	1929	125,086,418	7,114,989	5.7
67	1928	123,626,211	7,593,519	6.1
69	1927	123,083,257	6,829,009	5.5

Denver Union Stock Yard Company

1934	3,407,807	288,040	8.5
1933	3,268,824	176,481	5.4
1932	3,375,734	171,423	5.0
1931	3,387,594	179,545	5.3
1930	3,374,725	218,667	6.5
1929	3,363,936	256,621	7.6
1928	3,093,666	273,966	8.9
1927	3,006,686	213,827	7.1

890 The figures with respect to industrial corporations and public utilities are those published annually by the National City Bank of New York. Those with respect to stockyard companies generally and The Denver Union Stock Yard specifically are taken from the annual reports filed with the

Trans.

Secretary of Agriculture in accordance with the Packers & Stockyards Act, or those set forth in information developed in the rate hearings here at Denver. The per cent return shown in the right-hand column of this table is not to be taken as the rate of return as it is spoken of in a public utility hearing such as this. That rate is ascertained by dividing net profits,—that is, profits after all expenses are paid, including interest, and all reserves have been set up,—by the net worth of the corporations,—that is, the equity to the stockholders as shown by the books of the company. The sole purpose of this table is to ascertain the relative stability of these various types of industry. It will be seen that the stockyards companies have been subject to less variation in their earnings from year to year than either public utilities generally or industrial corporations generally.

- 891 This completes my statement with respect to a fair return on the fair value of the stockyard property. There is one other subject with respect to which I desire to submit information. That has to do with the livestock population in the trade territory of Denver and the draw of the Denver market and competing markets upon this territory. The facts are set forth in what I shall call for purposes of identification "Government Exhibit 46." The information contained in this exhibit is taken from the estimates of the Department of Agriculture with respect to livestock population and receipts at various markets, as compiled by the Department. The basic figures in this exhibit are revised from time to time. Those shown in this exhibit were as of the date formerly set for this hearing. Since that time certain revisions have been made in the estimates and certain corrections made. The necessary corrections have been carried into the basic figures. The most recent revisions have not, but I have

Trans.

checked these revisions and have found that they are so slight in character that they would make no material change in the summary of the situation as shown on page 1.

The first column in this summary, with the exception of that for the date, contains the number of animals marketed at ten markets which compete more or less with Denver for livestock receipts. The names of the markets are listed at the top of the column, as, for instance, Denver, St. Joseph, Kansas City and others. The figures shown in column 3 892 and the succeeding columns are the percentages of total marketings at the ten markets received by each. For instance, of the 2,908,884 cattle and calves marketed from seven states, shown on page 2 of the exhibit, 19.9 per cent were marketed at Denver, 9.3 per cent at St. Joseph and 21.3 per cent at Kansas City. The same explanation holds good with respect to the other markets shown and for the other species listed in the lower two-thirds of page 1. I have submitted these figures for the purpose of showing the trends in livestock marketing over the past 15 years.

Govt. Exhibits
45 & 46
received.

893 Government Exhibits 45 and 46 offered in evidence but right to object was reserved until after cross-examination.

Government counsel then offered in evidence the following exhibits all of which were received in evidence without objection.

Govt. Exhibits
47-52-C ad-
mitted.

Government Exhibit 47, being a Separate from the Yearbook of 1930 of the Department of Agriculture, containing statistics on cattle, hogs, sheep, horses and mules.

894 Government Exhibit 48, being a Separate from the Yearbook of 1931 of the Department of Agriculture, containing statistics on the same classes of livestock.

Trans.

Government Exhibit 49, being a Separate from the Yearbook of 1932 of the Department of Agriculture, containing statistics on the same classes of livestock.

Government Exhibit 50, being a Separate from the Yearbook of 1933 of the Department of Agriculture, containing statistics on beef cattle, hogs, sheep, horses, mules and asses.

Government Exhibit 51, being a Separate from the Yearbook of 1934 of the Department of Agriculture, containing statistics on the same classes of livestock. Government Exhibit 52, 52-A, 52-B and 52-C being issues of the publication of the United States Department of Agriculture entitled "Crops and Markets" for the month of January to April, inclusive, 1935; and particularly that portion entitled "Market Reports on Livestock and Livestock Products."

Cross-examination.

Yes, I am standing upon the method which I pursued in 1930 as the method or theory upon which my rate of return is based, with this modification, that in 1930 I was speaking of a rate of return as of that date based upon the single year 1929. Now I am speaking on the basis of the prospective rate of return to be received in the next few years. Yes, in 1930 I was also speaking of the prospective rate of return that would be received in the next few years, departing from the single year of 1929. When I say "a few years" I mean four or five. No, I have not testified that one-third bonds, one-third preferred stock and one-third common stock is the ideal setup. I am taking the financial structure pretty much as it now exists. Yes, I testified to that in 1930. I never said that one-third bonds, one-third preferred stock and one-third common stock is the ideal setup. I do say that it is a well-balanced financial structure. The structure which

Rates to be
fixed for 4
or 5 years.

Trans.

898 a corporation adopts is a matter of management, from the standpoint of the corporation. I do not believe that having one-third bonds, one-third preferred stock and ~~one-third~~ common is a better capital structure than all common stock.

By saying that one-third bonds, one-third preferred stock and one-third common stock is a well-balanced capital structure I mean that a corporation which has bonds outstanding to the amount of one-third of its value would not inject a great amount of risk,—an undue amount of risk into its bonds, either from the standpoint of principal or interest. I think the same thing is true with respect to the preferred stock. The risk to the industry centered on common stock equal to a third of the value of the corporation would not make those stocks highly speculative. No, I don't mean that if all of the ownership was represented by common stock and there are no bonds or preferred stock, that the common shares would be more speculative. I think that the common stock would be less speculative from the standpoint of the investor than if the corporation had a third of its value covered by bonds and a third of its value covered by preferred stock.

890 My studies generally lead me to believe that a successful corporation which has a history back of it of earnings and is a going concern, conservatively managed, will not endanger the position of a common stockholder if the common stockholders have in front of them one-third of the property covered by bonds and another third of it covered by preferred stock.

I determined that The Denver Union Stock Yard Company, for example, has one-third in bonds, one-third in preferred stock and one-third in common, in this way. The 5% bonds are carried on the books of the company at \$1,134,000. They are call-

Trans.

able at 105 less 25c each year from the call date to maturity. They are at present selling at about 102½ and 103, which is very nearly the present call price. There are 8,945 shares of preferred stock carried on the books at par, callable at 105, and quoted at from 103 to 105. If that call feature were not in the preferred stock it is my opinion that it would sell for about \$120 per share. There are 31,200 shares of common stock without par value, selling or quoted at from \$33 to \$35 per share, and under all the conditions I think the stock is worth that money. I make no change in the bonded indebtedness but I apply the price of \$120 per share to the preferred stock and \$35 a share to the common stock, and when this is done you will see that there is about one-third in bonds, one-third in preferred stock and one-third in common stock. Yes, I arrive at my theory by the process of multiplying the market price, or my estimate of the market price, because that is what I think the securities are worth as revealed by the market. It is an evaluation of the securities and not an evaluation of the property.

903 I do not know what the property is worth. It is the value which the public is now placing upon the securities of the corporation.

I say that the public is placing a value upon the preferred stock \$15 a share higher than the market price because it is a 7% preferred stock which would be capitalized in the open market at about 6%, which would mean a value of \$116 or \$117 per share.

905 I would not use a distress situation as the sole criterion of the present rate of capitalization of income. It might be some criterion. I do not think that it should carry undue weight. What I mean is this, that if I had no information at all except that one scrap of information, I would not base an opinion on it, but I do know that interest rates now on high-grade securities are lower than they

Trans.

- have been at any time in the life of anybody sitting in this room. Yes, I think the Crystal Sugar situation is a distress situation, but another example in Colorado is the sale of 6% cumulative preferred stock of the Mississippi River Power Company at a price to yield about 6%. The latter company has assets of \$54,000,000 and is much larger than The Denver Union Stock Yard Co. It operates one of the largest hydro-electric plants in the world, is a public utility and the territory is limited. As an economist from that information alone I would say that because the Mississippi River Power Company preferred stock has sold in this locality on a 6% basis that the securities of The Denver Union Stock Yard Company would sell today on the same basis, but I think it is some indication of the yield which the general public demands on that particular type of investment. Yes, I think the preferred stock of the Stock Yard Company is in the same general class of investment. They are both designated as preferred stock. The preferred stock of the Mississippi River Power Company is redeemable at 115 and accrued dividends and has equal voting right with the common.
- 909 Yes, when a preferred stock has no conversion right and is redeemable at a fixed price, it rarely sells above the call or redemption price. No, there is no conversion right with regard to The Denver Union Stock Yard Company preferred stock. The call price is 105. I say it would sell at \$120 a share if the redeemable privilege were not in there. Now anything with a blemish on it sells at a lower price than it would sell at if it did not have that blemish. The call feature of these preferred stocks is a blemish from the standpoint of the investing public on that security. When I say "blemish" I cast no aspersions at all upon that security because I believe it a thoroughly good investment.

Trans.

Q. The point, Doctor, is that we are dealing with a condition and not a theory here. Aren't we? This stock has what you call a blemish. By what right then as a fair-minded economist do you overlook that blemish and place a higher price upon this stock than you know, as a matter of fact, it will attain in the eyes of the public?

A. The investors in the preferred stock of The Denver Union Stock Yard Company are getting a higher rate on their investment because of that call price than they could get. Those who own that stock have a handsome investment, and if they were to dispose of it I do not think that they could re-invest their money in other similar corporations which were free to seek their own price level at a yield that good.

Q. But you wouldn't advise Mr. Zelinski, for example, to pay one hundred twenty for Denver Union Stock Yard preferred stock, would you?

911 A. I would not advise Mr. Zelinski to pay one hundred twenty for something today which could be called out from under him by the company tomorrow at one hundred five.

(Witness continuing). In my statement which I read into the record I said, "Up to the time of the hearing held in 1930, 1929 was the best year except one, namely 1928. Since that time there have been years which have not been so good and others which were better." 1934 was a better year than 1928 or 1929. Taking a five-year period from 1930, which excludes the former hearing, every year has been poorer than 1929 with the exception, on the face of it, of 1934. Yes, I speak in my statement of the fact

Trans.

that 1934 was abnormal due to the unusually heavy receipts incidental to the handling of Government cattle. Yes in saying cattle I mean livestock, including pigs and sheep. It is my understanding that the revenue-producing business in 1934 was unusually large. I don't think the Government purchased all species in 1934. It purchased mainly cattle. The Government purchase of hogs was 913 earlier. I do not know about the purchase of sheep.

Q. Well, do you know the amount of income which the auditor in this case has found due to the Government purchasing program in 1934?

A. I haven't studied that—I haven't the figures on that so that I can give them to you accurately. They are in the record.

Q. Well, let us assume that the income account due to the purchase of Government livestock was \$107,938.48 in 1934. Do you know whether or not if that be subtracted as a non-recurrent and unusual, abnormal situation, the result would make the earnings of 1934 equal to or less than 1929?

A. I haven't those figures in front of me, Mr. Bosworth. I will give them to you if you want them tabulated from the audit.

Q. Well, do you know that with the elimination of the Government income account; that is, the income on account of Government purchases, that the net earnings of 1934 would be less than 1929 by almost a hundred thousand dollars? Have you given consideration to that fact?

914

A. I have not gone into the specific figures of revenues produced by the extraordinary situation in 1934, but I do know that they are much heavier than they would have been had

Trans.

it not been for the Government purchasing program.

Q. Now, Doctor, if it were to appear that the income of 1934, net, eliminating the income on account of the Government livestock, was less than the net income adjusted on the same basis of the years 1929, 1930, 1931, and only about \$5,000 total more than the income of 1932 and \$3,000 more only than the income of 1933, would or would that not affect your judgment in this case and particularly your statement which I quoted to you a moment ago?

915 THE WITNESS: I am not sure that I get your question but I think the following statement will answer it. I testified at the former hearing that in my judgment a schedule of rates which would have produced in 1929 a return of between 7½ and 8 per cent would be reasonable and that in the poor years the return might fall below that and in the good years it might go above that. I stated in my testimony this afternoon that if the returns shown in 1934 had been above 10 per cent I would not, for that reason, have considered the rates unreasonable. If you iron out the unusual situations in volume in 1934, naturally you iron out the peak returns to which I referred.

916 Q. You make the same statement in your oration, I mean your paper here, which you have read into the record, so that your explanation adds nothing to what you have already said. What I am getting at is this, let us put it this way, do you know of any year since 1929 which has returned 10 per cent?

A. I have no calculation.

Q. You know of any year that has returned over 7 per cent?

Trans.

A. As I say I have made no calculation or investigation, either on the value of the yards from year to year which would enable me to calculate a rate of return as of those years or any mathematical calculation which would throw out the non-stockyard expenses or make any adjustments as they would have to be made in a rate hearing. Now, I can answer your question, I think satisfactorily, with this statement, based upon the one previously made. If you take the situation as it actually existed between 1929 and 1934 and iron out all of the unusual conditions, then, my testimony with respect to the unusual rates of return, high and low, also go out of the picture.

(Witness continuing). Yes, I say in my statement on page 2 that I would not think a rate is unreasonable if in the year 1935, it should produce a rate somewhat below this zone of reasonableness. I anticipate that due to this unusual flow of livestock in 1934, it is likely that the income will fall below my rate of return. I am not prepared to give you an estimate of how much, but the decline would be more than one or two per cent.

917

Q. Well, then, Doctor, since you have taken a four or five-year period, as you say, would one of these prospective four or five years represent more than two per cent above your return, do you know?

A. I do not.

Q. Well, Doctor, you will agree, as a rate economist, that we are entitled over the period to receive your fair return upon the value of our property, won't you?

A. That is my statement.

Q. Well, is that your statement?

Trans.

A. Why, surely.

Q. All right. Faced with the knowledge, as you have expressed it, that in one of those four or five years we will not receive your fair return, isn't it incumbent upon you to point out or feel definitely that there is bound to be some compensating year or years to make up that loss?

A. Let me answer that question this way.

Q. Well, can't you answer it directly, Doctor? I would prefer to have you answer it directly if you can. If you cannot, well and good.

A. I do not think so. Let me add this, which, I think, will answer the question indirectly. Rate of return in a rate case is one of a number of factors which have to be given weight in arriving at a schedule of rates to be prescribed by the regulatory authority. If the single year, 1935, should be taken, and a return, let us say, of five per cent, be applied against the value of the property, and the number of dollars so ascertained be spread over the light receipts of 1935, you might get precisely the same schedule of rates, or a schedule of rates that was very much of the same altitude as you would get if you took the best year in the five and multiply that by eight per cent and spread that number of dollars over the high receipts. Now, it is my judgment that, due to the unusual conditions which existed in 1934, and which I think will exist in 1935, that it would not be safe for the rate maker to give undue weight to these years, but that taking everything into consideration he should determine as nearly as possible what

Trans.

the receipts are likely to be, let us say, from 1936 onward, and aim, during a period of years following that time, at a schedule of rates which will yield to the company a return of between $6\frac{1}{2}$ and 7 per cent.

Q. Well, now, Doctor, with that pearl of wisdom—

MR. MILES: Now, Mr. Examiner—

MR. BOSWORTH: Strike that. (Continuing) Now, Doctor, the trouble is, as I see it, if in the 919 years 1936, 1937 and 1938, if those with 1935 constitute the four-year period, or adding 1939, if it be a five-year period, we are not only to get your $6\frac{1}{2}$ to 7 per cent return, where do we make up the two per cent loss, two per cent or greater loss of 1935?

A. You have already made it up in 1934.

Q. Oh, thank you, Doctor, that is just what I wanted to find out. Then you are, as of this date, penalizing, or basing your rate for the future upon what we have earned in the past, and are therefore cutting down our rate accordingly, is that what you mean?

A. No, sir, not at all.

Q. Then, explain your statement that we have already had it in 1934?

A. If this schedule of rates had been prescribed in 1929 which from that date up to the end of 1935, had produced a normal rate of return of around $7\frac{1}{2}$ per cent, I should not have judged the rate unreasonably high. I think in arriving at what is fair and just that if you are going to include the unusually high, you ought also to include the unusually low. I think it would be better procedure to rule

Trans.

them both out of the picture so that you would come more nearly to getting a normal period of receipts.

921 In further explanation of the statement I made on page 917 of the transcript about the rate of return running lower than 2%, I had in mind for the moment the volume of receipts and I thought the volume of receipts would run more than 2% less than 1934. Speaking with respect to the net operating income, which is tantamount to the proceeds of the fair rate of return, I shall not be surprised to see the net operating income of 1935 as much as 2% below that of 1934 unadjusted. Yes, in my opinion, the receipts of livestock will fall off greatly in excess of 2%, but how much I do not feel prepared to say.

922 Referring to the Government bond table appearing on page 878 of the official transcript, what I mean by "the basic interest rate" is that when one is looking for an anchor, a point of departure, he usually thinks of the rate receivable on Government bonds as that prevailing for securities of practically no risk. I don't know that I have ever seen the phrase used before. Yes, short term Government or trade acceptances or call money all have a much lower rate at the present time, but I do not think they demonstrate the basic rate or shed much light on the problem. Yes, I testified that at this time I am looking at a five-year period, 1930 to 1934. The only reason these tables start with 1926 is that the published reports before me started with that date. I would give more weight to the five years 1930 to 1934. The average for the 5 year period 1930-1934 is 3.33% or a drop of only 1/3 of 1% from 1929. The 1% drop to which I testified was gotten by comparing 1935 with 1929.

Trans.
929

Q. Well, you see, Doctor, you will agree with this, won't you, that this is an important item because if based upon your tables here you reach the conclusion that there has been a drop of one per cent, (in yield) which justifies a drop of one per cent in our fair return, it amounts practically to a reduction of 14 per cent in the amount we are allowed to earn. Isn't that true?

A. I think that is correct.

931

Q. So that this question of the basic fairness of your figures upon which you determine that a drop of $13\frac{1}{2}$ to 14 per cent on the rate of return is of considerable moment to the respondent, isn't it?

A. I have always felt that the rate of-return is a very important factor in rate making and I still feel so. It is my opinion that for the next few years investors will have to be satisfied with a return less than that which they have received in the past. All the study I have made of the subject of finance in the last few years leads me to the conclusion that the downward trend in interest rates which has been in progress will continue to some extent in the future. I think that we perhaps are reaching the low point in high-grade investment yields at the present time and that we will see within a year or so an upward tendency, but I do not believe that that upward tendency will be so marked as the downward tendency has been.

(Witness continuing). No, I am not taking the low point as the indication of the drop. This table is in respect to Government bonds and Government bonds only. Yes, I reached the same conclusion in other tables, namely that there was a drop of one per cent roughly in industrials and in preferred

Trans.

a margin into what I think is the zone of reasonableness of the rate of return. If I were figuring it on the present situation without giving any consideration to the future, my inclination would be perhaps to go to $6\frac{1}{2}\%$ or below. I have left a leeway of one-half of one per cent in there so that if those who review this record think that the tendency is upward they may go to the upper zone of my zone of reasonableness. As an expert of the Department on this particular subject my feeling is that interest rates that will prevail before the expiration of the schedule prescribed as a result of this order ~~will be~~ higher than they are at the present time, how much higher I do not know. Yes, I think my method of figuring indicates a drop of one per cent from the high point of the period to the present time.

Q. Not from the high point because from the high point it would indicate a drop of $1\frac{2}{3}$ per cent, the high point was January, 1932.

A. Well, I will revise my statement then and say a drop from 4.28 as of January 1932 to a low point of 2.59 as of June 14, 1935.

- 935 I did not give particular weight to the annual average yield as shown at the bottom of page 1 of Government Exhibit 45, for the reason heretofore stated with respect to averages. The interest rates shown are for the highest grade tax free bonds,—the highest grade bonds there are in the country and the fact that the number of high grade issues yielding $4\frac{1}{2}\%$ and less compared with 1933 indicates to me that at the present time that the yield
- 937 on bonds of that type has declined. These are bonds of corporations whose common stocks are listed on the New York stock exchange. Some of the bonds are not listed on the New York stock exchange but I think are listed on the eurb. They are all listed securities. Yes, the fact that between

Trans.

1930 and 1935 there has been an increase in the number of bonds of both public utilities and industrials named on this particular list bearing interest below $4\frac{1}{2}\%$ (listed securities) is one of the factors that leads me to believe that there has been a decline in yield on high grade bonds and influences me in my opinion as to the fair rate of return for the Stock Yard Company.

Yes, if you look at the picture the other way, taking 1934, there were 16 public utility bond issues for that year out of 65, or approximately 25%, 938 which yielded to the investor above six per cent, while in 1930, there were 2 issues out of 84, or approximately 2.4% which showed a yield over 6%, and $7\frac{1}{2}\%$ in 1929.

Q. Well, now, with 25% of the public utility issues in 1934 bearing six per cent and better according to your data, while in 1930 only 2-1/3 per cent bore that interest, and in 1929 only $7\frac{1}{2}\%$ per cent, how do you figure that that shows there has been a decrease? 939

A. I stated in my direct testimony with respect to public utilities that the situation within the last year or so has been unusual and very abnormal.

(To obviate this objection by the witness he was asked to take his industrials and figure the same thing).

(Witness continuing). In regard to the industrials in 1934 there were 14 out of 43 issues bearing six per cent or over or approximately $33\frac{1}{3}\%$. In 1929 there were four issues out of fifty-six, or approximately $7\frac{1}{2}\%$, which bore over six per cent interest, and in 1930, 5 out of 60 bore $8\frac{1}{2}\%$.

940

Q. Now, therefore, leaving out this question of the abnormal conditions with regard to public utilities, you find with regard to industrials the same proposition, namely, that in the

More high
yield bonds
in 1934 than
previously.

651

Trans.

year 1934 there are more of that type of bond bearing 6 per cent and better than there were in 1929, a larger percentage, isn't that a fact?

A. My answer to all these questions is that these figures speak for themselves and any computation, correct computation that is based upon them, I will assent to as the computation naturally.

941 Q. All right, Doctor, but unfortunately it is necessary to get into your mind as a preliminary to the next question which is: how, on such a record, assuming our percentages are correct and the facts shown by these figures are true, do you say that that sheet one as to industrials indicates a lower annual yield?

A. All right. Let us take first of all the yield of $4\frac{1}{2}$ per cent on high grade bonds, bonds which I consider of a quality superior even to the good bonds of the Stock Yard Company.

Q. Well, now, just a moment, please. May I interrupt there? Do I understand that you are drawing a distinction between the public utility bonds which you yourself have listed here, and between the industrial bonds which you yourself have listed, making therefore those that bear less than $4\frac{1}{2}$ per cent the high grade bonds and those that bear 6 per cent the weak bonds? Are you making that distinction?

A. I am making this distinction that by and large, good bonds carry a lesser yield than less attractive bonds. Now, not all of these bonds, either public utilities or industrials, are of the same character. I happen to have enumerated and looked up the history of the group of public utility bonds bearing less than $4\frac{1}{2}$ per cent. Now, those are the Triple A and Double A

Trans.

bonds listed by the various services.

Q. Now, will you just give me that list then?
I think that is essential.

A. I am handing it to you.

942

Q. Thank you, Doctor. Now, I note and apparently this refers to only your tabulation 1934 and to none of the other years. Isn't that true?

A. That is correct.

Q. What public utility on that list, to your mind, is comparable to The Denver Union Stock Yard Company either in size, amount of the issue, listing or any other factor?

A. I think there is none.

(Witness continuing). The list of bonds bearing 7% or over also applies solely to the year 1934. This contains 12 issues, all of which are listed either
943 on the New York stock exchange or on the curb. I think that list of securities are all inferior to the bonds of The Denver Union Stock Yard Company. Most of the companies shown on that sheet are in financial difficulty. That is why I compiled the list and it is for this reason that I give little weight to those showing a yield above 7% and because I consider the other list superior to those of The Denver Union Stock Yard, but I do not give the low yield on them considerable weight in reaching my conclusion. The identity of the middle group is shown for the year 1933 in the supporting data; I do not have it for the year 1934. Yes, I have given most weight to yield at maturity. No, I didn't state that it was due to some special circumstance that certain bonds in my Triple A list of public
944 utility bonds bearing below $4\frac{1}{2}\%$ interest should bear or yield at maturity in excess of 6%. I do not know what my viewpoint is on that until I analyze each of those situations to see why those bonds were selling at that price. I know generally that the

No issue
considered is
comparable.

Trans.

companies which have issued those bonds selling
 945 at a higher yield are in difficulties. I think there
 is no industry on either of the lists which I have
 given you which is closely comparable to The Denver
 Union Stock Yard Company. **No compar-
 able industry
 considered.**

946 I have made no particular effort to find out the
 yield with regard to unlisted securities of compar-
 able companies. I have made investigation here in
 Denver in talking with various investment bankers
 and collected circulars of offerings, and I might say
 in fairness to everybody that industrial and public
 utility offerings at the present time are not nearly
 so frequent as the municipals. Yes, I discussed
 the Mississippi River Power Company 6% preferred
 stock circular. No I did not make any attempt to
 ascertain whether or not any of those shares of
 stock had been sold in Denver. I do not know that
 a single share of it was sold or that the market in
 Denver would absorb a single share. Yes, it would
 947 change my viewpoint with regard to that particular
 preferred stock if I found that an investment firm,
 believing that the market would absorb a 6% pre-
 ferred at par, found that the market would not do
 so, and if there are a sufficient number of such
 examples I will revise my opinion on that point.
 I have found that the industrial bonds such as those
 issued by the Stock Yard Company and other local
 issues are selling to yield net to the investor around
 5%. The preferred stock of the Great Western
 Sugar Company, which I do not consider really in
 a class with the ordinary preferred stock, because
 it is in reality a bond, is selling to yield $5\frac{1}{4}$ to
 $5\frac{1}{3}\%$ on dividends paid. The sugar company to
 which I referred yesterday has a preferred stock
 outstanding which I consider not so attractive from
 the standpoint of investment as the stockyards pre-
 948 ferred stock. It has got a speculative feature that
 may bring to the investor a higher yield and a bigger
 profit but he is taking a risk to do that. I inquired

Trans.

at a number of places in Denver about The Denver Union Stock Yard preferred stock and almost invariably I got this answer, that it is not moving or selling because people think so well of it that they do not want to give it up. I find on inquiry from investment bankers in Denver that if The Denver Union Stock Yard preferred stock did not have the call feature that my own estimate of the selling price at from 115 to 120 is equal to or less than any estimate I have got from anybody. Yes, it is my experience that where an issue is local and small it has a tendency to stay placed. No, I don't think that I have in my Exhibit 45 any preferred stock of any company which can be designated as small compared with The Denver Union Stock Yard Company. Yes, one of the purposes of listing (on the stock exchange) is to give liquidity and ease of trading and a constant market, which generally does not exist in a small local issue. On the other hand, during a period of speculation the price of the small local concern will not rise as high comparatively as those listed on the market, nor will it fall as low comparatively as those listed on the exchanges during periods of depression.

I would not go so far as to say that Government Exhibit 45 contains no truly comparable issues, but I will say that most of those issues are larger than the stockyards issue and furthermore that the main point in that exhibit is to determine the trend in money rates or yields on securities; although the securities may not be comparable, my position is that there is competition for the investor's money and the local trend follows in a general way the general trend, although the two curves up and down will not parallel each other exactly. Yes, I think I testified in the last hearing that the going rate on bonds and stock in the west was between one-half and one per cent higher than the going rate on the listed securities in the east. I feel that has

Trans.

changed somewhat but I do not think it has faded out entirely. The investment situation all over the country is peculiar at the present time. People are running over themselves to get good, high class securities at what seems to me to be ridiculously low yields and I think that has narrowed the spread between the east and the west somewhat, but I still

952 think there is some spread there. I have not given weight to these particularly low yields on Government bonds or quasi-Government bonds or other securities which, for some special reason, sell at around $2\frac{1}{2}$ to 3 per cent. I don't think that is comparable to the stockyards situation, and I haven't

given weight to the fact that some of the highest type industrial bonds have been selling at $4\frac{1}{2}$ per cent. or below. Nevertheless I believe it is a fact, and I think some weight must be given to the situation, that since the last hearing there has been a

953 decline in interest rates. Yes, I said I am taking into consideration the fact that the trend in interest rates would be upward from here on. I have not said that we were at the low point, but I don't see how good securities can sell at the yields they are selling at now for long, for if business ever gets started again, there is going to be a demand for funds and naturally that demand is going to make itself felt in the way of an increase in interest rates.

Decline in
interest rates
since last
hearing.

Q. But, Doctor, the point then comes to this: I would like to have you state into the records the factors which influenced you in reducing our rate of return 14 per cent approximately?

A. And when you say 14%, you mean my estimate of a reasonable rate as of 1929 of $7\frac{1}{2}$ to $8\frac{1}{2}$ and my estimate now of $6\frac{1}{2}$ to 7?

Q. Yes.

A. Well, I think I stated all of those throughout my testimony. I think I can summarize it this way, that those investors who are

Trans.

954

accustomed, on good securities such as the Stock Yard Company bonds, to receive a yield on investment of 6 per cent within the high years of the past will have to be satisfied in the immediate future with a return on their investment of less than that yield, and from all the information at my disposal, I think there will be approximately one per cent on that type of security. I think the same thing is true with respect to preferred stock such as those of The Denver Union Stock Yard Company, which I consider prime investments. Those stocks were selling in 1930 to yield about 7 per cent. I think that they would sell today, if they were allowed to seek their price level free from the call provision at a yield of 6 per cent; I think that the common stockholders should receive in dividends on their equity in the next few years a yield of approximately what the preferred stockholders get on theirs, namely, 6 per cent, and I think in order to be sure that the common stockholders do get their yield, that there ought to go into the rates the idea that they should be high enough to produce a surplus, or what I may have called a reserve for the payment of common dividends sufficient to insure investors in the common stock of The Denver Union Stock Yard Company of a 6 per cent dividend return. I want to make this additional statement: I do not now refer specifically to the securities that are outstanding, but a financial set-up similar to that which is now in existence made applicable to whatever the fair value of this property may be determined to be.

Call price on preferred is a condition, not a theory.

657

Q. Well, now, Doctor, two things to my mind stick out particularly in your statement, one is, first, we are dealing with a condition, not a theory, aren't we, with regard to this call

Trans.

price, in other words, as a matter of fact, that fixes the public's evaluation of this stock, does it not?

955

A. It fixes the maximum amount that the public will pay for it. It is an artificial condition, so far as the yield is concerned.

Q. And the yard company as such has to continue to pay 7 per cent upon that stock, does it not?

A. That is correct, and it pays a part of that 7 per cent because the privilege it has reserved to itself of calling that preferred stock at \$105 a share.

Q. Now, you are not saying that that was not a proper contract at the time the stock was issued?

A. No, not at all, I think it is wise.

Q. Now, you say the common stockholders are entitled to no greater yield than this preferred stock. Who bears the hazard and the risk actually in corporate organizations?

A. Common stockholders, most of it.

Q. And I believe you stated before and I believe you still will state the same thing, that the amount of hazard, or put it this way, the increase in hazard warrants an increased return, does it not?

A. In a business, yes, sir.

Q. And that holds true with regard to stockholders as well as to the business itself, does it not?

A. That is true.

Q. And since the common stockholder carries the hazard, why do you limit his return to

Trans.

956

the same amount the preferred stockholder is to receive?

A. I do not. I make a provision for an allowance over and above the 6 per cent, which the corporation may keep and use as it sees fit as a reserve to make good that 6 per cent, if in any year it doesn't earn it currently. That reserve is set up there for what I think is the main hazard in this business,—the fluctuations from year to year of the volume of receipts.

Q. And I believe you stated that surplus or reserve or excess allowance is one-half of one per cent, I think you so testified in your return?

A. No, I did not say that, as I recall.

(Witness continuing). I am familiar with the stockyards business from observation and contact with it for a period of ten years, but I have never operated a stockyards, nor have I been engaged in business as a commission man or anything actively in the livestock industry except that I was brought up on a farm and have some interests in farms now. But that experience would add nothing to my qualifications to testify on the risk in the stockyard and
957 commission business. I think that practically all of the hazards which exist in the stockyards business express themselves in the continuity of flow to the market. It is my observation that the losses incident to bad debts and losses of that sort do not occur to any great extent in the stockyards business. Most of the hazards, whatever they may be, are conditions of the business and manifest themselves in an up and down flow to the market, and I am assuming that there will be some fluctuation, how
958 much I do not know, in the volume of receipts. Yes, there are hazards of transportation; I know something about that, although I do not speak from the standpoint of a railroad man or as a livestock

Trans.

man. I know that there is a peculiar rate situation that exists here in Denver and I think it is responsible for some of the receipts at Denver. If that should be removed and the receipts at Denver should be permanently cut down, I think it is a factor that ought to be given consideration. If the other markets should get the same privilege and thus reduce receipts, I think that is a factor that has to be considered naturally.

Transportation factors must be considered.

- 960 When I spoke of special circumstances affecting public utility stock, I had in mind the revelation concerning certain public utility holding companies which have shocked the general investing public and the proposed legislation which has created a feeling of uncertainty. No, I don't think the uncertainty due to the legislation can be called a fear of regulation. The public didn't know whether the legislation would be conservative or less conservative or even radical. Yes the bill and the variations of it have been available to the public for a considerable
- 962 period. No, I do not think that the fear of regulation affects the stockyards security because stockyards have been under regulation since 1921 and I think the public pretty generally knows the type of regulation it may expect. No, I do not know that there is any decided feeling in Denver at the present time that this constantly recurring regulations or attempted regulations make the securities of the Stock Yard Company less attractive.

- 963 Referring to the list of public utilities stock in Government Exhibit 45, six out of eleven in 1933, or more than 50% common stock sold to yield above 7%, the eleven companies being those that paid dividends in 1933, and 66-2/3% of such common stock sold to yield above 7% in 1934.
- Yields on Public Utilities.**

Q. We are speaking of common in both instances in these last questions. Now, how

Trans.

does that situation lead you to the conclusion that The Denver Union Stock Yard Company should be limited to 6 per cent, as you have testified in its common stock in order to maintain that stock at the present market?

A. I have stated that a very unusual condition existed and has existed in the public utility field, a situation which I do not believe to exist with respect to The Denver Union Stock Yard Company.

Q. So that you, therefore, I take it, have disregarded the public utility situation in reaching your conclusion?

A. No, I have discounted the unusualness of the condition.

Q. Well, now, on what basis have you discounted it, how much, can you express it?

A. I cannot express it in a figure.

Q. To what extent have you discounted it, then, Doctor?

A. Well, to the extent that I would give less weight to the showing of public utilities than I would industrials.

Q. But, Doctor, to what purpose do you include in your exhibits here stocks that you feel not comparable and which are so affected by peculiar conditions that they are not comparable to the situation affecting the Stock Yard Company? In other words to make the question pointed and as clear as I can, to what extent did the public utility stocks affect your judgment that the trend in interest rates, dividend rates, was such that a reduction of one per cent or approximately 14 per cent in the rate of return of the Stock Yard Company

Trans.

should take place at this time?

A. I stated in my direct testimony that the public utilities situation had been unusual and that the weight which should be given to it was less than that which should be given to securities which behave in a more normal way. I make this statement without reference to my original testimony in the typed form, but I think that is the essence of my general statement. In the explanation of this general situation let me add this, that prior to 1927 I selected as high a class of common stock as I could find listed on the New York Stock Exchange. From that time on the identity of the list of corporations has been kept intact for purposes of comparability and that all information with respect to interest on bonds, dividends on preferred stock, dividends on common stock and earnings on common stock have been continued and that that information is carried forward from year to year. Some of the corporations which are on that list I would not now select if compiling a list of the highest grade common stock, but I have kept the list intact in order to give continuity to the study.

969 Yes, listed common stocks sell actively frequently although there may be no earnings, and the person who buys that stock does not buy on yield, he buys it as a speculation, for anticipated income. Yes, there is always a large element of the purchase of common stocks for appreciation in all purchases of common stock. They are the most speculative class of stocks.

Q. And you say speculative because they bear the risk, don't you, in other words, they have senior securities ahead of them?

A. They are the first shock absorbers.

Trans.

(Witness continuing). Yes, that in part explains my statement on page 883 of the transcript with regard to the increased purchase of common stocks with less attention to yield than formerly, but in part it does not explain it. One thing which has kept the yield on common stock so low is that with
 970 the fall-off in market price, there has been a decline in dividends. The other thing is the fear which was engendered by the losses sustained in the 1929 upheaval, equity securities have not been popular. I think the viewpoint of the public with respect to common stocks is undergoing a change, mostly due to the fact that the fear engendered by past
 971 losses is becoming less pronounced.

The information stated on pages 884 and 885 of the transcript are from Moody's Investment Service, —from the annual publication and from direct inquiry. Yes, the average industrial bond yield for the five-year period 1930 to 1934 is 5.58%. The yield for 1929 is 5.31%; hence the average yield for the period is .27 per cent above 1929.

972

Q. Well, now, Doctor, does that indicate to you a decrease from 1929 of one per cent, as you have stated in your statement?

A. No, it does not. It indicates to me that by averaging a set of figures which are declining, that the decline can be covered up.

Q. But, Doctor, since you are looking at this situation, you now state, from the basis of five years of past history, will you state again why you should not take that average as the fair indication of yield?

A. Because I do not believe that that five-year period, so far as yield is concerned, is what may be reasonably expected in the immediate future.

Figures do not indicate drop in fair return.

Trans.

(Witness continuing). By "immediate future" I mean for a period of four or five years in the future. No, it is not my opinion that we will stay
 973 on the present interest rate or lower. I have already stated that in my opinion we must be approaching the period of the low yield on the highest type of securities and that sometime during the period of four or five years in the future there will be a tendency toward a rising interest rate. How far
 974 in the future that turn upward will take place, I cannot judge. Yes, I stated that taking this low point there has been a decline of one per cent on the average in the trend of both bonds, preferred stock and common stock in my opinion, but if I thought we were in an interest period which is going to continue as low as it is now, I think my recommendation in respect to a rate of return would have been as low as $6\frac{1}{2}\%$, but believing there is likely to be an upward trend in industry, I have given as my opinion of the upper zone of reasonableness 7%, which is one-half of one per cent below the rate which I believe was found reasonable in the other case and approved by the court. Yes, I have stated that I thought the zone of reasonableness for the next few years would be between $6\frac{1}{2}\%$ and 7%.

975 A part of the information in schedule on page 887 of the transcript was obtained by direct correspondence with the Moody Investment Service and the balance from pamphlets and bulletins issued by that Service.

Counsel for respondent stated that a check of all of the Moody services in Denver failed to reveal such information and requested the witness to
 976 furnish his source, which witness stated he would do from Washington.

(Witness continuing). According to that table the cost of new capital in 1934 for industrial bonds was 6.04% as against 5.76% in 1929.

Decline of 1%
based on low
yield period.

Govt. witness
recommends
 $6\frac{1}{2}\%$ to 7%.

Trans.

Q. Does that indicate to you as to industrials that there has been a decline in trend in the cost or average price of new capital?

A. Read me the question again.

(Whereupon the question was read).

977

A. That in and of itself does not, but I call particular attention to the footnote at the bottom of that page which reads as follows and is a quotation from the Moody Service: "While these averages"—that refers to the years 1932, '33, '34 and '35—"are computed on the same basis as for preceding years, 1921 to 1931, they must be regarded in most cases as nominal in view of the small volume of new financing."

Q. But, Doctor, if you did compile this from Moody's data, that expresses the best available opinion in your mind, does it not, or best available estimate of the average price of new capital during those years?

A. I think those figures are correct as the computations are made.

Figures do not indicate decreasing yield.

Q. Well, then Doctor, again I repeat, does that indicate a declining average price of new capital?

A. On its face it does not. As a matter of fact, I do not think a great deal of weight should be given to the figures from 1932 to 1935 for the reasons stated in the footnote. A literal interpretation of those figures would indicate an increase in the yield demanded on new capital.

978 (Witness continuing). I do not think these figures carry into them the amount of industrial financing done by the Reconstruction Finance Corporation. That financing, in my opinion, has had

Trans.

the effect of a reduction in yield of public offerings.

979 Taking the third column of the table it shows 6.88 average cost of new capital for industrial preferred stock in 1934 as against 6.09 for 1929. No, that does not indicate to me a trend through the period downward. The yield has varied from year to year. Yes, in 1933 the yield got up as high as 7.23%.

Figures do not indicate decreasing yield.

981 No, I do not have the names of the companies shown in the tabulation of stockyard companies on page 889, or the names of the public utilities or the industrials shown on that page. No, I think I stated in my direct testimony that I had used these merely for the purpose of gauging the stability of the different types of industrials shown and did not place much reliance on them. I also called attention to the fact that the last column on that page "Per cent Return" should not be confused with what I have been talking about during my testimony as to a fair rate of return or the fair value of stockyards property. I gradually came to the general conclusion that the stockyard business, as a whole, is a very stable business, and in order to check that impression which I had gained I compiled these figures for the purpose solely of measuring as accurately as I could the relative stability of stockyards stock with other industries. That table has nothing to do with the altitude of earnings to be made.

983 Yes, public utilities generally operate under a franchise so that if anyone wants the service they get it solely from that concern. There is a monopolistic element. Their competition is only with substitutes such as electricity and coal for heat. Yes, the competition is with some totally different element or commodity. That is not true with regard to stockyards. I think the prospective user of stock-

Competition a factor in stockyards.

Trans.

yards services has a wider choice from which to select his services than the user of electricity in a city which is lighted by one company.

Q. Well, now you take, we will say, a cattle raiser at Rifle, Colorado, he has a choice with no additional expense to himself, does he not, of all the river markets, the Chicago market, as well as the Denver market? When I say all the river markets that is perhaps a little broad; I should eliminate St. Paul.

984

A. I think that is true with this provision about which I myself do not know. If he can stand the freight rate, difference in freight rate for the different points, then, he has that choice.

Q. But, Doctor, don't you realize from your study of the stockyards industry that the price paid at Omaha on, we will say, a fat steer is the price paid at Denver on the same day approximately, plus the freight, so that the shipper is not out even the freight?

985

A. I realize that is the case, but the shipper does not always have at the same time the choice at the particular moment that he is going to ship his cattle. Now, what you say is generally true and I am not disputing that, but it may be that on the day on which a man wants to ship his cattle he has only one point to which he can ship it, for the reason that the price on that particular market, or the conditions at that particular time, make it to his advantage to ship to that particular market and to his disadvantage to ship to any other market. If that were not the case, then your statement would be literally true that a shipper at any day in the year might ship his cattle to any market that he chose and get the same net price for it.

Q. What I am meaning, Doctor, was your

Trans.

statement that, "oh, yes, he could do that provided he could stand the freight." Now, the shipper never stands the freight in the livestock industry, does he?

A. No, but the cost of the freight and the other costs total a sum which eventually determines for him the place to ship his livestock.

Q. But, Doctor, isn't that fact the essential earmark of freedom of choice? He only ships to one because of an advantage, as he sees it. If he didn't see that advantage, he can ship to any other market without any additional cost to him, can't he?

986

A. That is correct.

Q. Now, you don't have that situation with regard to a public utility, do you?

A. No.

(Witness continuing). I do not think there is any franchise grant to a stockyard company nor any certificates of convenience or necessity required before a new stockyard could be started.

**Stockyards
have no
franchise
or monopoly.**

987 This list of 83 stockyards as of 1934 includes auction yards insofar as they have been posted by the Secretary. No I do not know how many of those 83 so-called stockyards have their securities publicly sold or quoted. It is my judgment that a great many of them do not have their securities publicly sold. Some of them are not corporations. I do not think hog concentration yards are included in the list.

By "net worth as of December 31", that represents the book value going to the various classes of stockholders. No, although under my definition the book value has decreased from 123,000,000 in 1927 to 119,000,000 in 1934, the number of yards has in-

Trans.

creased from 69 to 83. I have not analyzed the figures sufficiently to answer that question. It may be a change in financial set-up or it may be the writing down of values. I cannot answer that.

The witness was requested to furnish a list of the stockyards and more detailed figures.

(Witness continuing). That list has played no part in my determination that a reasonable return for the Stock Yard Company at Denver is $6\frac{1}{2}$ to 7 per cent. It has merely indicated to me that the stockyard industry is a comparatively stable industry. Yes, the list would furnish an indication of fluctuation in receipts both in the number of head 989 and number of dollars. I do not know the extent to which the factors fluctuate from year to year, but I do know in a general way that there is some fluctuation. No, I made no investigation of that.

Gave no consideration to decline in 1935 earnings.

Q. Well, now, did you give any consideration to the fact that as far as Denver is concerned, The Denver Union Stock Yard Company, its earnings this year have declined 45.85 per cent over a similar period of 1934.

A. Will you read that back to me, please?

(Whereupon the question was read).

A. You refer to earnings, or to volume of business?

Q. Earnings.

A. I did not know what the earnings of the yards up to date are or were.

990

Q. Well, if you were to add, or, rather, take of our earnings \$5,000 which was not paid until December of 1934, for a certain service which has been paid in advance during this period, that the decrease would amount to 54 per cent?

Trans.

You have given no consideration to that, have you?

A. Well, I did not have before me specific figures and could, therefore, give no consideration to them. I have assumed that 1935 would not be nearly as good a year for the Denver Stock Yard Company as was the year 1934.

Q. Well, Doctor, have you given that fact consideration in your rate of return?

A. In this way I have, Mr. Bosworth. I have this feeling about it in fairness to the Stock Yard Company and its patrons: if the cut-off is at the end of 1934 and it be assumed that that is the volume which must produce the return, I think the rates would be pressed downward and that would not act against the interest and perhaps be unfair to the Stock Yard Company. On the other hand, you assume that 1935 is going to be a year of very low volume and that the return is to be collected by a schedule of rates high because of that low volume, it would be unfair to the shippers. Now, I have this feeling about it: whatever test period is finally decided upon by those who decide what these rates ought to be, that if they include in that test period the year 1934 as it actually was, they ought to include along with it the year 1935 as it actually will be. If, on the other hand, adjustments are to be made in the year 1934 for unusual conditions, then those who decide the case ought to remember also that the chances are that 1935 will be unusual in the other direction.

(Witness continuing). I do not think that it is necessary to have a compensating year to make up for the low years when the return is less than a

Trans.

- reasonable return. If compensation is to be made, it can be made by a schedule of rates applicable to all years and that schedule of rates would be somewhat higher than the rates would be otherwise. Yes, in unusual conditions in a single year the schedule of rates may exceed the rate of return and should secure or produce a return in excess of what I have recommended as a fair rate of return. The schedule of rates which is ultimately decided upon will produce a certain amount of net operating income year in and year out over the period. If I were called on to do the job, at the end of the next five years I would add the net operating income and if it amounted to 35 per cent of the fair value of the property I would know I was on the right track. The 35% is five times the annual fair return of 7%. This is from a practical standpoint and a part of that would be due to feeling and not to reason. If at the end of five years it was found that the return was less, I would say that the rates ought to be revised. I can't say that I would increase them over the next five year period above what might then be a fair return to make up, but if I was charged with that responsibility and found that I had made a mistake, I would do my best to rectify it.
- 992
- 993 Yes the schedule of rates is supposed to return as closely as practical a fair rate of return as determined by the Secretary within the zone of reasonableness somewhere above confiscation, which I cannot determine.
- 994 The per cent return shown on page 889 is the relationship between net profits,—not net operating profit—divided by the book value of the concern. The rate of return is the return on the fair value of all the property. All of the property is not represented
- 995 in those figures on page 889. Those figures do not include the bonded indebtedness, nor do net profits include the interest paid on bonds. (The table re-

Trans.

ferred to by the witness is the table on bottom of page 889 of the transcript referring to respondent). Yes, I think it is correct that this table includes income from Government purchases. It is my understanding that it includes all of the income received by the company from any source, whether stockyards
 997 or non-stockyards operations. Yes, I stated that bonded indebtedness had not been eliminated from net worth because net worth does not include bonds. The figures shown in the bottom table for 1934 show the net worth of The Denver Union Stock Yard Company to be \$3,407,807. The net proceeds are the earnings after interest has been paid and the net worth is the figure which stands on the books of the company as the value of the preferred stock, the various reserves which belong to the common stockholders, the surplus and the common stock, which, as I think it is in the case of the Stock Yard Company being no-par value, means everything after
 999 the value of the preferred stock. Yes, the figure of \$288,040 includes the Government cattle and sheep income. The \$23,000,000,000 shown for industrial stock (in another table on the same page) is not comparable in size, but the composition of the \$23,000,000,000 is the same as the composition of the \$3,407,807. Yes the \$23,000,000,000 of industrials
 1000 exclude the \$9,000,000,000 of public utilities. The industrials come from the National City Bank list and there are 9 stockyards included for the year 1934 and 1933, 10 for the years 1932 and 1931, 10 for the years 1930 and 1929 and 7 for the years 1928 and 1927. No, they are not classed under public utilities.

Yes, I characterize 1932 as the worst security crash of this era, and due to it there was a great deal of distress selling both of commodities as well as stock,—everything that one had to sell.

1001 My schedule at the bottom of page 889 of the

Trans.

transcript shows the book value of The Denver Union Stock Yard Company in 1934 as \$3,407,807 and shows approximately \$1,340,000 of bonds outstanding, so that the net worth and funded debt of the company would be \$4,747,807. The interest on the funded debt at 5% is \$66,242, and if that be added to the net profits shown in the schedule of \$288,040, there is a net operating income of \$354,282. Assuming that the record shows the net income derived from Government purchases in 1934 to be \$107,000, if that figure be deducted from the net operating profit, there is left \$247,282, which is approximately 5¼% of the net worth and funded debt.

- 1003 Yes, the company has to pay 5% interest on whatever of its bonds are outstanding and 7% on the preferred stock. Yes, I believe the bonds were sold at 94 and 95 and have what is known as the tax free covenant. No, I do not recall my testimony in the former hearing that the tax free covenant and the bond discount added one-half of one per cent to the coupon rate, but so far as this case is concerned and so that there may be no misunderstanding, the rate of return to which I have testified in this case does not include anything on account of cost of financing. All taxes, including the tax free covenant, I assume are included in operating expense. [If anything is to be added for cost of financing then that should be added to my rate
- 1005 of return.]

The question of the value of the service to the patron is a question which arises in the rates themselves and the structure of the rates is determined. I assume that when the rates are finally determined that they will be within the value of the service to the patron.

Q. I am asking you whether, in reaching your idea of 6½ to 7% rate of return, you have

Trans.

taken into consideration to any extent the question of whether that return is the value of the service to the patron or whether it simply represents what you, in your opinion, feel is all that the Stock Yard Company should be permitted to earn.

Government counsel objected on the grounds that the value of the service was immaterial. Objection overruled.

(Witness continuing). The value of the service to the shipper is worth a great deal more than the rate of return to which I testified. To find the value of the service or to compare the value of the service to the shipper you would have to add to my rate of return all of the operating expenses and all the other legitimate expenses. I have considered the value of the service from the standpoint of determining in my own mind whether the traffic will bear the rate of return which I have fixed. I take the situation as it is.

Value of
service
exceeds
allowed rate
of return.

Q. Do you know relatively what the level of the livestock price is today compared with the, either the five-year average from 1930 to 1934, inclusive, as compared to the 1929 level of prices?

MR. MILES: Renew the objection, Mr. Examiner, it is so absolutely utterly immaterial.

THE EXAMINER: Objection overruled.

A. Why, I do not keep currently posted on the daily prices of livestock, but from my general information, I do know that livestock prices are much higher now than they were at the low point. That is a general statement, and I can't measure it mathematically or by an index number. I mean to say that I do not have that information.

Trans.

**Expense of
rate hearings
not included.**

1009 (Witness continuing). No, I have included nothing to cover the expenses of these rate hearings.

As to Government Exhibit 46 the first page is a percentage summary showing the number of head of livestock by species marketed at a number of markets including Denver and is based on the detail contained in the pages which follow. These pages also show the livestock population in various States as estimated by the Department of Agriculture. For
1010 instance, returning to page 1, in 1934 there were marketed at Denver, St. Joseph, Kansas City, Omaha, Sioux City, Chicago, Ogden, Salt Lake, San Francisco and Los Angeles, from the States of Colorado, New Mexico, Texas, Utah, Wyoming, Idaho and Nebraska 4,186,597 head of cattle and calves, of
1011 which 17.4 per cent were marketed at Denver. No, these percentages have nothing to do with the number of head of livestock actually marketed but are only the receipts. It does not include direct sales in the country.

Yes, I am familiar with the fact that of the receipts at a given market a greater percentage will be sold
1012 at one market than at another. The character of the Denver market is more of a transit point where cattle come in and try the market, and if satisfied with the prices are sold to move on ultimately to a final destination. No, the relationship of sales to receipts is not shown in this exhibit. Yes, livestock which merely stops to feed and is not sold is counted in the receipts, if the livestock company counts them so far as these figures are concerned. I do not know whether they do or not. If the stockyard company counts such livestock in its receipts it would not affect my opinion. It is my understanding that livestock which stops to try the market and is not sold, is forwarded without a yardage charge, but that livestock does consume feed on which the company makes a profit. The expenses

Trans.

incurred are incurred on account of the livestock received and the income is from the livestock as you receive it. I have made no effort to analyze sales percentages at all. No, I don't think the sales percentages would affect the pertinency of my figures. They are stated for what they are worth.

Q. What I am trying to find out is what they are worth, Doctor.

A. Those, in my judgment, are the most accurate figures of livestock receipts at the stockyards that are available. Now, I am not a livestock statistician but I have compiled those figures from sources that I believe to be correct.

(Witness continuing). The pertinency of the percentage figures on the first page of the exhibit is that they show Denver received a smaller percentage of the livestock from these States in 1934 than in 1927. Yes, this exhibit shows that Denver is in a competitive situation with 9 other markets shown on the sheet. No, it does not show the competition of the Denver market with the problem of direct buying. As to that problem and as to whether or not it has increased within the last 5 years, I have looked over the report prepared by the Bureau of Agricultural Economics which report is more authentic than anything I might say. I will provide a copy of it for the record.

Denver competes with other markets.

Yes, I know that receipts of cattle from Colorado at Denver have decreased from 408,000 head in 1926 to 299,000 in 1933, or roughly 26%. That is shown on page 2 of Government Exhibit 46. The second column on page 2 of the exhibit shows the cattle and calf population for those years to be 1,406,000 in 1926 in Colorado and 1,526,000 in 1933. No, I don't know what percentage of that population was marketed in either of those years. Denver received

Trans.

about 29% in 1926 and 19.6% in 1933. Yes, that shows a decrease relative to the number of head on farms on those dates. All that I could say from those figures is that Denver is receiving a smaller percentage of the population, cattle population, now than it was formerly. All the reasons for it, I do not know.

1019 (Witness continuing). The percentage of Idaho lambs received at Denver has increased from 7.6% in 1930 to 30.8% of that State's shipments to the ten markets in 1934. I have been under the impression that the transit privilege as it exists at Denver has helped Denver's sheep receipts.

**Hazards at
Denver.**

1020 As to the hazards of the business at Denver, I stated yesterday that I think the variation in volume received is the factor which has to be given consideration. There are many things which influence that, and I do not think that I can enumerate all of them. I think that the freight rate structure influences the flow of livestock and that Denver has an advantage now which it is likely to lose that may have some influence on the future receipts of
1021 the business. Yes, direct buying, fluctuations of livestock, prices, disease, are conditions of the livestock industry. In my rate of return I have assumed that there are hazards in the business. I have assumed also that in meeting these hazards and in the expenditure of money on account of them, that that money will show up in the expense account, and if those who finally pass upon it feel that these specific hazards ought to be insured against, that that matter will be given consideration.

Q. But, Doctor, doesn't that affect your determination in a way of the rate of return because I believe you will admit that, for example, take a change in the freight rate situation, that perhaps can be partially offset or per-

Trans.

1022

haps entirely offset by an increase of solicitation, by an increase in advertising, by an improvement in facilities, by an endeavor to increase the buyers on the market, including packers, so as to increase the market outlet, and if those efforts result in greatly increased, and I take it from you, properly increased operating expenses, it leaves a smaller balance which does affect, does it not, what you call your net rate of return?

A. No, because if those are counted in the operating expenses and are carried into the operating expenses, the effect will be to raise the rates higher than they otherwise would have been and those higher rates will produce more gross revenues, and when you subtract the increased expenses from the increased gross revenues, your return, your hazards are paid for and your return is there.

Q. But, Doctor, it seems to me that you have made an assumption which was not within my question. You assume that these efforts will result in increased revenue. My assumption was that these efforts were being put out to maintain the revenues at their present level, we will say, which present level may or may not be due in part to these freight-rate situations.

A. Then your efforts in part, at any rate, are a mistake on the part of management.

(Witness continuing). I am not testifying as
024 to a gross rate of return. I am testifying as to a
net rate of return. Yes, I think the rates prescribed
ought to contemplate that the company will make
reasonable effort to increase its business if there is
025 reasonable opportunity for it to do so. I think that

Trans.

reasonable expenses for holding what business you have and increasing your business should be allowed, but I can't tell what the bounds of reasonableness is. I think you are entitled to pass a reasonable amount of expense on to your shippers

1026 on account of that effort. I can't say that presumptively the efforts made by the management for the protection of its own business and its increase are reasonable. They may be unreasonable. I think there can be excessive expenditures in the stockyards business on account of advertising. I do not know what your expenses are on that account, but merely because expenses happen to be

1030 made by a management does not sanctify them in my opinion. In the rate of return to which I have testified I have excluded nothing to meet the situation about which you speak (the possible loss of the transit privilege). If that situation develops and it appears that it is right and proper for an allowance to be carried into rates to meet it, then those who fix the rates should put it in there. I have not.

Does not give weight to freight situations.

Higher rate recommended at Omaha.

Yes, I have traveled over the various markets and their territory. I have heard talk about an out-of-line haul to reach the Denver market from Cheyenne, and have heard a good deal about the Dotsero Cut-off and Denver being on the main line in the last rate hearing. Yes, there is Pueblo and what is known as the Pueblo Cut-off at the south

1031 and the Cheyenne Gateway on the Union Pacific at the north. Yes, I would think that the hazard of diversion of livestock is a hazard of the Denver market which does not exist at Omaha to the same extent. My answers on these freight situations should not be given great weight.

1032

Q. Well, the point is, and coming briefly to it, if that be a hazard, you recommended a

Trans.

rate at Omaha of 7 to 7½%. What change has occurred, since your recommendation in Omaha which leads you to reduce your estimated fair rate of return one-half of one per cent?

A. I think those are stated in my main testimony and cross examination. I could add nothing.

(Witness continuing). I cannot answer directly the question as to whether or not I see the same hazard in Denver as I did in the Omaha market. I will make this statement that from my observation I think Denver is a more seasonal market than Omaha. I don't think that increases the hazard. 1033 It may increase somewhat the expense of Denver doing business over and above what Denver's expense would be if it had an even flow throughout the year and that expense is reflected in the expenses as incurred and shown.

Denver a more seasonal market.

Q. Just one last question which is so that we can be sure of it, and please try to make this answer specific, Doctor. If I understand your testimony you are figuring this one per cent decrease in yield by comparing 1934 or 1935 so far with 1929 and not with the average yields during the five-year period?

A. I cannot answer that question directly because I am doing neither. I have not taken into consideration mathematically the averages except on a monthly basis or a yearly basis at Denver merely for the purpose of time determination, but I am making my recommendation on this basis: from the date of the last hearing downward to the present time, 1935, and I think continuing sometime in the future, investors will have to be satisfied in the future, the date during which these rates will be in

Trans.

effect, with a smaller return than they have been accustomed to. Now, I cannot state it clearer than that.

1034

Q. Then, you are using a trend, as you see it, and not an average?

A. That is correct.

Q. And you will admit that the average, if an average were used, would not show on your Government Exhibit 45 or in the tables used in your statement, a one per cent drop from 1929 to that average?

A. The figures speak for themselves and I think the computations have been made.

MR. BOSWORTH: That is all.

1035

Re-Direct Examination.

In my rate of return I made no provision for amortizing the bonds of the stockyards. Yes, my figures of receipts at the Denver yards include the direct purchases by the packers.

The first hearing under the Packers & Stockyards Act in any stockyards was in 1922. In adopting the language of "constantly recurring expense for these hearings" as used by respondent's attorney, I had knowledge of the fact that a hearing had been held in Denver in 1930 and a very vivid consciousness of the fact that one is being held now.

1036

No, I wouldn't think that would entitle it to be called "constantly recurring expense."

Re-cross Examination

Yes, I think I know why the yard company had an appraisal of its real estate made in 1925. I know that a rate hearing was in the air in 1926 because my first visit to Denver was in 1926, when I met Mr. Arthur Bosworth and asked him for

Trans.

information, telling him not to give me any information that I should not have. He told me that the only confidential information was that he did not want his competitors here in Denver to know that he was trying to buy the yards and I do know that one of the factors that he took into consideration and asked me about at that time was the prospective rate hearing.

1037 No, I do not know the extent to which packer directs affect this market compared to other markets.

I made no allowance for amortization of bonds in my rate of return, not because I feel that a stockyards company should remain in debt. I think it is a wise provision for a stockyards company or any other corporation to get out of debt, but speaking specifically with respect to a regulated industry and The Denver Union Stock Yard Company, if it gets out of debt I think the stockholders who get the increase in equity should pay the bill and not the patrons who use the market. On short-term borrowings at the bank, I have assumed that the interest will go into the expense account, but after amortizing the principal of short-term loans, I look upon that as a phase of operation. There is nothing in my rate of return to amortize any type of indebtedness. Yes, I know that in order to get a loan through a bank you must give reasonable assurance that you can pay the debt.

No provision for amortizing any debt.

THE EXAMINER: Is there objection to Government Exhibits 45 and 46?

Government Exhibits 45 and 46 admitted over objections.

MR. BOSWORTH: Yes, Mr. Examiner, we object on the ground that they are incompetent, irrelevant and immaterial, as shown by the cross-examination of this witness, no corporation stated thereon being, as he stated, comparable in any manner to The Denver Union Stock Yard Company:

Trans.

MR. MILES: Renew the offer on the ground that the cross-examination made them competent and material.

MR. EXAMINER: Objection overruled and Government Exhibits 45 and 46 will be received. Witness excused.

(Whereupon *Government Exhibits Nos. 45 and 46* received in evidence).

1038-A In response to request for information as to where I obtained the figures shown in my testimony relative to the average price of new capital for industrial and public utility companies, the information for the years 1921 to 1933, inclusive, will be found at page A-39 of the Special Features of the blue insert of Moody's Industrial Manual for the year 1934, following page 1856 of the principal pages in the volume. The information for 1934 and the first quarter of 1935 was obtained by me through inquiry from the Moody service.

Counsel for respondent renewed his request for a complete statement of the stockyards companies listed in Dr. Dozier's testimony and schedule on page 889 of the transcript. The list was finally furnished and appears in the record as "Government Exhibit 58," respondent objecting on the basis that its incompleteness rendered it immaterial.

**Government
Exhibit 52-D
and 53
admitted.**

1038-D Government Exhibit 52-D, being the May, 1935, issue of "Crops and Markets," a publication of the United States Department of Agriculture, was offered and received in evidence.

Government Exhibit 53, being a copy of the report of the Bureau of Agricultural Economics on direct buying was offered and received in evidence.

1038-E (Whereupon, the witness, Dr. Dozier, was excused).

Trans.

MR. MILES: That is the Government's case.

MR. BOSWORTH: You mean that is all?

MR. MILES: Yes, sir.

MR. BOSWORTH: Mr. Examiner, at this time I would like to ask a question of you. I would like to ask whether under the, as you frequently describe it, the liberal practice, for the Secretary, the Examiner feels that he has the authority to dismiss an investigation of this sort as on a motion for non-suit based upon jurisdiction, or whether that is a power or prerogative solely of the Secretary of Agriculture as the rate making authority which is, as I understand, the situation to be, frankly.

THE EXAMINER: It is with the Secretary and not with the Examiner.

MR. BOSWORTH: Then, any motion which we might have addressed to the jurisdiction of the Secretary due to what we feel to be a lack of proof on the part of the Government, then, should then properly be presented to the Secretary at the time of any oral argument as I understand.

THE EXAMINER: Yes sir, sometimes that motion is made before the Examiner on the record, in which event the Examiner overrules it and then it is considered by the Secretary or you may make it before the Secretary when you argue the case orally before him as you may elect.

MR. BOSWORTH: Well, my point is this exactly that should you state that the Examiner would overrule the motion and you would overrule it on the basis that you have no such authority, and that it must be decided by the Secretary, and therefore I can see no reason for doing a nugatory thing in making the motion now.

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Vol. III

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TRANSCRIPT OF RECORD

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U. S. S. C.
done in
from

Supreme Court of the United States

OCTOBER TERM, 1937

No. 798

**THE DENVER UNION STOCK YARD COMPANY,
APPELLANT,**

vs.

**THE UNITED STATES OF AMERICA AND SECRE-
TARY OF AGRICULTURE**

**APPEAL FROM THE DISTRICT COURT OF, THE UNITED STATES FOR
THE DISTRICT OF COLORADO**

FILED FEBRUARY 14, 1938.

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VOL. III

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

THE DENVER UNION STOCK YARD
COMPANY, a Corporation,

Plaintiff,

VS.

UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE,

Defendants.

IN EQUITY

No. 10913

ABSTRACT OF EVIDENCE

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THE CASE FOR RESPONDENT

CHARLES W. PACE, a witness called by the respondent, testified as follows:

I am a farmer, feeder and stock raiser at Longmont, Colorado. I first commenced in that business in Missouri, but have been in the feeding business for 27 or 28 years in Colorado.

1040 My average number of head in the last four or five years has not been as much as further back, but I have run around 400 and 500 head of cattle. There are about four carloads to each hundred head. I have a sheep capacity of 6,000 head and a few years ago I was feeding with Richard Mitchell and we had run around 5,000 and 6,000 head. The year they knocked us in the creek we had over 11,000 head. Now I have no producing herd of cattle,—just sheep. At one time I think I had the best herd of white-faced cattle in Colorado.

1041 Yes, I patronize the Denver market both as a shipper and a buyer, and have patronized it ever since I have been in this country. I don't see how the livestock industry in the West could get along without the Denver market. I buy the majority of my feeders at Denver and I very seldom ship anything elsewhere unless it is some very heavy cattle. Pretty near everything I sell comes to Denver. Denver does not use as heavy cattle as Chicago. Denver uses just as heavy cattle as the river and it is just as good a market. Yes, the Denver market fixes the price of livestock in this region. We try to buy our stuff as near as the Denver market and sell it that way, and that is what we use out here. I refer to when we buy or sell direct.

As to the Stock Show at Denver, I have not missed a one since it was built. We all think it is a benefit to the industry as a whole. It just seems to get

Show benefits industry as a whole.

Trans.

Show brings
buyers.

a lot more buyers together and a lot more cattle, and it seems every year that the cattle have been improved and more sales and more buyers, and I have heard it said many times that Denver is the best feeder market of any town or place anywhere, produces more good cattle, more good feeders, sold here in the Stock Show than any other one market. Yes, the same thing refers to bulls. It just looks as though there were buyers here from everywhere and there always seemed to be stock for everybody. Sometimes it might run a little short like anything else, and maybe a little long, but not very much. The buyers come from a great many States and buy the livestock by the carload and maybe more. Yes, I think the Stock Show has been influential in bringing buyers to this part of the country and advertising our livestock, because, as we look at it, we are always waiting for the Show to either buy feeders, if we want them, or have them to sell. The same way with bulls and the same way with horses. It just seems that it is a place to get together and do business. I think it is very valuable. If you want to buy any amount of stock I just don't know where you would go to pick it up. I believe there would be a way to do it but it wouldn't be nearly as convenient as to come right where it is and where you can see it all. Yes, I generally have livestock for sale at the Denver show, and I have also sold quite a little at my home place to yard traders who come up there and buy them. Yes, I have come in contact and gained a patron several times at the Show. I recollect at one time I bought a train load of cattle out of Cimarron, Oklahoma, and entered two cars in the Show, and it was either an Iowa or Illinois feeder that bought those cattle and they won three prizes. He wanted to know if I had any more as good as them and I said I had some more of the same kind, probably not quite so

Trans.

good and I took him up to the ranch and sold him five or six carloads or more of cattle of the same string. I had 520 of them.

I would say that there was an increased business at the Denver yards due to the show because during the Show week it looks as though everything was full. Yes, from my observation I would say that bulls are sold in the yard, apart from the hill or Show property, during Stock Show Week as a result of the Show and because the Show is there. There is no argument about that because people come there during Stock Show Week in order to purchase these bulls because they know they are going to be there. The same is true as to feeder livestock and horses. Then there are fat cattle and pure-breds on exhibition that are sold at the Show and always figure to bring \$1.50 or \$2.00 a hundred more than they would on the open market at any other time of the year.

**Increased
business due
to the show.**

1045 As to the statement that all this livestock would come to the market in any event at some later time, I do not think so. I wouldn't think it would be really safe for the producer, the shipper, to come at any time whether there were going to be any buyers there or not. I wouldn't know how they would turn out, because they have increased in number the cattle and number of buyers all these years right along up to the present time. I don't know how it would be if they would come in here with these bulls and nobody would know they were coming, what they would do with them. It is a sort of get-together proposition. If there were not a Show probably they would go to some other place where they had a show.

**Livestock
would not
come except
for the show.**

1046 When I first knew the market back in about 1905 the old Exchange Building was there but there was nothing on the hill in the way of a horse market.

Trans.

Growth of
market.

1047

The hog pens were just back of the old Exchange Building and there was an old brown colored hotel northeast of where the new Exchange Building is now, and the first thing you went through, you had to go through the hog pens, just a little row of hog pens there, and the sheep were yarded in a little shed down west and a little handful of yards back of the hog sheds. The outlet for livestock was very small because they couldn't take care of but very few and it just kept getting bigger and they kept building more room until it got to where it is at the present time; it has grown steadily all the time. I recollect men on the yards at the time they had 10,000 cattle and they didn't know what in the world they would ever do with them all, and I remember several years back I was on the market when they had 15,000. The chute and scale pens and everything else were full and you couldn't sort cattle and you couldn't move cattle or do anything to them until they got the congestion out of the way.

Yard Trader
beneficial.

Yes, the shipper to the market is interested in the outlet for his livestock, certainly. He sends it there for sale. Yes, he is interested in the number of buyers, for the more buyers you have the better price you always get.

Shipper wants
buyers.

1048

Yes, the trader is a buyer on the market and I have been on the market several times when the trader was all the market we had. Yes, I think I am familiar with the operations of the traders on the Denver market and the place they fill. I did business with them for years. No, it would not be of any benefit to the shipper either to restrict the number of traders or to handicap the trader in his operations. There are a lot of them that can hardly make a living the way it is. My opinion is that the trader, if any additional burden is put upon him,

Effect of half
yardage
charge on
traders.

1049

Trans.

in order to handle this stock would have to take it off the producer in price.

Q. Now, there has been a good deal of talk in these rate cases, Mr. Pace, concerning what in the 1930 hearing here was called, or in the decision of the Secretary in the 1930 hearing was called a half-yardage charge to traders, and in certain other cases it has been called a reweigh charge; for example, instead of a charge of 35c a head on fat cattle, adult cattle, I should say, the trader was to be charged, say 15c. Do you think any charge of that sort, irrespective of the amount, would be detrimental to the market outlet at Denver?

A. Well, I have talked to some of the boys—we have talked back and forth over this matter, and I have heard several of them say that if it was taxed onto them, they were going to quit, that they couldn't stand it.

Believes such charge detrimental to the market.

Q. And do you think that to have them quit would be detrimental to the market?

A. I would say that to a certainty.

Q. You would say to a certainty?

A. Yes, sir.

Q. Now, as a patron of the market, are you desirous that the yard company should do all it possibly can to increase the outlet for your livestock?

Yard company should do all it can to increase outlet.

1050

A. I would; certainly that would be a betterment.

Q. And you believe it is for the betterment of the industry and the benefit of the industry, do you, for us to exert every effort to increase the demand for livestock on the Denver market?

Trans.

Buying outlet
includes all
who absorb
livestock.

Need for
sheep shear-
ing outlet.

A. I would think that would go along with making a better market out of it.

Q. And in increasing the demand and the outlet, that includes, does it not, packers, dealers, order buyers or any other factor that may absorb the livestock which comes here for sale. Isn't that what you mean?

A. Yes, sir.

(Witness continuing). As a sheep feeder I have shipped lambs to Montgomery, which is a feed lot or feed yard out of Chicago for shearing and sale. Yes, I think it would be of benefit to me and the other feeders if there was a sheep-shearing layout at the Denver market because they have got them in Kansas City, St. Joe, Montgomery and Omaha
1051 —I am not sure about Omaha. I don't see why there wouldn't be advantage here; there are more lambs fed in this territory than in any other territory that I know, and it would be close, a short ship and less death loss to get to the shearing pens. I don't see how it wouldn't be an advantage. Our climate is the best there is for lamb raising. I don't know the exact percentage compared to the rest of the United States, but our territory is the best feeding country there is. Yes, the shipper likes to feel that he is within striking distance of his lambs when they are sold, and the Denver market is within striking distance of all this feeding section.

Cross Examination.

Trader
Operations.

1052 I don't know how many cattle are bought by the traders every year at the Denver market. I know there are a lot of them. The cattle bought by the traders are bunched up and sorted and classified to suit the different trades and different customers that they have got and shipped to different places

Trans.

where they belong. As I see it, that is the way they do with them. They buy a string of cattle of all ages and types and the like of that, and classify these cattle, and they have customers who have given them orders to ship these cattle wherever they want them to go. It would be just a guess for me to try to say how many of these cattle bought by the traders are resold on the Denver yards. These traders have orders throughout the country to feed-
 1053 er buyers in northern Colorado and Nebraska and Kansas and they ship a lot of them out that way, and then they have other customers who are coming in here and taking a small profit on their purchase. There are very few of them that are sold through the commission men again. The traders are a
 benefit to the producer and shipper because they buy anything that comes in and which the packer wouldn't touch at all. Somebody has got to do that. If you didn't have your trader I wouldn't know where to go sometimes. Yes, the trader must dispose of that livestock somewhere. Commission men don't find that same market. Yes, if my cattle sent in one day were sold to a trader and then put back onto the Denver market the next day, they would come into competition with my cattle sent in the second day, or with other cattle of some other shipper, but there is very little cattle that doesn't go through the commission men's hands. The trader pretty nearly always takes care of his own business
 1055 that he does. Yes, the farmer who actually feeds the cattle will come in and buy cattle from the trader and the same day there may be a bunch of feeder cattle in the pens of the commission men.

Traders often order buyers.

Traders beneficial.

Trader competition with fresh arrivals.

Q. Then, the cattle in the pens of the trader will come into competition with the cattle in the pens of the commission men?

1056

A. Well, it would if he has not got them all

Trans.

sold. If he has got any left over it might come in contact with fresh arrivals.

Q. And would there not be, then, competition between the trader cattle, that is cattle owned by the trader now, and the cattle shipped in by the producer or feeder?

A. Well, I have never seen the time that they have congested or anything in any manner at all.

Q. But you do admit that they come in competition with each other?

A. Well, if they have got some on hand it is certain that they would be there, as I say, even though they pretty near always have got orders for their cattle they know where they are going to send them.

Trader often
only market.

(Witness continuing). Yes, I have seen days when the trader was the only market. The majority of these traders' cattle are all on order, they know what they are going to do with them when they buy them or where they are going; they are not bought to be put back through the commission men 1057 on sale again, except in very few cases. No, I don't make a distinction between the order buyer and the trader, they run in the same, they are the same people because the trader buys to sell again.

I have always found it better for me to buy a heavier steer, a more matured steer with the feed that I have got. I feed pulp, syrup, cut hay and ground chuck grain and ensilage and the like and the weightier steer will put on a lot more pounds and make a better steer quicker than the young steer. I feed a heavier cattle than the fellow who feeds grain. The average steer that I send to the Denver market will average around 1200 pounds and the price this year may be 12½ to 13½c per

Trans.

pound. Last year I sold some at \$8.00, \$8.20, \$7.25 and \$7.35 a hundred. Three years ago I sold some 1058 1500 pound cattle, as good as any that are grown, for \$4.25 a hundred. Yes, there are certain classes of traders that buy steers of the type I have mentioned. At 13½¢ a pound the sale price of a 1200 pound steer is somewhere around \$156.00. As to whether or not a charge of 15¢ on a \$156.00 steer would make any difference to the trader, you have got a lot of traders on the market that do not buy fat cattle, they handle feeder cattle and stock cows and breeding cows and classes of that kind and there are just a few of the bigger, stronger traders that handle fat cattle. 15¢ would not make any 1059 difference if the cattle made money, but if the trader lost money, it would make just that much difference. Yes, if they lost money any charge would make a difference. When I said the traders would leave the yards if there was a charge put on them, I am just telling you what the conversation was out there in the lobby of the Exchange Building, talking it over among ourselves, and George Ray, one of the boys out there, said that if they ever put on a charge he was going back to the ranch, and there are others who made the same remark. I do not know what they will do, but am just telling you what they 1061 said they would do. Oh, I wouldn't say that they would leave the yards, but I would say that in their purchase price they would in some way protect themselves to overcome this charge; they would take it off the cattle they bought; they would cover it up somehow. We figure that the traders out there on certain classes of cattle really make the market.

Trader
viewpoint.

Charge would
be passed
back to
shipper.

As to whether the Denver yards do not open up until after the river yards and the Chicago yards open up, that applies to fat cattle and fat lambs. The traders trade any time they get a customer. I

Trans.

**Chicago and
other markets
only affect
Denver price
on fat stuff.**

understand the Denver yards open up for business
1062 at 8 o'clock. The Chicago yards open at 8 o'clock
and there is an hour difference in time. I wouldn't
say that the commission men in Denver find out
the Chicago and river market prices before they
offer anything for sale, because I know a lot of
times if they think they are getting the worth of
them, they just sell them. In my judgment the
Chicago and river markets make no difference in
the stock cattle or feeder cattle or stock cows or
anything of that kind. The Chicago and river mar-
kets only affect the price of fat cattle coming to
the packers, and if we assume the market on fat
cattle takes a decided jump it will influence the
market on deer. *res, if any of the traders are going*
to buy my fat cattle and ship to the river he will
see what the market is, but I don't see where it
affects these stock cattle or feeder cattle at all ex-
cept that if fat cattle came up it might make the
feeders a little stronger.

1063 I don't know that the trader can sell for any
better price than the commission man, but as I see
it there are two sections. The commission men
have got your fat cattle to sell, and it is their business
to look after them and the trader buys the trader
1064 end of the cattle, which can be either feeders or
stock cattle. Oh, yes, the commission men sell quite
a few feeder cattle in these yards and make the first
sale where the trader buys.

Stock Show.

With regard to the Stock Show, yes, I have access
to the various educational sources, such as County
agents, newspapers, magazine articles, etc. on the
breeding of livestock, but I don't know that you
get very much intelligence from the County agent
on the breeding of livestock. No, I wouldn't go so
far as to say that the stock shows were solely
responsible for the improvement in breeds but would

Trans.

say that they are responsible for a majority of it. I would say that the decided improvement in the breeding of cattle first made itself manifest in Colorado when they began to get together at the Stock Show and exhibit their herds and one fellow sees where another fellow has made an improvement and talks the thing over and sees where he could make a betterment, and from time to time just that way. The first show in Denver I think was either 29 or 30 years ago, and prior to that time there was pretty nearly every kind of cattle that there is produced in Colorado with the old-time style of breeding. I think our first stock show here, as I recall it, was held in a tent, and it has just got bigger and better all the time. It looks like it would be a good thing, all right. Yes, I would honestly think the stock show is a benefit to the stockyards as an organization. The stockmen all over the country regard it as a get-together time. We all try to have something to sell and if we want to buy, we go there to buy it whether it be feeders, breeding cattle or registered bulls. I handle quite a few horses, always have horses to sell at the Stock Show and invariably buy quite a little bunch. I know there are a number of stockyards of major importance in the country that do not have stock shows; probably the location would make a lot of difference, that is, whether they had the feeders and the registered cattle that they have got out here in this country. Yes, I have put feeders in the Stock Show but generally I have not done very much of that because I put cattle in the feed yard and finish them out.

Show improved cattle.

Increased receipts due to show.

It is a pretty hard question to say how many cattle come into the Denver yards on account of the Stock Show that would not otherwise come. I couldn't tell you as to how many or anything of that kind, but we think that the receipts are very

Trans.

**Stock Show
beneficial.**

- largely increased, but as to the amount, I wouldn't want to say. I think your records of receipts at the yards would give you that more accurately than I could guess it. Yes, I have personally found the
- 1069 Stock Show valuable to me. I have always found out that I have got a good price, a better price at the Stock Show. We always have more buyers and more excitement and in that way we feel it made us all better sales. Then, if there were any good bargains in feeder cattle, why, you could be there to take advantage of it. It certainly reflects itself in dollars and cents to me. As to whether it could be worked out that when I take advantage of the Stock Show there would be a charge for it, it would appear to me that we are paying about all we can for what we get and I wouldn't think there would be any chance to put on any more. Yes, it is natural to believe that there would be some patrons of the Denver yards who wouldn't show at the Stock Show and who don't come to the Stock Show to either buy or sell, but then it is largely attended by people who do come for that purpose. No, I don't know the attendance nor the number who
- 1071 patronize the Denver yards by either buying or selling.

It is my understanding that if he does not come here and if he does not patronize the Show nor buy any cattle, he wouldn't have anything to pay.

Re-direct Examination.

**Show benefits
the industry.**

- As to whether or not the man who does not come to the Show derives any benefit, there might be two
- 1072 ways to answer that question. It might be on this one particular shipment or something like that he wouldn't derive any benefit from the Show, but as he is a producer the chances are that he has been at the Show and maybe bought some breeding stock or some registered bulls or something like that,

Trans.

and if he did, he would get the benefit from it. People get ready for the Show for some months before in the Fall and buy cattle and take them north in the beet country and put them on beet plants, and the cattle on the range are gathered to send to the Show because there are feeder buyers from a lot of other adjoining States here to buy feeders. We have buyers that do quite a business at all times, but as I say, at Stock Show time we have got feeder buyers of good stock cattle, buyers that don't ship any cheap stuff East, but there are just a lot of them Stock Show week that buy cattle when they all come in here.

The movement of range cattle is pretty well over about the middle of December. Whether it is any earlier than that depends on the fall of the year. The shortage of grass and the weather has a good deal to do about that and the shippers have got to take them down to the meadows and take them some place else, and that movement is pretty well over by the 1st of December. As to cattle on the feed lots, quite a number of our short fed Northern cattle come before April but the long fed cattle would be coming into the market about the 1st of April. The short fed stuff starts coming in about March 1st. No, I wouldn't think that, except for the Show, January would be any larger in cattle receipts than December.

Yes, from my knowledge the way the traders operate at Denver is very largely as order buyers. Yes, I said that competition for livestock generally meant better prices, but I don't think that the small amount of competition which may come from trader reselling on the market hurts the shipper in the long run. We have different types of traders out there which everybody knows that is acquainted with the market. We have got some people that

Increased
number of
buyers at
show.

January re-
ceipts would
be same as
December but
for show.

Trader com-
petition not
hurtful.

Trans.

Trader tends
to stabilize
price.

handle the good cattle and make a specialty of that; then we have another class of trader that handles the cheaper class of cattle, and then we have another trader that handles nearly all calves and has orders for all the calves that come, and that is the way it is handled. They never handle fat cattle unless the packer buyer lays down on the commission man and the trader buyer thinks there is a little margin in these cattle to buy them and ship somewhere else. That happens once in a while, but that is the only time they handle any fat cattle. The rest of it is all feeders and stocker cattle. Yes, in those instances the trader operates to hold up the prices to the benefit of the shipper.

(Witness excused).

1077 BARCLAY IVINS, a witness called by the respondent, testified as follows:

Qualifications.

24 years ex-
perience in
business
property.

Appraisal
experience.

Industrial or
trackage
property
experience.

I have been in the real estate business over 24 years, most of the time specializing in the handling of business property exclusively. I am a member of the Denver Real Estate Exchange, which is affiliated with the National Association of Real Estate Boards. I am a director of the Denver Real Estate Exchange and have served as a member of its Business and Industrial Property Appraisal Committee, and also as general chairman of that committee. For several years I managed some of the most important business blocks on 16th Street, which is the retail business district of the City of Denver. I have also managed property on 17th Street, which is our financial district. There is hardly a block on 16th Street in which I have not negotiated one or more leases of retail property and also many on 17th Street.

As to my industrial property experience, for the past 18 years I have handled a great many track-age and industrial properties, and during the past

Trans.

ten years have probably made more deals of trackage property than all other real estate offices in Denver put together. Some of the firms for whom I have made industrial property deals are the General Electric, the Graybar Electric Company, which is a subsidiary of Western Electric, the Westinghouse Electric & Manufacturing Company, the Goodyear Tire & Rubber Company, the Pittsburgh Plate Glass Company, the Continental Oil Company, Libby, McNeil & Libby, Armour & Company, U. S. Radiator Corporation and many others. There are others that I could name that are not industrial properties but they are with representative industrial concerns and pertain to property off of tracks, such as the B. F. 1079 Goodrich Company, the Gates Rubber Company, which is on track, Kelly Springfield Tire Company, the Texas Company, Standard Oil of Indiana, and other oil companies, the Atchison, Topeka & Santa Fe Ry. Co., and I should also state the Union Pacific, for which I have had numerous deals and where I have both appraised and purchased property for them. I assembled between six and seven blocks for the Union Pacific under option for a market scheme they had. I have managed and am managing properties for several banks and have also made business property deals for officials of large 1080 banks in Denver. I now handle property for the Provident Mutual Life and for the New England Mutual. I have been engaged on several occasions to buy property for the Safeway Stores Corporation, and also to appraise property for them.

Q. Now, have you made any sales of industrial property recently so that you know or feel the current situation with respect to them?

A. During the past month I sold the corner of 26th and Market Streets to the Union Pacific Railroad Company. I sold two lots next to the corner of 25th and Market Street to the Mine-

Trans.

hart-Traylor Company. I am not revealing any—or not revealing any confidence I should not when I say I am right now at the point of closing a large deal for the Safeway Corporation that has been generally talked about by them, so I feel perfectly at liberty to state that. I am making a sale to them of six lots next to their present plant at 21st Street and Market Street.

Q. Now, Market Street, is that trackage property?

A. That is trackage property with the joint tracks of the Union Pacific and Burlington Railroads serving it.

A. And it is in the general direction from the city toward the stockyards area, is it?

A. It leads toward that area.

1082 (Witness continuing). I have been recently called upon to appraise the real property of The Denver Union Stock Yard Company in association with Messrs. L. F. Eppich and H. W. Newcomb, or Harry Newcomb. I was notified by Mr. Shoemaker, president and general manager of The Denver Union Stock Yard Company on February 25, 1935, to serve as one of their appraisers, and started work the following day with Messrs. Eppich and Newcomb, at which time we met with Mr. Shoemaker and received our instructions to proceed and then we began the work of appraising the stockyards property. The method which we followed is best outlined, I feel, in our letter in which our appraisal report was made to the Stock Yard Company. Yes, I have prepared a written report of our findings as a board, and have signed that as one of the members
1083 of the board.

(Witness was handed a document marked "Respondent's Exhibit No. 3." Witness continuing).

Trans. A

This is the written report concerning which I have just testified. It expresses my opinion as a member of the board of appraisers, though I have one exception where my opinion differs from that of Messrs. Eppich and Newcomb. It is my personal opinion, which was outvoted by the other two members of the board, so I signed the report.

The letter of transmissal stating our method and the elements of value which we considered is as follows:

084 " "Denver, Colorado, March 23, 1935.

Mr. J. A. Shoemaker,
President and General Manager,
Denver Union Stock Yard Company,
Denver, Colorado.

Dear Sir:

As requested by you, we have after careful investigation and analysis of the properties involved, appraised the lands of The Denver Union Stock Yard Company as follows:

Zone No.	Number of Acres	Value per Acre	Value of Each Zone	
1	3.6	\$15,000	\$54,000	
	34.934	17,500	611,345	\$665,345.00
2	23.190	15,000		347,850.00
3	19.825	8,000		158,600.00
4	16.382	12,000	196,584	
	2.340	10,000	23,400	219,984.00
5	12.640	3,500		44,240.00
6	3.383	10,000		33,830.00
7	4.608	4,500		20,736.00
8	0.759	10,000		7,590.00
9	7.081	20,000		141,620.00
10	2.303	2,500		5,757.50
Total	131.045		\$1,645,552.50	

Trans.

In arriving at above values we personally inspected all the lands of the Company, giving consideration to their proximity to related and other industries and to various features having a bearing on their adaptability and desirability for industrial uses, including those of a stockyards company. These influences are set out in the following pages:

We compiled a list of sales of properties in the neighborhood of the stockyards, personally inspecting these properties, checking insofar as deemed necessary, with grantors and grantees the considerations involved. These transactions are described in detail on the accompanying sales sheets. Thereupon we appraised each Zone, giving what we consider a conservative value thereof. The following factors were weighed by us in making our valuations:

Location The yards are located in the north end of the City, the Exchange Building being less than three miles from the main Post Office. Their northern boundary is the City limits. They are conveniently accessible to the business district of Denver over paved streets, the most direct route being via Brighton Boulevard and Broadway Viaduct. Not only does the topography of this land lend itself to industrial development, including stockyards use, but the gravelly soil is an advantage that contrasts with the adobe soil of other districts. The Platte River affords excellent sewerage facilities due to its passing directly through the length of the stockyards district.

1086
*Topo-
graphy*

*Sewerage
and sani-
tation*

*Transporta-
tion*

Excellent street car and bus service between the stockyards district and the City of Denver is furnished by the Denver Tramway Company. Bus lines to all parts of Colorado and adjoining States are available. Six railroads serving the stockyards, with their connections, offer

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aved
oads

087

the best of transportation for livestock and products of the packing houses. Truck lines radiating from Denver supplement the railroads and serve the richest irrigation districts in Colorado. Completion of the Dotsero Cut-off brings much of Western Colorado within easy reach of Denver and has lessened the time of transit by about fifteen hours on cattle trains. Much livestock that heretofore went East via the Pueblo gateway is now diverted to Denver by reason of the saving in time effected by the Cut-off. This area is connected with the paved and improved highway system of Colorado, reaching all producing sections of the State. Mr. Charles D. Vail, Colorado Highway Engineer, states that the following highway improvements affecting transportation in Denver have been completed in the last five years:

Limon Road from Burlington, Colo. to Denver paved. Livestock that formerly went to Omaha and Kansas City can now be brought into the Denver stockyards at high speed over this good road. \$1,000,000 was spent on this road.

Route No. 36 from the cattle country north of Burlington has been greatly improved. The Julesburg road has been surfaced and oiled, and \$500,000 spent on the road from Wiggins to Denver. This road enters Denver at the north end of Colorado Boulevard.

The Trinidad-Denver Road has been oiled or paved with concrete from the New Mexico line to Denver.

The Wray-Sterling-Holyoke Roads into Denver have been improved at a large expense.

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*Labor and
Housing*

The area appraised is favorably located as regards a dependable supply of labor, within easy walking distance, in both Elyria and Globeville. The districts are mostly made up of attractive small homes which are rented at moderate rates. Supplementing these home districts are good schools, churches, playgrounds and a branch library.

*Protec-
tion*

The City of Denver maintains a Fire Department Station at 47th and Brighton Boulevard, the short distance from the stockyards assuring best of protection against fire. Radio equipped motor police patrols give this district the same protection as other parts of Denver.

Zoning

The stock yards district is the only part of Denver zoned for business of this character. When the city was zoned in 1925, this question received the special attention of the Zoning Commission and of E. M. Bassett and Robert Whitten, authorities of national prominence, who served as consultants in the preparation of the Zoning map and ordinance. It was their unanimous opinion that stock yards and other nuisance industries should be confined to the north end of the city, so that smoke and offensive odors would be carried away from the City, our prevailing winds being from the south.

*Allied**Industries*

1089

The industries in this district, in addition to the packing houses, are, in the nature of things, related to the stockyards business and are mutually beneficial, forming an intense, though specialized, industrial development. Among these industries are:

Trans.

Armour & Company
 Swift & Company
 Cudahy Packing Company (formerly
 Blayne-Murphy)
 K. & B. Packing & Provision Company
 Capitol Packing Company
 Pepper Packing & Provision Company
 H. & M. Packing Company
 Local Beef & Mutton Company
 Colorado Animal By-Products Manufacturing Company
 Union Rendering Company
 Colorado Serum Company
 Denver Hog Serum Company
 Purina Mills
 Mountain States Mixed Feed Company
 Also many feeding lots

**Other
Industries**

Continental Oil Refinery
 Burlington-Colorado & Southern Shops
 Intermountain Elevator Company
 Eaton Metal Products Company
 Oil Distributing Plants

To the north of Denver are many sugar factories, whose by-products offer advantages for the feeding of cattle and sheep.

**Growth of
Denver**

The constant growth of Denver has added to its importance as an industrial center, particularly from the standpoint of the livestock industry, assuring stability to the value of the Company's lands. This growth is evidenced by the following figures furnished by the Secretary of the Denver Union Water Company, Mr. George F. Hughes:

Water Taps

In January 1930	68,137
In January 1935	70,352

School Registration

The Denver School Board in its February, 1935, report states that "pupil membership has

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1090

increased consistently year after year * * * *
During the past five years average daily membership has increased 5,173. The figures for these years are as follows:

"1929-1930	50,127
1930-1931	51,613
1931-1932	52,730
1932-1933	53,282
1933-1934	54,350
1934-1935	55,300"

Census

The 1930 census showed Denver to have a population of287,861
Annual surveys of the Denver University School of Commerce, based on house-to-house checking of the City by districts, shows Denver's population in 1935 to be....
302,000

The 1930 census gave Denver's Metropolitan District a population of330,761
Denver University School of Commerce estimates, without a house-to-house check of territory outside city limits, that the Metropolitan District in 1935 has a population of347,000

In view of the foregoing factors that enter into the value of a tract of land such as The Denver Union Stock Yards—its location, its proximity and accessibility and the further fact that there is no other tract of land so favorably situated and of equal size available for stock yards purposes—it is our opinion the valuation we have placed on these lands is conservative.

Very truly yours,

(Signed) L. F. Enrich
" Harry W. Newcomb
" Barclay Ivis

Appraised as
vacant land.

(Witness continuing). The last signature is my signature. We appraised the land as vacant land,

Trans.

stripped of all improvements but with the packing houses and other related industries and surrounding utilities there. The tracks owned by the carriers themselves were considered as means of access to the stockyards. As to the trackage owned by the Stock Yard Company we considered the land but not the trackage. We gave no consideration to the fact that there were sewers in place and water systems in place on the stockyards property. We disregarded all sub-surface and all surface improvements.

Surface & sub-surface structures not considered.

I have read Mr. Zelinski's appraisal and report and heard Mr. Zelinski testify both on direct examination and on cross-examination.

Extent to which assemblage value included.

We added nothing to our appraisal for assembly value in dollars and cents as a distinct item. We did give consideration to the fact that it is a large unified tract. We checked what I would term similar property and property not similar though comparable. When I say "not similar" I mean not similar as to value, but at the same time we figured that it had a comparative basis to consider as an element of reaching our opinion. In Zone 1 we had to go outside of the stockyards district to find lands comparable. We found none that I considered of a similar or equal value but we figure that those lands reflected the values in Zone 1. Some of those sales also applied to the land in Zone 9. There were other lands such as the Union Pacific industrial district which we did not consider as similar and yet it offered a basis for comparison with lands in Zones 6, 7 and 8.

As to the weight we gave to the zoning ordinance, this district is practically the only district in the city, I should say that it is the only district in the city, that is zoned for business of the character of the stockyards. Elaborating on the factors as enumerated

Zoning Ordinance.

Trans.

Land suitable
for other uses.

erated in our letter, there were four particular features that had application to a stockyards above, I figured, other factors. One was the topography. We found that satisfactory for any industrial use, practically, not alone for stockyards, but for, say, steel mills, for railroad yards. There is a particular feature there in regard to railroad yards that is not existent anywhere else in Denver. In other districts where the railroads have their yards, they are put to the expense of building either viaducts or subways or, rather, contributing toward that expense where it is shared with the city. In the stockyards district a railroad could use those yards and have practically no expense to contribute to by reason of the construction of subways or viaducts. There is no necessity for it. When the Union Pacific wanted to close several streets that led across their yards, I believe they contributed to the expense not only of the Broadway viaduct but of the 38th Street subway as one of the considerations by which the city let them close up these streets, so that this yard, that is, the stockyards lands, have a varied utility. However, we figured that the stockyards was its highest and best use. The zoning feature is absolutely vital because without the zoning permission from the city, the stockyards could not be established in the city limits. There is no other part of the city except the north end that is zoned for that. The railroad facilities are ideal, more so than in any other part of the city. The other outstanding feature is that the packing houses are all located either immediately contiguous or immediately surrounding the stockyards property.

1095 (Witness continuing). Referring to zone 5 and counsel's discussion with Government witness Zelinski concerning the sale of the so-called Murphy barn, that sale is listed as our sale No. 2 and is Government sale No. 21 on page 78 of the Govern-

Murphy Barn.

Trans.

- ment appraisal. The facts with regard to that sale are that the property fronts 250 feet on Humboldt Street and 125 feet on 47th Avenue and was deeded by F. B. Hollis on April 23, 1924, to Mr. Joseph P. Murphy as grantee, the legal description being Lots 15 to 24, Block 2, West Elyria. The consideration was \$22,000. Elyria is a sub-division of the city of Denver, as is Globeville. Of the consideration of \$22,000, \$6,000 is represented by the value of the improvements and \$16,000 the naked value of the land. Mr. Zelinski in the Government appraisal has the land value and the improvement value figures transposed. He shows the value of the improvements at \$16,000 and the value of the land at \$6,000. Mr. Murphy tells me that there has been no change since the barn was built in 1915. It has not been added to or subtracted from. I did not discuss with Mr. Murphy the subject of repairs, but it is pretty evident that there have been no repairs because the building is in a sad state of neglect. I think it is perfectly apparent that Mr. Zelinski was wrong in using a land value of \$6,000 on which to base his value in Zone 9, and as I recall his testimony, he indicated that if he were shown that he had transposed these figures, it would have an influence in changing his value of the land in Zone 9. The value we placed on the land in Zone 9 was \$20,000 per acre. Mr. Zelinski appraised it at \$15,246 per acre, and I believe if he gives due consideration to his error in transposing, he will bring up his value on Zone 9 even to or in excess of our value.
- 1096
- Correct figures should increase Zone 9 values.
- 1098 Yes, I listed topography among the elements of value which we considered. As to the freedom from ~~fire~~ and flood menace, I would say that is a decided element of value in appraising land of this nature.
- (The witness was asked to state from his observation and inspection and experience his opinion con-

Trans.

cerning the Local Beef and Mutton tract, the Hanks Feed Lot, the H. & M. Packing plant tract, etc. as to their comparability and the effect upon his values of the consideration paid for those tracts by the owners).

Local Beef &
Mutton tract.

Subject to
flood.

(Witness continuing). Starting with the Local Beef & Mutton Plant the Government appraiser is in error in stating that the per acre cost is \$3,000. The original sale is listed in our sale No. 32 and occurred on December 17, 1920, for a total consideration of \$3,350 for 1.34 acres. On October 18, 1922, or about two years later, the Local Beef & Mutton Company bought a similar tract adjoining the first on the north at the same price per acre. I think they must have felt there was a value of \$2500 an acre in the land or they wouldn't have gone back and bought it. Comparing that land with the stockyard land from the standpoint of floods, two weeks ago we had a flood and I went out to the stockyards but I could not get to the Local Beef & Mutton because the bridge was partly out and the road leading to it was flooded. Yesterday I went out to the Local Beef & Mutton Company and employees informed me that water had gotten into the building to a very minor extent. The yards, however, had all been covered by water in the flood and some of that water is still standing two weeks
1100 later. The employees said that they had suffered no loss of livestock in this flood because they had driven the sheep they had in the pens up to the second floor of the packing plant. They had ample notice that the flood was coming down. Two years ago in the flood they had about 85 sheep in their pens, of which 18 were drowned and the others were standing up against the wall with just their noses out of the water. Of the 85 sheep about half died either as the result of drowning or exposure in the flood.

Trans.

I then went to the Hanks feed lot, talked to the Hanks feed
1100-a Superintendent and found that their yards were lot.
largely flooded two weeks ago and the water still
standing over a large area of it. He stated that
they had suffered very disastrously in the flood two
years ago, both in the loss of livestock and in loss
of the value of the product when flooded due to
exposure.

I could not get to the H. & M. Packing Company
1101 because the road was still flooded from the Hanks H. & M.
feed lot. I reached the property by retracing my Packing Co.
steps and going down Race Court around Brighton Tract.
Boulevard and coming around from the other end.
The H. & M. Company told me their land was de-
cidedly under water. I inspected them the morning
after the flood. The H. & M. Company had had
warning that the flood was coming and put their
cattle in trucks and hauled them down to the stock
yards where they were safe from the flood menace.

Mention has been made by Mr. Zelinski of the
sale of land to the D. & S. L. Railroad. The lands
were bought, I believe, in 1915 and they suffered
from this last flood.

There was none of the land of the Stock Yard Stock Yard Co.
Company flooded during this flood two weeks ago land not
or is subject to flood menace unless you consider flooded.
about 10,000 square feet of Zone 3 which actually
runs down into the river bed of the Platte River,
but after you eliminate that 10,000 feet in the river
bottom, all of the land of the stockyards is decidedly
above any possible flood menace. Yes, I mean, when
1102 I speak of the land in the river bed, that when you
take the metes and bounds description of the prop-
erty comprising Zone 3, a corner of it is actually
in the river channel, and I estimate that small cor-
ner to be about 10,000 square feet.

Zone 5, which is the tract across the river, is Zone 5 723

Trans.

not in the least subject to flood menace. It is nice level land above any flood menace. Bearing in mind the price of \$2,500 an acre paid by the Local Beef & Mutton Company for land in 1920 and 1922, it is my opinion that the land in Zone 5 is of much greater value. We, as a board, placed a value of \$3,500 per acre on Zone 5. Yes, we found that since 1930 Washington Street was curbed and surfaced and the curbing and surfacing was assessed October 3, 1931, at \$1,773.22 against Zone 5. The oil surfacing was covered by general taxation and done by the highway department. The Stock Yard Company actually paid \$1,587.03, which I take it was the original sum of \$1,773.22 less the discount for paying in full, under the Colorado Statutes. The street was again oil-surfaced in 1931.

More valuable
than Local
Beef and
Mutton tract.

Comparative
sales sustain
higher value.

There were several sales that were considered in arriving at our valuation on Zone 5. One was a tract of 7.29 acres purchased by the city of Denver from the K. & B. Packing Company on January 8, 1927, for use in connection with the straightening of the channel of the South Platte River. The consideration was \$26,600; the land is a little south but not adjoining Zone 5,—I should say about 700 feet south of the south line of Zone 5 on the west side of the official channel of the river. We reached the value of \$3,648 per acre for the land the city bought which at that time was subject to overflow. This was obtained by dividing the number of acres into \$26,600. The government figure was \$3,237 because of an old bridge which was removed and the Government allowed a credit on that account. Mr. 1104 Newcomb and I called on the K. & B. Packing Company, and Mr. Sam Sigmund, one of the officers of that company, verified the consideration involved in the transaction and stated that they value their land between four and five thousand dollars an acre at this time. Another sale is our sale No. 6, Gov-

Trans.

ernment sale 120 of .846 acres from the Ruedy Products Company to the City and County of Denver for the purpose of straightening the channel. That land is north and east of Zone 5 and practically adjoining. Then there is a sale from the Ruedy Products Company to Meyer and Dave Averich on March 10, 1926, involving 1.13 acres, the consideration being \$3,120 less \$200 for improvements or a total naked land value of \$2,920, or \$2,584 per acre. This last tract of land, Mr. Zelinski testified, had a frontage on Washington Street, of about 10 feet.

106 As a matter of fact this land comes to a point at Washington and 50th Avenue. There is a 10 foot strip reserved for ingress and egress to the Ruedy Packing plant but that 10 feet disappears before you get to Washington Street because the tract comes to a point.

107 All of these sales to which I have referred are sales considered in reaching our valuation of Zone 5 and were prior to the establishment of the official channel.

Mr. Sam Kaminsky, an officer of the Capitol Packing Company, the present owner of the tract, told Mr. Newcomb and me that he values the land at between \$6,000 and \$7,000 an acre, and I feel, therefore, that we are very conservative in our value of \$3,500 per acre. Yes, I recall Mr. Zelinski's testimony that he thought this land was peculiarly affected by the depression, but I think any effect of the depression has been more than offset by the building of the new dikes confining the Platte River in the enlarged channel and eliminating the danger of the floods, and also the improvements on Washington Street would be considered an asset.

Any effect of depression offset by channel improvements.

108 Zone 4, like all the rest of the stock yards property, except the 10,000 feet I have referred to, is above any flood menace. About 16.382 acres are

Zone 4.

Trans.

Topography.**Government
value not
sustained.**

- very well filled nice level land which we appraised at \$12,000 per acre. There are 2.34 acres that require some filling or leveling at the northern end of Zone 4. It is being filled now and we gave a value of \$10,000 per acre to that part. Yes, we gave a value of \$3,500 per acre to Zone 5, and our reason for the increased value in Zone 4 is that it immediately adjoins the stockyard Zone 1, which is the most intensively used part of the land as a large industrial tract. It is ideally located for switching facilities, both the center and the extreme end. Yes, I am looking at it from the standpoint of a large industrial tract of which this zone is an integral part. Zone 4 has a decided increase in value over Zone 5 because Zone 5 is separated from the main body of the tract by the river. Zone 5 has no accessibility to rail transportation, while Zone 4 has ideal rail facilities. Now the Government appraisal of Zone 4 is \$2,500 per acre and I see no reason in that. To begin with it is close in, it adjoins the Armour and Swift plants and it is immediately contiguous to the sheep and hog barns, the most intensively used part of the stockyards, and I cannot see the line of demarcation where it would drop from even the Government's figures in Zone 1 of \$8,500 an acre abruptly to \$2,500 an acre in Zone 4. It has availability for stockyards rails or for any railroad service by way of industrial side-tracks. It is so tied in with the larger tract that it has ideal accessibility from the main carriers.

Zone 3.

- Zone 3 comprises 19.825 acres lying north of Zone 2, from which it is separated by Race Court. If we deduct the 10,000 square feet, or approximately one quarter of an acre in the river channel, it leaves 19.575 acres in this zone. We appraise Zone 3 at \$8,000 per acre, or \$158,600. This value is supported by lease No. 22, which is a lease from The Denver Union Stock Yard Company to the Union

ans.

Pacific Railroad Company under date of October 27, 1924, covering 9200 square feet of right-of-way and the rental is based on a land value of \$8,772 per acre. Also our sale No. 38 from the Northwestern Terminal Railroad to the City and County of Denver is actually only an easement and we gave little weight to that sale. Of the land in Zone 3 13.645 acres are similar in character to the land in Zone 2, being practically on the same level. The remaining 6.188 acres are somewhat broken, lying higher and would require leveling. The gravel on this land can be sold to more than pay the cost of leveling. This land is needed for expansion as business of the stockyards increases. Access is had to this land by Race Court from the east and from the west it joins with Franklin Street. I do not regard Race Court as a permanent hindrance to the expansion of pens to the area north of Race Court for the reason that the City Planning Commission four or five years ago went on record as favoring the moving of this street to the north limits of Zone 3, that is, between it and Fairmount Cemetery. Yes, this tract has the same relative availability to good labor supply and fire protection and lies within the industrial B zone of the zoning ordinance. Yes, it has rail accessibility from the Burlington Railroad on the east and the Northwestern Terminal to the west. There is also a Union Pacific track into the territory used by all the railroads. Yes, in valuing this tract we considered that it can be made an integral part of the main large industrial tract without any break.

**Race Court
not a
permanent
hindrance.**

Zone 6 comprises 3.383 acres lying between 46th Avenue and the Colorado & Southern right-of-way, the Burlington right-of-way and the plant of the Pepper Packing Company. On this land is located the road leading from 46th Avenue into the stockyards and to the Armour and Swift plants. The

Zone 6.

Trans.

land is required for future railroad switching facilities. Adjoining this land on the west, the Burkhardt Packing & Provision Company sold to the Western States Packing Company on June 16, 1928, as per our sale No. 9, a tract which Mr. Burkhardt stated to me and to Mr. Newcomb personally
1115 they valued at \$10,000 per acre. Mr. Burkhardt also made both oral and written offers to The Denver Union Stock Yard Company to buy land next to this parcel and in Zone 6 at \$10,000 per acre.

Zone 7.

Zone 7 comprises 4.60 acres south of 46th Avenue and between the Burlington right-of-way and the Platte River. We placed a value of \$4,500 per acre, or \$20,736 for the tract. There are several sales which are comparable to this tract and which we have listed. One sale from the American Smelting & Refining Company to the City and County of Denver, which sale was at the rate of \$1,220 per acre and was one of the most fortunate real estate deals that the city ever engaged in. It is the site of an old smelter and one covered with slag which the city desired for paving. Mr. Simonson, the Government witness in 1930, testified that this land had more value even when the slag was removed
1116 than the city had paid for it. The National Fuse & Powder Company bought 1.132 acres on August 9, 1929, from the Union Pacific Railroad Company for \$4,000. This is our sale 33 and Government
1117 sale 46-A. This price figures \$3,532 an acre and the land has no access to any street. The land is very rough and to reach it from 38th Street would require about a 20 foot fill in an arroyo. The land has no rail connection. Contrasted with Zone 7, Zone 7 is on a main highway, whereas the land bought by the National Fuse & Powder Company is entirely surrounded by other property. I think Zone 7, by reason of the proximity to the Platte River, is saved from any future flood menace and

rans.

that that would offset any effect of the depression.

As regards Zone 6, I figure that this land is so close to the main body of the stockyards that it is not affected by the depression. You do not have to cross any streets to get to it. Also in Zone 7, when the Stock Yard Company parted with some land to the city for the widening of 46th Avenue, it reserved the right to cross 46th with rails, either at grade, above grade or below, so that Zone 7 has accessibility to this large industrial tract. At the present time Zone 7 is not served by any railroad but the rails can be brought in very easily there. Zone 6 has both the Colorado & Southern and Burlington abutting on it.

We appraised Zone 9 at \$20,000 per acre. We Zone 9. felt that there were ample sales close by to prove that our valuation was correct. Those sales are referred to at the bottom of our zone sheet No. 9, but you must also refer to sales listed under Zone 1 for the values or for the sales we used to support this value. Some of the lands that we recite to support it on sales sheet 9 are comparable but not of similar value. I refer to the sales that went into the Union Pacific tract, but under Zone 1 there are several sales that are very highly indicative of the values we placed on the land in Zone 9. For example, our sale No. 1, Government Exhibit A-4, page 262, which is the sale of lots 29 to 46, block 3, West Elyria, from Hollis-Platte Horse Company, grantor, to The Denver Union Stock Yard Company, grantee, August 13, 1919, total consideration \$75,000 of which \$50,000 was for improvements and \$25,000 for the naked land, or \$19,340 per acre. Yes, that sale was in 1919 and the city has increased in size, and I believe this land has also increased in value since that time. There is no question in my mind about it. Then there is

Trans.

sale No. 3, or Government sale 24, pages 82 and 83, which is the sale of two lots in block 3, West Elyria, to the Drovers National Bank. The naked land value of the two lots was \$17,500 out of the total consideration of \$47,500. This gives a square foot value of \$2.80, or an acreage value of \$121,960. These check with the Government figures. I might say that we would not take that sale as indicative of the value of the tract, because this is a corner on 27th and Lafayette and it reaches the peak of value there. However, it serves to show that land 1120 is very valuable in that neighborhood. Yes, the first sale I referred to of lots 29 to 46, block 3, West Elyria, is the land which is included in Zone 9, the horse and mule division, and is on the east side of Lafayette Street between 46th and 47th Avenues. Zone 9 is very close to what you might term the main entrance to the stockyards, although I do not know whether you would consider it the main entrance because it is possibly of equal importance with the road leading into the land from the south. A large portion of the traffic going from the city goes immediately by Zone 9 under the Burlington tracks and into Zone 1. This land 1121 as compared with Zone 1 is where I differ from Mr. Eppich and Mr. Newcomb. I considered the land in Zone 1 to be of equal value if not greater value than the land in Zone 9 because the land in Zone 1 is in the very heart of the stockyards district. Mr. Zelinski indicated in his testimony that he used the center of Zone 1 as the peak of values and that going north and going south he found a diminishing land value. He testified that where the viaduct leading to the Blayney-Murphy plant crosses Zone 1 was the center of trading activities. To Zone 1 he gave the value of \$8,500 per acre, yet to Zone 9 he made an exception and gave a value of \$15,246 per acre, or \$6,746 per acre more than

Trans.

he gave to Zone 1. He did say that if he were shown that he had transposed his figures regarding the Murphy barn sale, he would increase his values of Zone 9. Mr. Zelinski attributed his higher values in Zone 9 to the fact that it had retail possibilities.

- 1122 Mr. Zelinski was undoubtedly influenced by the same factors that influenced Messrs. Eppich and Newcomb and myself in fixing the values in Zone 9, namely the sales of similar property located nearby. I feel that he should correct his figures covering Zone 1 if he believes, as he testified, that the railroad facilities are better in Zone 1 and trading activities reached their peak in Zone 1. I can go down in Zone 1 and show you greater retail value if The Denver Union Stock Yard Company used a portion of Zone 1, you might say, for its retail utility rather than for its use as a stockyards and to create a market. It would be the same if
- 1123 any other owner used that part for retail purposes. There was a hotel in Zone 1 until the Stock Yard Company wanted to use the land for stockyards purposes and cancelled the lease. The proprietor went up and bought land near Zone 9 and erected what is now known as the Ward Hotel. He didn't do that because he wanted to or because it was a superior location. He did it because it was what he considered the next best location; in other words, if you were to put small stores down in Zone 1 I feel that they would command a better rent than the same sized stores facing Lafayette Street in Zone 9, and it is on that basis, when I consider the superior trackage advantages, the proximity to the large packing plants, that I personally feel that Zone 1 has an equal if not superior value to the land in Zone 9.

As to Zones 1 and 2, judged from the industrial Zones 1 & 2. use standpoint, the land is very similar. Zone 2 is equally adaptable for industrial purposes as the

Trans.

land in Zone 1. However, it is a little further removed from the peak of trading activities and I figure it has a slightly diminished value as related to Zone 1, but for the purposes of utility it is just as ideal as Zone 1.

Real Estate
Values
recovering.

- 1124 Yes, I have testified that I have made sales of industrial properties recently and real estate values of this property have largely recovered in Denver. About 1932 or 1933 there were many distressed properties that were thrown on the market and they sold with no relation to their real value. Two lots on Market Street between 25th and 26th were sold two or three years ago for \$1,200 or \$600 apiece, an absurdly low value. That figures approximately \$6,500 an acre. I sold two lots recently in the same block within the past month for \$5,000, or \$2,500
- 1125 a lot, that is about 80 cents a square foot. One block away I sold four lots for the same price I sold in 1922, but the owner has tried to negotiate loans and I regard that more or less in the nature of a distress sale. On Market and 21st Street I appraised six lots for the Safeway Company last
- 1126 winter and I sold three of those lots for \$3,000 apiece. They were vacant. Giving regard to the depressed conditions and figures that were quoted me elsewhere, I appraised those lots at \$2,750 each for the raw land. I was asked to do that. The grantor would not consider that and the sale is going through at a considerably increased price, showing no subtraction from the normal value. When I say I was asked to do that I mean that I was asked to make the appraisal and my opinion of value was \$2,700 after taking into consideration the depressed real estate market. The point I am trying to make is that during the past few months there has been a marked recovery in values.

I have been in the real estate business in Denver

Trans.

estate situation concerning industrial property in all parts of the city and in some parts I think I have the values at my finger tips. Yes, I specialize in trackage and industrial property, particularly in the section from the 7th Street (railroad) yards district out toward the stockyard area and even south of that on Broadway. The different railroads come to me when they have shippers who intend to
1128 locate on their rails for assistance in getting them locations.

Zone 8 is a small triangular tract comprising **Zone 8.**
.759 acre lying north of 46th Avenue and between the Colorado & Southern right-of-way and the Burlington right-of-way, and in arriving at its value we have taken into consideration the street frontage, nearness to the stockyards and to the business district of Elyria, also railroad facilities. The value we placed is \$10,000 per acre, or \$7,590. That small tract has an unusual industrial use for a filling station and that has influenced our value. There are a number of small, various types of industries that could very easily locate on that tract, both related to the stockyards business and other businesses.

Q. Well, now, summing up all your testimony, what, in your opinion, based upon your experience, your inspection of the premises, your familiarity with real estate conditions in Denver, is the total value of the real estate owned by The Denver Union Stock Yard Company?

A. For the 131.045 acres, my opinion of its value as a member of the committee or board that appraised it, is \$1,645,552.50.

1130 (Witness continuing). Yes I used the phrase "the peak of activity" referring to Zone 1. Zone 1 is surrounded by the packing houses and that is

Trans.

the center of activities. I couldn't say that the same tract would be the center of activity of any industry utilizing the ground because that would depend upon the engineering feature of the industry that would happen to go in there. It might apply to another and it might not apply and in this particular one I figured all along that the highest and best use is the stockyard industry and due to the packing houses, this is the center of value in my opinion.

When I used phrases such as "expansion land" or "land for expansion" or "land necessary for expansion" I was not limiting that solely to the stockyards but to any large industrial use such as steel mills, which, as its business grew, would bring land on the outside into more intense use.

Resp. Exhibit 3, 1131
3 offered in
evidence.

Respondent's Exhibit 3, being the real estate appraisal report of Messrs. Eppich, Newcomb and Ivins, identified by the witness, was offered in evidence, Government counsel reserving the right to object until after all real estate witnesses of respondent had testified.

Cross Examination.

Yes, I would think that if the expansion lands which I have mentioned were built up with pens or covered with railroad tracks it would add to their value.

I have been in Denver about 31 years and in the real estate business about 24 years. Respondent's Exhibit 3 sets out the opinions of the three appraisers as of March 23, 1935. We considered all facts we thought material up to that time.

1132

Q. Now, during the course of your activities in real estate, you have had occasion to follow the assessments of lands as made by your tax assessors?

Trans.

Respondent objected on the ground that it was incompetent and immaterial and decisions of the Supreme Court of Colorado holding that assessed valuations of property have no bearing upon the question of actual value and cases were cited to the Examiner. Objection overruled and exceptions noted.

- 1135 (Witness continuing). I have had occasion to investigate the records of the assessment of land in Denver in various instances where I have been paying taxes, but I do not go to the court house to find out what someone else thinks the property is valued at when I am called upon to appraise it. Yes, in the past few years I think in some instances the assessments on real property have been decreased and on some they have been increased. I cannot say that it is the general supposition that assessments have been decreased since 1929, but several years ago a new administration went entirely over the assessments in Denver. I do know that the assessor who is responsible for that set up for the first time a system of depreciation of improvements, so that the assessed valuation of my home would progressively decline each year on account of the depreciation taken. I don't believe there has been any such rule applying to the land values. I have had no occasion to check into that. I don't know whether the assessment on the stockyards land has been decreased or increased. I know less about the assessed value of the stockyard (land) I think probably than anybody in this room. I have steered clear of that, as I do not wish to have any preconceived views put into my head as to what others thought. If the assessors had decreased the assessment that might mean that they would think the stockyards land had decreased in value, but it would not necessarily make me think so because I have found them radically wrong in both extremes.
- 1136
- 1137

Trans.

I have found them way high in certain parts of the city where the land has been progressively deteriorating and lessening in value, so I am frank to say that I pay very little attention to the assessor's figures unless I am vitally interested. Where I feel an injustice is being done my client, then I try to get them brought into line with what I think is a fair value. It might indicate the personal opinion of the assessor. I don't know whether the assessors use the same percentage figure on lands and buildings. I do know that under a building permit (new construction) the assessor's office,
1138 as a matter of custom, takes 80% of the building permit figure as the value of the building. In regard to the land, it is purely an arbitrary opinion in most cases. I don't think they have any similar rule in assessing lands.

Yes, I think the value of certain property, and particularly some of the property out in the stock-yards has increased since 1919, but I would not
1139 make that as a sweeping rule in Denver. I am positive there has been a retrogression in values in certain districts. I would go back even before 1920. There is some land which has been going down in value all the time I have been in the real estate business, but that is due to a peculiar condition affecting the particular tract or street, because in general I think the value of land has gone up. I would say as a whole the value of land in Denver has increased from 1920 to 1930. From 1930 to 1935 I think that lands have been affected by the depression, but there are some exceptions to that where there has been a marked stability in value
1140 even during the years of the depression. Yes, when I say "affected by the depression" I mean cases where certain property owners have been caught where they had to raise funds and the market was not supporting the values, so they had to take their

Trans.

loss and their property sold off on the basis of depressed values. I will say this that during the past year there has been a marked recovery all down the line except where I said that there were certain districts where the retrogression is constant. The forces which have actuated recovery started more than a year ago, but made themselves more manifest, and decidedly manifest, this last year in some instances. As to the locality of the stockyards, but not particularly the stockyards area itself, I would say the same things apply to those directs as they do to others. Right near the stockyards the Union Pacific is the largest holder of land probably, and they have not lowered their values; they have remained firm. There has been comparatively little land sold of a character comparable to the stockyards. As to the homes in Elyria, I do not think they are any different than if they were in South Denver. As to the stockyards lands themselves, I would say that they have a marked stability in value, but with the straightening of the Platte River channel and the elimination of the flood damage, much of the stockyard land has improved in value. No, I wouldn't say that that is the only element that had increased the value or left the value stable. The livestock industry in Denver, as I have been able to trace it, has constantly shown a healthy normal trend toward an increase and growth of the industry. That relates, of course, to receipts and sales of the general business there, and I would say that the increase in receipts has stabilized the values. If you take the reverse I think it might reflect the other way. If there was a marked increase it might take the value upward normally. In this case I would say that it has stabilized the value, tended to keep the values as they were in 1930.

I know that there has been a normal growth in

Trans.

business in the past years. I do not know the extent but I think there has been an increase from 1930 to 1935, but I am not positive. I could not
 1144 relate one year to another. Fluctuations in business would not affect the situation unless they became permanent trends. Yes, I think receipts of livestock at the Denver yards will hold up so that my values will be maintained in the future. Right now the Government is promoting large irrigation projects. They are going to increase the possibilities
 1145 of livestock production in Colorado, I think. I see no reason why there should be a tendency the other way. I think there is going to be a normal, healthy growth in Denver. Denver has progressed even in spite of the depressed conditions. No, my viewpoint is not based on the earnings of the stockyards; I don't know anything about the earnings. You ask me to assume that the livestock receipts increased but that the income of the stockyards consistently decreased. I would say there was something wrong with the management in such a case. Of course, if it were due to no fault of the management but to some condition such as the Government reducing rates without regard to justice, why, the
 1146 Government could ruin any business, including the stockyards. What I have said is that if the normal trend of business were constantly increasing, the
 1147 value of the property should increase. No, my theory is not that there would be a decrease in value if the net income should decrease constantly, because there are several related facts. There is the increase in business and the maintenance of the efficiency in management. Of course, any business is affected by its net income, but there are many
 1148 things that enter into net income. Yes, if I believed that the decrease in income would be sustained, and could not be directed by better management, it would decrease the value. I think the general busi-

Opinion of
 value not
 based on
 earnings.

rans.

ness trend in Denver and the flood control have
49 had marked stabilizing effects. Yes, if other stock-
yards were cutting in on the receipts and the con-
dition could not be corrected, it would affect the
value.

As to flood control, I think the work was com-
pleted about 1931 or 1932. I am not positively
informed as to the dates. As to whether or not the
stockyard lands themselves are flooded, I know that
150 the old Blayne-Murphy tract contiguous to the
yards used to be flooded. I don't know of the yards
proper being flooded in recent years.

As to Zone 5, I did not go out to investigate after
the other floods, but I am sure that it would have
been affected. No, I didn't figure the added value
to the stockyards land because of the flood control
in percentages. I just looked at it as a broad
picture. This control of the channel helped me
form my impression that the land was not sub-
ject to floods and enabled me to form a basis of its
value, but I didn't reduce that to percentages or
153 dollars. I couldn't help but add something mental-
ly. No, I have never seen the condition when the
stockyards lands were flooded.

. Most of the corporations I mentioned for whom
I had worked in land deals chiefly referred to
leases. I assembled a tract of land of about 6 or
7 blocks on option for the Union Pacific in 1926.
That is approximately 14 acres at 43,560 square feet
to the acre. These leases for these other corpora-
tions did not materially affect my judgment but
naturally assembling land like that keeps me in-
formed on property values but I wouldn't say that
154 I would relate this to the stockyards land. I would
say that my general experience over the past years
has enabled me to gauge values rather than say
that the lands handled for these various corpora-

Trans.

tions did or did not influence my judgment. Experience in every deal helps inform me. If I hadn't handled any of these lands I would not say I was competent to judge any industrial property, but having had a diversified experience I think it does fit me. No, I would not say there is any one particular tract which I handled for any one of these people that had more weight than the rest of the tracts in my valuation. I would say that it
 1155 was my general experience. The Union Pacific tract of 14 acres which I assembled under option in 1926 is the only large tract that I have ever assembled. Most of my experience has been leasing rather than selling.

Omitting industrial property and limiting my
 1156 answer to business property, I would say that the most valuable property is the corner of 16th and Stout Streets, which is the height of the retail shopping district, and that has been recognized for a great many years as the center of value. The May Company is one block down and the Kress Company two blocks, and by reason of the enlargement of the May Company and the Kress store, they pull a slightly heavier traffic count by that property
 1157 than obtains at 16th and Stout, but as against the higher pedestrian count, the higher purchasing power, I think, still rests at 16th and Stout. The 14 acre tract which I assembled is six blocks down towards the Union Station and 14 blocks out towards the stockyards. By airline I would say it is maybe a mile and a half distant from 16th and Stout. The stockyards is about three miles from the postoffice, and 16th and Stout is about a quarter of a mile from the postoffice. Some of the property I assembled was improved and some was not. No, I could not tell you the values of the various prop
 1158 erties that went into that assembled tract. There is a wide variance in lots. I paid \$1,000 cash for

Trans.

1159 an option on one lot at \$3,000 in this tract because
it happened to be a vital lot. No, as such I did not
add my assemblage value to the stockyards land.
In other words, we looked at it as a large vacant
1160 tract, unimproved, that is, with the surface and
sub-surface improvements taken off, available for
development in one unit, but to add to that a prem-
ium such as I have indicated, we didn't do that.
There was no obstacle to it, the land is assembled,
so we did not add any premium or penalty, anyway
1161 you term it, to the value we fixed on these lands.

Yes, the report is a joint report. We did not
always go out to the stockyards together. I went
out there independently of them many times but
we also made trips together. We met repeatedly
and discussed the sales of adjoining lands and my
impressions were being formed as we were discuss-
ing them. As to how I approached the situation
and what I personally did, I did many things. You
1162 can take me into any part of this city and show me
industrial property, and I shall have some opinion
of its value to start out from. I won't say that I
won't change my opinion until after I have given
it mature consideration. No, I did not have an
opinion about the value of the stockyards land be-
fore I assembled any data for this hearing. I merely
had a general knowledge of values. We met to
determine the basic elements; I had a knowledge
of trackage property acquired over about 18 years.
I did not have any set opinion regarding any of
the stockyards lands. I went out there and weighed
1163 them. I formed my opinions after I got there and
I did not form them immediately, I could not. We
did not fix any values on any zones, or at least I
did not, until I had practically a month of delibera-
tion with them. When we met we took individual
sales and discussed them and eventually, with the

Trans.

single exception to which I testified, we three agreed on values.

Valuation
period Feb. 26
to Mar. 23.

- 1164 As I recall it, we started out the 26th of February and we formed our conclusions and rendered our report on values, but not the written appraisal, on, I think, March 23. The reports were written up
- 1165 since that time. When we three appraisers met sometimes there were slight differences of opinion. Take Zone 10, for example. Mr. Eppich fixed a value of \$3,000 per acre while Mr. Newcomb and I thought it was only worth about \$2,500 an acre. We stated our reasons and Mr. Eppich was out-voted; as a matter of fact there was ample ground
- 1166 for Mr. Eppich's value. The city bought some land on 48th Avenue between Gilpin and High Streets from the Brannan Sand & Gravel Company, as shown in our sale No. 30 on the basis of \$3,165 per acre, and if the land in Zone 10 had been level and well filled, it would have gone over that value, but I figured, taking all things into consideration, \$2,500 was a fair value. Mr. Spratlen of the Brannan Sand & Gravel Company with whom we talked is a firm believer in the value of the land including Zone 10. He has some land at 31st or 32nd and Brighton Boulevard which he is willing to sell at \$4,000 an acre, but refused to name a price when he got up to 48th and Brighton Boulevard. He wanted to hold that land and was protecting himself for the future, so I figured very little weight to his values. I figured the present value of \$2,500 was well supported by nearby lands, all things considered, and Mr. Newcomb agreed with me and that is what I call voting Mr. Eppich down. I tried to
- 1167 vote them up on Zone 1 but did not get away with it. I felt that Zone 5 should have a slightly higher value, but I did not have so fixed an opinion that I could not yield to them on that and I yielded after they presented their arguments. They figured

Trans.

- 1168 that we better err on the side of conservatism. I don't recall any instance where values were increased or voted up. As I remember it in every case where there was a dispute, the lower value was taken. In a retail appraisal I would not say that I would consider all of the elements that I
- 1169 considered in the stockyards property. Different types of property would have different factors weighing either lightly or heavily; for example, railroads do not weigh at all in retail property. Yes, we consider the railroads in valuing the stockyards but would not have considered them in some
- 1170 of our downtown property. Topography is another element that we would not consider in valuing downtown property. It goes without saying that it is flat; all of our business districts are practically flat, so I wouldn't stop on that. The downtown district has transportation as shown by the traffic counts and the number of people downtown purchasing. Paved roads, labor and housing do not influence me downtown, because it is a general condition that obtains and is taken for granted, while in an industrial property it is a marked advantage. In other words, if a man comes to Denver to establish a factory, that would be one of the first things he would want to know: "Am I near a labor supply? Are they going to have difficulty in arriving at my plant when I build it?" In a downtown retail property I don't stop to consider labor and housing. Those elements are disregarded, we consider they exist. The zoning question, it goes without saying downtown that it is zoned for retail business, but in industrial property you must consider it. It is vital. The scales are weighed with each
- 1171 particular property. There are elements which I would use in valuing downtown property which I would not use in valuing the stockyards. For example, I did not use income in the stockyards. I
- Income not considered in valuing stockyards.**

Trans.

would use income downtown. I would consider the rental value of the property and that would be probably the determining factor with me in downtown property. I would also consider whether the property had stability or whether it was slipping or advancing. You can go down in what we term our loop district, 20 years ago and a little prior thereto, when I was starting in the real estate business, that was one of the very highest rent districts in the city of Denver. You could not call it high class shopping because it was made up of groceries and meat markets. There has been a revolution in the retailing business in those particular industries. Instead of being centralized downtown, they are scattered all over the city. They have created values in the suburbs and in creating values in the suburbs, they have just about milked the values downtown in that district, and I would certainly consider that in advising one of my clients. When you go to 16th and Stout Street I would say there is an element of stability there that is marked so far as I can see at present. In the lifetime of any of us present I don't think the value will lower. I 1172 won't say that it will increase. I think it will.

**Method of
testing com-
parative sales.**

Yes, I state on page 2 that we checked as far as necessary with the grantors and grantees the considerations involved. We gathered a number of sales that we thought in the beginning might have application and discarded some of them. We had a list of 1173 sales covering Elyria and that district from the abstract company, and when we went out there it was perfectly obvious that many of those sales had no bearing on the value. There are other factors, take the Union Pacific lands, the Union Pacific sells their lands with restrictions. Some of their sales have not had those restrictions. For example, one of my clients wanted to lease (sub-lease) a piece of land at 46th and Brighton Boulevard, with trackage on

Trans.

it for \$200 a month-rent. There was a bulk oil station on it and we had difficulty in getting that rental because a clause in the Union Pacific lease prevented the lessee from selling gas at retail. We didn't get anywhere, but in viewing the values of the Union Pacific I take those things into consideration.

No, the statement that we consider the accessibility of the yards to the business district of Denver is not a duplication of the transportation and paved roads element. In transportation we had in mind the bringing in of livestock by truck from all over the State. The accessibility to the business district
 1175 of Denver is an element of value because in doing business at the stockyards men are necessarily coming into Denver all the time. It hasn't an influence that I can translate in dollars and cents, but it does add to the value of the stockyards, I think. I can give you a very definite example of how that is an element of value. Up to about three or four years ago both Swift and Armour maintained downtown wholesale distribution outlets. With the development of roads and motor trucks they found it just as convenient, more so, to deliver to the retail firms in Denver from their plant at the stockyards instead
 1176 of maintaining those plants downtown. I figure the accessibility to Denver is something to be considered. I cannot fix a definite value showing the extent to which it has influenced me. It is a beneficial factor but I cannot translate it into percentage or dollars and cents.

Yes, under topography I state that the gravelly soil is an advantage that contrasts with the adobe soil of other districts. We have here in Denver different types of soil. We may have adobe soil that when it rains it retains the moisture, it doesn't absorb it or shed it. For example, at the Hanks feed lots, that has adobe soil or floods have added a top soil of clay that holds the water. It is muddy after

Trans.

this rain. A gravelly soil readily absorbs moisture. There would be a distinct disadvantage in adobe soil
1177 at the stockyards, particularly in Zone 3 where it is not paved. It adds to the susceptibility of the land to drainage and sanitation to have it gravelly. Yes, I know that the sewerage at the stockyards is entirely underground and that the roads are paved.

1178 MR. BOSWORTH: Now, Mr. Examiner, I think we have all been on the same basis here, and that is that Mr. Zelinski testified, as these witnesses have testified, that as land men they appraised this without any surface improvements and the surface improvements would include paving, so specifically upon that situation, when it is perfectly manifest from the testimony of all the witnesses that this land was appraised as naked land without any of the surface or sub-surface improvements in place, the question then comes up as to what could be done by way of paving. That is something apart from this witness—as to which no direct testimony was given on direct.

MR. MILES: But, Captain, he has told us that this gravelly soil is an advantage.

MR. BOSWORTH: To the tract, not to the stockyards.

MR. MILES: To the tract. I am trying to find out just in what way.

1179 (Witness continuing). I do not think the difference in cost would be material in putting in a sewer in adobe soil and gravelly soil, but it doesn't follow that this gravelly soil wouldn't be an advantage for other industrial purposes. I don't know how deep a trench would have to be in adobe soil not to need shoring, nor how deep the trench would have to be in gravelly soil to need it. I don't know

Trans.

1180 how deep the gravel extends; I haven't gone into that, but you will note out there in the zones where the gravel pits are, there are zones that play out. I do not know whether the stockyards company has insisted upon additional value in the structural property on account of the gravelly soil. They have not insisted or suggested any valuation to me whatsoever, and no one connected with the Stock Yard
1181 Company has done so. I totally disregarded the structural property.

1182 Government counsel stated that he was in error and that the Stock Yard Company had not insisted upon any value of the structural property due to shoring.

1183 (Witness continuing). The only place that I know where the gravel is "in place" is in 6.18 acres at the north end of the yard, and of course that would not have a marked influence on my values.

1184. Q. In your opinion, Mr. Ivins, could you sell the stockyards land at the value that you have placed on it? **Believes land would sell at valuation figure.**

A. I think so.

Q. To what industry?

A. To a stockyards industry.

Q. Do you know of any other industry that you could sell the stockyards lands to at the value that you have placed on them?

A. I do not know as to that but I think I could, I might not immediately.

Q. What other industry?

A. Possibly for a steel plant.

Q. In your opinion how long would you have to carry those lands if they were listed with you

Trans.

on a certain date, how long would you have to carry them before you could sell them to a steel industry?

A. That is an impossible question to answer. I could say this, that I have carried lands of my own for several years during the best times and then disposed of them very satisfactorily both by sale, by building and lease in the time of depression.

(Witness continuing). A smelter might be another industry that could use a tract as large as the stockyards. The establishment of such a smelter
 1185 at Denver has been much discussed of late. It hadn't been discussed much prior to the revival of mining. Yes, periodically or almost as long as I have been in business, there has been discussion of the establishment of a steel plant in Denver. I would not say that there would be no chance of selling the tract
 1186 to such an industry. I think there is other business that may not be apparent to me today that might use the tract. I might have to hold the tract for a year or two, I do not know. Denver is near a supply of coal, iron and limestone used by a steel mill, as a matter of fact, is nearer to the source of iron than the Colorado Fuel & Iron Works at Pueblo. No, I
 1187 do not know of any industry that has made a bona fide attempt in the past 5 or 10 years to secure 131 acres of land in or near Denver. No, I do not know the value of lands which smelters generally try to obtain. In valuing the lands of the stockyards company I consider the general industrial use and I would place approximately the same value on the land for that use, because I realize that the stock-
 1188 yards is the present highest and best use. I valued those lands for industrial purposes recognizing the highest and best use as being for stockyards purposes. Yes, in our report we mentioned the Dotsero Cut-off, and state that it brings a part of western

General industrial use considered.

Trans.

- Colorado within reach of Denver, lessening the time of transfer to 15 hours on cattle trains. The element of time would particularly apply to stockyards, but the element of bringing coal from the western Colorado fields would be influenced by the Moffat Tunnel and the Dotsero Cut-off. The haulage of coal is the only commodity which I have in mind apart from the stockyards that would benefit from the Dotsero Cut-off. Yes, I state that much livestock that heretofore went through by the Pueblo Cut-off is now diverted to Denver, by reason of this saving in time. That livestock previously went to St. Joe, Omaha and Kansas City probably. George Williams of the Rio Grande told me that the Dotsero Cut-off gave Denver a decided advantage over those three cities. No, I do not know the amount of livestock that comes to Denver by reason of the Dotsero Cut-off that otherwise would not come here. The Cut-off was just one of many contributing factors I considered. I gave no specific value to that statement of Mr. Williams. I would not want to differentiate as to whether it was of minor or major importance in fixing my value.
- 1191 Yes, I have also mentioned the paved and improved highway system of Colorado. It is another contributing factor of value. I think it has brought livestock to Denver from eastern Colorado. I can't say how many head. I gave the fact of paved highways some weight. I don't know whether the improvement of highways in other States has counterbalanced the improvement of highways in Colorado. I am not familiar with it. Yes, these several factors contribute to the value. Highway system.
- 1192 The increased number of water taps between 1930 and 1935 tends to show that Denver has increased in population and because of that increase the land values here are stabilized or even increasing. No, I am not aware of a plan of the Water

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Department that where a person has a private supply you must seal it off before he taps on to the
 1193 city main. I have lived here 30 years and I know that the number of people with a private supply of water are comparatively few. I have read in the papers that during this drouth certain parties down in the country club district have drilled their own wells to irrigate but they are in jeopardy of losing those wells because of the water right laws here.

1194 Yes, I remember my statement about the beef which was caught in the flood not dressing white but dressing yellow. I only know what the Superintendent of the Hanks feed lot told me, that it was due to the exposure of the cattle to the flood and in some cases I am only using his statements and know nothing about it myself.

By the use of the word "proximity" in my last paragraph I refer to the various elements that go
 1195 to make the highest and best use. You asked me yesterday regarding the accessibility to the business district of Denver, and I cited you Armour and Swift, selling their wholesale distributing branches in the business district. By the word "proximity" I mean very largely proximity to Denver. I can think of no other element considered that is not enumerated.

No, I can't tell you the number of industrial lands that I have appraised, I don't recall that right now because it has been over a number of years. No, I couldn't tell you the number I have appraised in the past five years, but I am continually called upon
 1196 by clients either for a formal appraising or for opinions on the value of industrial property where the prospective purchase or sale of land is in view. I have sold industrial land in the past five years but I don't recall selling land in terms of acres cov-

Trans.

ering that time. Nor have I bought any for clients in terms of acres.

Yes, I referred to the National Fuse Company sale at \$2,500 an acre, which I used as one of the other sales of land near to Zone 7. I gave comparatively little weight to it because it has practically no access to a public highway, except that it is tied up with land of the National Fuse & Powder Company adjacent and so long as they remain in the same hands, that would give ingress and egress to this particular tract and would have some relation to its desirability for the National Fuse & Powder Company but not for the general use of the land. As to Zone 4, its access is to Franklin Street at the north. Yes, the Burlington right-of-way intervenes but I don't think that bars access to Franklin Street. It would also have access to Zone 1 through the sheep division and you could also reach the public highway along the easement on the bank of the river. I don't know whether that is open to the public.

Yes, we considered sales of land east of the Burlington right-of-way and in the general vicinity of Lafayette and 47th Street as to Zone 1 values. The Murphy barns, for example, are about 400 feet away from Zone 1. Yes, I considered that sale indicative of values in Zone 1 although that tract has not the facilities that land in Zone 1 has.

Yes, I said that Washington Street had been curbed and oil-surfaced. I didn't attach any particular value in terms of dollars and cents to that in fixing the value on the stockyards land. It gives access over good roads to land in Zone 5. That is the principal way I considered it. It is only in the way that a highway is supposed to reflect value.

Trans.

Trackage an element of value in industrial property.

1208 Yes, I have stated that trackage is a valuable element in valuing industrial property. No, I cannot describe in percentage of the total value specifically what I would allow on account of the trackage facilities. I have not estimated as to any one zone on the map that that zone has so many dollars extra value because of the trackage facilities. I can't approximate it except to say that industrial land without trackage is almost inconceivable. Oh, yes, there may be some industries where a single line of track would suffice for that industry and other industries, such as stockyards, where a number of tracks and a number of rails would be necessary to serve them properly.

1209 With regards to the Capitol Packing Company, the building is practically on the same grade as stockyard zone 5. I do not know whether the K. & B. plant has a switch from the Colorado & Southern but I think it does. This map that I have shows a switch to the Mountain States Packing & Provision Company and I think that should be the K. & B. plant. If it does not have trackage, it would make some difference in my value. We valued Zone 5 at \$3,500 an acre and the lack of trackage would probably bring down the K. & B. land to at least that and possibly more because of the fact that the K. & B. plant is lower and not as favorable to grade as Zone 5. The lower end near the South Platte would be several feet below the Washington Street level, but where the buildings are is practically the Washington Street level.

1210 I understand that the railroad tracks on Zone 4 are owned by the Stock Yard Company and leased to the railroad. Yes, in evaluating the property I theoretically stripped that zone of those railroad tracks. If not used for railroad tracks there are parts of that zone that could be used for other purposes advantageously, possibly for a small packing

Trans.

plant which would be only if the stockyards were used as a stockyards.

Yes, I said that retail utilities could be placed on Zone 1. You would have the same accessibility there as now to the Exchange Building. I would place them in the immediate vicinity of the Exchange Building. Yes, the land is now used for pens. Yes, if you assume that the land is used as a stockyards the retail utilities on Zone 1 would probably lessen the value of the remaining portion of that zone for stockyard use. I could not say how much.

1212 By the lease or sale No. 5 in our appraisal the railroads obtained 4.26 acres. I don't know whether the railroads also obtained access to the unloading docks and unloading chutes and chute pens and chute alley. I have not read the lease. All I considered was the price at which the railroads leased the land. No, I did not consider any improvements.

1213 I couldn't answer the question what I would have done had I considered the improvements because I have been instructed not to consider the improvements. I do not know what was contained in the lease.

Blayney-Murphy tract.

Yes, in connection with the Blayney-Murphy transaction we state in our report the purchase of land at \$40,000 plus and total cost to Blayney-Murphy Company to make land suitable for packing house purposes, \$83,000 plus. Blayney-Murphy Company has, as I see it, attempted as nearly as possible to reproduce the facilities available to other packing houses next to Zone 1, which would be Armour and Swift. The tract in its raw state was without rail facilities, without direct access to the yards, so by means of the construction of a viaduct they tried to get the same facilities as Armour and Swift, or as nearly as possible thereto. Naturally,

Trans.

the distance from Zone 1 in my opinion does not make that tract of equal value to land abutting on
 1214 Zone 1. Yes, we considered the value of adjoining lands in evaluating the stockyard property, and I considered the Blayney-Murphy land, as stated, namely at \$89,717.75, being the cost to Blayney-Murphy to make the land suitable for packing house purposes. At the raw land cost of \$40,781, the tract would not have had access to the stockyard, and would have left it like other lands near there. The Blayney-Murphy tract, I do not consider, does not reflect the value in Zone 1, but Zone 1 reflects a value out there. I used it as corroborative of the opinion I formed of land in Zone 1. If I had considered it (the land without the viaduct) at \$40,781.00, it would not have affected my valuation of Zone 1.

1215 The 3.6 acres in Zone 1 we valued at \$15,000 per acre, and the 34.934 acres in Zone 1, we valued at \$17,500 per acre. The 3.6 acres is just south of the Exchange Building. My understanding is that the line is on the south side of the alley immediately south of the Exchange Building and runs through from the Burlington right-of-way to the joint right-

1216 of-way. The difference in the accessibility is that the north portion of Zone 1 is accessible by the subway under the tracks; also by the road coming in over the Burlington right-of-way. The 3.6 acres is also reached by the subway under the Burlington tracks and by the road, and I would say that the accessibility is the same. The topography is prac-

1217 tically the same, and transportation, paved roads and sewerage are equally available to both tracts. The 34.934 acres is in the center of the yards and is closer to both the Armour and Swift plants and to the viaduct leading over to Blayney-Murphy. I wouldn't say that all of the elements of value affect both tracts equally. The 3.6 acres at the south we

Trans.

figured were more nearly like the land in Zone 2. **Intensive use of large part of Zone 1 an element of value.**
 The reason for our difference in price is that the land designated at 34.934 acres is more intensively used.
 1218

I can't say that I have made a study of Government Exhibit 21, which is called the sales map. I have examined it in the short time it has been laid before me. I am familiar with the location of the land in Zone No. 1 in the Government appraisal, but I am not familiar with the sale. I don't know anything about that land. As to sale 2, I am not familiar with that land and can only state its accessibility as I see it on the map. As to sale 3 from Mountain States Packing Company to George H. Cooper, 9.758 acres, Mr. George Cooper is a personal friend of mine and was an officer of the Mountain States Packing Company at the time this so-called sale was made. He told me that the Mountain States Packing Company was in financial trouble, they needed a loan and he purchased this land from them with the understanding that they could buy it back at such time as they were financially able to do so. They were unable to purchase it back and Mr. Cooper continued to hold it. He told me that he did not consider it a legitimate sale. As to whether it reflects the value of the land, part of the land, I believe, is being used for a dump at the present time. Part of it was sold to a couple of men for a filling station. In my opinion the value of the land might be in excess of \$10,000 shown as the consideration. I don't figure that Mr. Cooper would buy the land on virtually a loan basis and pay the full value and let the grantor buy it back any time they wanted to at the same figure if he felt he was paying full value.
 1221
 1222 I have not considered, however, the difference in my judgment between the two. Generally speaking most of these sales are so totally unrelated to the

Trans.

lands of the Stock Yard Company that I haven't even considered them. I consider them having no similarity. Sale 3 is comparatively near to Zone 10, but I don't consider any of those as having a bearing on the stockyards land. No, I don't consider sale 3 nearer to Zone 3 of the stockyards because the Burlington right-of-way intervenes and separates it. It is totally unrelated, disconnected, and has no bearing whatever on the stockyards land.

- 1223 As to Government sale 4, which is our sale 27 "above land" is located at the corner of Brighton Boulevard and Race Street." I am reading from our sales sheet. "The consideration was verified by grantor. Mr. Gildea was forced to sell and the property was bought by the estate of John Norman, deceased, which owned adjoining land. Mr. Robert Norman, the present owner, told Messrs. Eppich and Ivins on March 18, 1935, that the estate paid Mr. Gildea \$1,000 for the land, which he considered a bargain. This property and another parcel were deeded to John Robert Norman by the administrator of his father's estate." The land is comparatively close to Zone 10. I didn't attach much significance to it, practically none.

- 1224 Sale 5 in the Government appraisal I know nothing about, but from its location on the map I would say it was totally dissimilar. The same remarks would apply to sale 6. When I say "dissimilar" I am not speaking of topography but value. The topography may be the same. It has street accessibility. Both sales 5 and 6 face on York Street. Sale 7 is totally dissimilar as to value. It is absolutely remote from the stockyards. According to the map there is no rail connection with any of these lands. As to whether or not rail connection is possible, I presume it could be arranged. The same remarks apply to sales 8, 9 and 10, except that sale 9 has trackage facilities. Sales 11, 12 and

Trans.

13 are dissimilar to stockyards land. Sale 14 would apparently be close to Zone 10. I haven't examined it and really cannot speak from any opinion I might form at this time.

Re-Direct Examination

Yes, I would regard the gravelly nature of the soil as an advantage to an industry which perhaps did not require 100% paving of the entire area, as, for example, an oil refinery or a railroad; that is, a large railroad yard.

In my opinion the Blayney-Murphy tract would not have been comparable to stockyards land without this expenditure of roughly \$49,000 for the items listed in our report. The Blayney-Murphy transaction you will find under Zone 1 immediately following sale 15 in our report.

Blayney-Murphy tract.

1227 In appraising the land I regarded it as stripped of tracks and the railroad accessibility of which I spoke was the railroad coming up to the different ends of the yard available for connection with tracks that the Stock Yard Company might build there.

Appraised as naked land.

1228 Zone 4, as shown by my map and by respondent's Exhibit No. 1, I believe abuts the Northwestern Terminal tracks at the north end. The Burlington Railroad, I think, has a small strip immediately south of Franklin Street. At the south end of Zone 4 it abuts on the C. & S. right-of-way, and also abuts on the Union Pacific right-of-way into the yards.

Zone 4.

1229 What I said about Swift and Armour being able to close their wholesale distribution plant and serving their trade from their packing plant, is also true of Blayney-Murphy or its predecessor, the Coffin Packing Company. They formerly maintained and operated a wholesale meat house in the 1500 block on Market Street. They found it unnecessary to maintain it and Mr. Blayney sold his

Trans.

building for \$35,000. Summing up these three in-
1230 stances I would say they reflect a value from a
wholesale standpoint in addition to the value for
the stockyards.

Accessibility
to city an
element of
value.

Yes, proximity to the center of the city is gen-
erally considered an element of value. The fact
that people having business with the yards may
come in by train and reach it with reasonable
speed and a reasonable expenditure of time, is an
element of value, which is not limited solely to
stockyards but to any industry.

Yes, the Cooper-Mountain States transaction
1231 started out as a loan and amounted to a forced sale
by reason of the fact that the grantor was unable
to pay back the loan and repurchase the property,
although it was not made in the form of a mortgage.
I do not consider, as an appraiser, that such a sale
is representative and should not be considered in
1232 determining fair values.

Potential
value
considered.

What I meant when I answered Judge Miles and
stated that if pens were constructed on Zone 3 it
would increase the value of Zone 3, is that any
appraiser in appraising land for industrial uses
necessarily figures into his valuation the potential
value of the site. Perhaps I should not limit this
solely to industrial appraisals. Here in Denver we
use statistics covering the number of people passing
certain corners, and these figures are compiled by
the University of Denver School of Commerce. I
think these facts are recognized by all appraisers.
The same thing is true in a certain measure in
industrial property. If a particular site has clearly
a highest and best use, I do not believe any appraiser
can overlook the utilization of the tract, and there-
fore its potential value or potential earnings to a
concern engaged in the highest and best use. If
pens were on the tract north of Race Court in Zone

Trans.

3, it would mean that the highest and best use, which all of us, including the Government appraiser, have recognized, namely the stockyards use, had come up to some of the potentialities as we saw them, viewing the land as naked land on March 23, 1935, and since those potentialities would have actually been realized by the construction of pens, this area would have tied in closely and become a part of the main area as an enlargement of that
1233 area. Hence, the value of Zone 3 would then more nearly approach the value of the main tract than it did on March 23, 1935. He stated with regard to Zone 9 that the potentialities of that zone for small retail store business was what led him to give the greatly increased value which I spoke of yesterday, or about \$6,000 an acre over the value he assigned to Zone 1. Except for the three stores he mentioned, those stores do not exist today on Zone 9, any more than those pens exist on Zone 3, but I take it that Mr. Zelinski and I are looking at it in the same manner necessary from the standpoint of potential intensive return from the highest and best use.

Q. Now, the mere fact that the highest and best use of a tract is perhaps destroyed, but with other uses, possible uses and utility left intact, would that necessarily change your idea of the value of the tract?

Land
appraised for
industrial
purposes.

A. No, we appraised this tract for industrial purposes, not confining ourselves to stockyards use.

1234 HARRY W. NEWCOMB, a witness called by respondent, testified as follows:

1235 I have been in Denver 55 years and in the real estate business 33 years. I am President of Newcomb Realty Company, which conducts a general real estate business. We buy and sell real estate, collect rents, have a property management depart-

Qualifications.

33 years
experience.

Trans.

ment, a real estate loan department, an insurance department and make appraisals, and we have built homes, store buildings, garages and an office building, which is the second largest office building in 1236 the city. I make all the appraisals personally.

Appraisal experience.

As to my appraisal experience, I have made appraisals for the Denver Union Water Company, the Chicago, Burlington & Quincy Railroad, the Mountain States Telephone Company, the American Smelting & Refining Company, the First National Bank of Denver, The Rio Grande Fuel & Feed Company, the Denver Terra Cotta Company, Crown Hill Cemetery Association and El Jebel Shrine Association. I have appraised the Masonic Temple in Denver for a loan. I have been appraiser at various times for the County Court in estate matters and have appraised for the state inheritance department for the State of Colorado. I have also made appraisals for the city in condemnations where streets have been opened and where subways have been built. In July, 1932, I appraised \$585,000.00 worth of mortgages and real estate of the Good estate for inheritance tax purposes.

Experience in assembling properties.

I served on a committee which reviewed the values of the downtown business district for the Assessor of the City and County of Denver.

I have assembled properties. The first property that I ever had any experience in assembling was 1237 when I worked for Wilkins & Cornish and afterwards became a partner in that firm. We assembled the property upon which this building, the Post Office building, is situated, together with A. G. Bowes, and sold this property to the Government for the present Post Office site.

I have assembled properties for industrial purposes for the Queen City Foundry, the Gates Rubber Company, the Schwayder Trunk Co., the Piggly

Trans.

Wiggly Stores Company, the Spray Coffee Company, the Bundy Coal Company, the American Radiator Company, Blayney-Murphy Packing Company, General Motors Company, St. Luke's Hospital and the Tivoli Brewing Company.

I have had experience with sales of business property. Our firm sold the Metropole Hotel and the ground adjoining this hotel situated at 18th Avenue and Broadway upon which the Cosmopolitan Hotel has been erected. We sold this hotel and lots adjoining for \$660,000.00. I speak of "we" here. That is the Newcomb Realty Company that would make these deals under my supervision. We sold the corner of 16th and Stout Streets, known as the Barth property, for \$525,000.00.

We made a 99-year lease on the corner of 16th and Welton Streets consisting of four lots on Welton Street, being 125 feet on 16th Street, and 100 feet on Welton Street. This lease was made for 99 years, starting at \$30,000.00 a year and increasing to \$40,000.00 a year.

1238 We sold six lots on Tremont Street, 50 feet east of 16th Street and leased the two lots on the corner of 16th and Tremont to the Tremont Investment Company for 99 years. I was a member of a syndicate which erected a 12-story building on this property, known as the Republic Building, and secured a loan from S. W. Strauss & Company of Chicago for \$1,750,000.00. This building is a 12-story structure with basement and sub-basement. Our Company has complete management of this building.

I belong to the Denver Real Estate Exchange and am a member of the Colorado State Association and of the National Association of Real Estate Boards. I was President of the Denver Real Estate Exchange in 1919 and three years later was elected President of the Colorado State Association. In

Trans.

1920 I was elected Vice-President of The National Association of Real Estate Boards and was again elected Vice-President of The National Association of Real Estate Boards in 1928. I have served on the Appraisal Committee on downtown property for The Denver Real Estate Exchange for periods of one to three years at a time from 1919 to 1930.

I belong to the National Association of Building Owners and Managers.

I have recently made an appraisal of the land of The Denver Union Stock Yard Company with L. F. Eppich and Barclay Ivins. Yes, respondent's Exhibit 3 is the report to which I refer. Yes, that is my signature attached.

Familiar with tract for 20 years.

Made appraisals in 1925 and 1930 of stockyard land.

1239 Yes, I am the same Mr. Newcomb who testified at the hearing had by the Secretary of Agriculture in 1930 and I appraised the property of The Denver Union Stock Yard Company at that time. I appraised the land at an earlier period, namely 1925. I have been familiar with the area and the district and with this particular tract, which is called the stockyards tract for over 20 years. 1925 was the first time I was called upon to make a definite appraisal.

Present value. 1240 Yes, the sum stated in respondent's Exhibit 3, namely \$1,645,552.50 is my opinion of the total value of the stockyards land as of March 23, 1935.

Appraised as naked land.

The basis on which we appraised those lands was without improvements, taking Armour and Swift and the Packing houses all in their present places but other improvements taken off, that is, with the pens, buildings and all surface structures of the yard company removed. We did not consider the sub-surface structures.

Blayney-Murphy tract.

1241 Yes, I was the one who assembled the Blayney-Murphy tract and it took me about eighteen months.

Trans.

As to the consideration which entered into the total,
1242 cost of land of \$40,781.11, one tract of 3.71 acres
the company paid \$19,000 for and in addition paid
the expense of moving a house which was situated
thereon to other property and gave the woman 6
months' free rent and also paid me a commission
of 5% on the \$19,000. The company then paid
\$11,000 for approximately a 3 acre tract from Bran-
nan Sand & Gravel Company, inside of which was
a gravel pit and had to be filled. Before Brannan
would sell Blayne-Murphy had to pay the cost
of a bridge across Race Court, the cost of opening
up Brighton Boulevard and leveling the road and
getting 49th Avenue closed by City Council. The
cost of the fill is also included in those figures.

1244 The other figures I obtained from Mr. Murphy,
including the cost of constructing the viaduct or
cattle runway over the railroad tracks to connect
the packing plant with the stockyards, namely \$40,-
000, making a total of \$89,717.75. In my opinion,

1245 those additional expenditures must be considered
in determining the per acre cost of this triangular
tract because they were necessary to make the tract
properly accessible to the stockyards. To do so
you would either have to lower the ground or build
a viaduct to have accessibility to the stockyards,
and I regard these various items as the equivalent
to a leveling or grading of the ground.

My valuation of Zone 5 is based upon the follow- Zone 5.
ing: There was a sale made from the Reudy
Products Company to the City and County of
Denver. Yes, these are the same sales to which
1246 Mr. Ivins testified. Yes, they had some influence
on our value. Also the street improvements that
the Stock Yard Company have paid amounting to
something like \$1,700, and the condition of the chan-
nel being completed, the uses that the property
could be put to, made me think that a reasonable

Trans.

value was \$3,500 per acre, and I feel that that value is adequately supported by these contiguous sales.

Freedom from
floods an
element of
value.

Yes, the stockyards land is free of flood menace and I figure that the freedom from flood menace is an element of value. Yes, the elements of value 1247 which we list are those which we considered, but my opinion is based upon my best knowledge and experience. I placed a value of \$2,500 an acre on Zone 10, which was called the old gravel pit, in the last hearing. Yes, that was a lower value than we placed in the last hearing. It is not level but irregular and pretty well pitted. I think the last time we considered more value to the gravel than we did to the land.

We adopted these zones because they were given to us by the Stock Yard Company, and it was stated to us that it was the zoning recommended by the Government.

Zone 9.

Supporting
sales.

As to Zone 9, which is the Stadium property and the horse and mule division, I placed a value of \$20,000 an acre, which, in my opinion, is supported 1248 by contiguous sales. Some of those sales are the Hollis Platt Horse Company sale of Lots 29 to 46 to The Denver Union Stock Yard Company on August 13, 1919, for \$75,000, \$50,000 improvements, and naked land value \$25,000, or a sale at the rate of \$19,340 per acre. The Gordon Hollis sale of Lots 47 and 48 to the Drovers National Bank on January 8, 1920, for \$47,500, estimated improvements \$30,000, naked land value \$17,500, Mr. Jacob Burkhardt stated on September 25, 1929, that at the first receiver's auction to dispose of the assets of the Drovers National Bank, he made a bid of \$23,000 for the two lots and improvements, which bid was turned down. Later a subsequent receiver sold it to him for \$18,000 and a short time thereafter Mr. Burkhardt received an offer from Henry

Trans.

1250 VanSchaack of \$28,000 for the property, which he declined as he considered the property to have a value of at least \$40,000. On March 14, 1935, Mr. Burkhardt told Messrs. Newcomb and Ivins that he now values the land alone at \$25,000. I also considered the Murphy barn sale, and I may state that I considered the improvements there not to exceed \$6,000. I have known the property for 10 years and it hasn't changed any in the last ten years. I couldn't say beyond that time. My basis for the statement and figures of \$6,000 for improvements and \$18,000 for the land was obtained from Mr. Joseph Murphy, and he is the grantee in the deed. Yes, I consider the value fixed on that acreage in Zone 9 as a fair and reasonable value of that tract as of the date of our report.

1251 In Zone 1 we valued 3.6 acres at \$15,000, and Zones 1 & 2. 34.934 acres at \$17,500. In Zone 2 we valued the land, namely 23.19 acres, at \$15,000 per acre. It was after investigation of the property that we divided the zone into two zones. We took the 3.6 acres in Zone 1, which is the so-called triangle property south of the Exchange Building, at \$15,000 an acre. We thought that was comparable to Zone 2, and we took the other part of Zone 1 as the highest land. I figured land values of trackage property in various parts of the city. I had occasion to appraise land for the Burlington Railroad on Market Street between 38th and 18th Street, and while it is different property, I can't get out of my mind the knowledge of other trackage property in the city, though that is not in exactly the same location. Yes, the land I appraised on Market Street is comparable industrial property except that it is very difficult in any other section (Denver stockyards) to secure a large tract of land. You take on Market Street from 38th to 18th and there isn't a piece of a dozen lots there owned by one

Trans.

owner. I have had experience in trying to buy property for different industries in these various sections, and would shift from one locality to another because we couldn't get a tract of land sufficiently large for what they wanted. Brighton Boulevard property has direct accessibility to the center of town. Yes, the Brighton Boulevard property is known as the stockyards district, or the stockyards area in the town of Elyria. Due to Brighton Boulevard, which is practically a belt line, people can get to the stockyards quicker and I consider this property is very valuable on account of that accessibility, not only to the city but to the roads all over the State which have been improved. Yes, the list of improvements in highways affecting transportation into Denver completed in the last five years, which list was obtained from the Colorado State Highway Engineer, was read into the record by Mr. Ivins, and has a great bearing on values. Yes, the extension of Broadway and the Broadway viaduct renders it quicker to reach the stockyards than it is to go to 38th Street and Blake.

Highway
accessibility
an element
of value.

- 1256 Yes, I figure Zone 1 as the center of activity of this tract, and that is true in my opinion of any use of that tract. From Lafayette Street, which is the main entrance, it would be my impression that this main street would form a center of operations for any industry, stockyards or any other and they would begin, then, to build from that section there where the subway and the street adjoining the subway enter the stockyards ground. For that
- 1257 reason I have scaled down values at each end, so that the triangle at the south is \$15,000 per acre and Zone 2 at the north is \$15,000 per acre. Yes, I think the triangle is more nearly comparable in value to Zone 2.

Trans.

1258 Our procedure as a board was that the first thing we did was to order a list of sales of all property in this locality from the Record Abstract Company, then we inspected the property. I have been inspecting the property since 1925 and was on the appraisal in 1925 and 1930. We walked over every foot of the ground and we would find things that we were in doubt about, then we would go back and go over them again. Sometimes Mr. Eppich and myself; sometimes Mr. Ivins and myself and sometimes the three of us would go together. We would raise the various points that we might be in doubt about.

**Method of
procedure of
Respondent's
appraisers.**

1259 I have had 33 years' experience in Denver in the real estate business and am familiar with the conditions generally speaking of real estate in Denver. Yes, I verified nearly every sale and in 1930 Mr. Bartels and I verified sales, talked to Mr. Burkhardt and Mr. Brannan, to the Capitol Packing Company offices, to Mr. Averich, to Mr. Murphy and to the agents for the property that was sold for a filling station out there a short time ago. My opinion is based not only upon my personal experience, not only on the sales verified, but talking with people as to their own opinions of value, checking up with the sales.

1261 Yes, I heard Mr. Ivins' testimony with regard to the Local Beef & Mutton tract. I don't think that tract is comparable in any manner with any part of the stockyards land because it is away from the stockyards area, it is low, subject to floods, is not on an oiled highway or comparable road with the stockyards, and I would term it that it was on a sidetrack. Yes, it was flooded in the recent flood. I was out there and couldn't get across but saw where the flood had got it when the bridge was out.

**Local Beef
& Mutton
tract.**

1262 None of the stockyards land was affected by the flood. We went out the day after the flood to check

Trans.

it. Yes, the stockyards lands slope towards the Platte and have good drainage.

Zone 3.

Zone 3 has accessibility by Race Court. The C. B. & Q. abuts it on one side and the Moffat on the other, namely on the northwest side. If the road were changed from Race Court to the north side of the track I don't think it would alter my values, although I wouldn't want to answer that question until I saw how the road was put in there. If it was as accessible as Race Court, it would not affect my opinion.

Zoning Ordinance.

Yes, I am familiar with the zoning law. I think there is no other tract that could be assembled in the City and County of Denver for industrial B uses covering 75 to 130 acres with the zoning classification as specified. The stockyards tract is the only tract in Denver that could come under that ordinance, which has such trackage facilities to the Burlington, Union Pacific, Moffat Road, Colorado & Southern, Santa Fe and the other carriers entering Denver.

1265

Cross Examination.

Yes, I appeared as an appraiser in the 1930 hearing. No, I did not go into the 1930 report in making out this report. I made an independent report at this particular time, and did not take into account the methods of 1930. I took my knowledge and experience and best judgment in making my appraisal. I would not say that I used the same factors; in a period of 5 years there might be different elements that would enter into the appraisal so that I might use one factor at one time and another at another time. I had not checked to see whether I used the same factors in 1935 that I used in 1930. In both cases I took my general knowledge. In both appraisals I took the location of the land, made a careful inspection, going over every piece of ground, considered the railroad facilities, uses

Trans.

to which it was put, the labor, facilities, housing conditions, roads entering the stockyards from the city and throughout the State, the fact that lands are cheaper in this than other locations, that there are churches, schools, community houses, suitable for the enjoyment of the employees of industries in this location, and particularly the zoning ordinances pertaining to this location. I think these are about the factors I took into consideration in both appraisals. Yes, I have read Mr. Zelinski's report and I think his ideas and mine coincide very closely with the method that he pursued in appraising this land. I heard Mr. Zelinski testify here, and I read
 1268 his report since the trial began. Yes, since 1930 the stockyards disposed of a small parcel up in Zone 10 and sold a strip of ground to Armour & Company since our report was made, but there was an option out on that piece previous to the report which we knew about. That acreage was sold for \$8,772 per acre to Armour & Company. In March, 1935, the area was given us as 131.045 acres, and the acreage given in 1930 was 131.514 acres. Yes, we obtained a higher value for 1935 than we did in 1930. The zones are different in 1935. The following is a table showing zone changes and comparative acreage values 1935 as against 1930:

1935 Zone No.	1930 Zone No.	1935 Acreage Value	1930 Acreage Value
5	3	\$ 3,500	\$ 3,000
7	7	4,500	3,000
3	2	8,000	8,000
9	4)	20,000	20,000
	9)		
10	8	2,500	3,500
1	Part of 1	15,000)	15,000)
		17,500)	15,000)
4	Part of 1	15,000)	15,000)
		10,000)	10,000)
8	5	10,000	8,712
2	Part of 1	15,000	15,000

Trans.

Appraised as
naked land.

1272 In the 1935 appraisal we appraised and considered the land as stripped of all improvements. Those were also our instructions in 1930, and we did that. Yes, I am aware of my answer in the 1930 hearing and I may have been confused, but it was our method at that time to appraise the land stripped

1273 of all improvements. Yes, we stripped off sewers. I didn't give the sewers any thought at all other than that the land was available to sewage to the Platte river. In 1930 we valued the land for stockyards purposes or what it might be used for in other industrial uses and we did the same in 1935, and I also considered it as land, or valued it, at the highest and best use, which I consider is the

Appraised for
general
utility.

1274 stockyards use. We considered the land as industrial land that could be used for stockyards, which we construed to be the highest and best purpose, but we also considered the area of the tract, the zoning ordinance, the factors that I have mentioned of location, contour, of the ground, proximity to the Blayne-Murphy Company and the various industries listed on page 4 of our letter of appraisal. All of those are factors of value that we take on the land. Yes, we considered that these lands are available for other industries. Some time ago I was called upon to appraise a large tract of land that was in close proximity to The Denver Union Stock Yard for the Burlington Railroad. At that time they were trying to secure a large acreage for some purpose which I do not know, but they wanted a large tract. It was on the other side of Washington Street in a district very similar to the stockyards and we went over that tract of ground. There were school buildings, houses, various improvements, and it would have cost a great deal more to assemble the land than we have appraised this ground, and had I been in a position at that time to offer The Denver Union Stock Yard property to the Burling-

Trans.

ton Railroad at anywhere near the value at which we had appraised it, which taking the whole tract, is something over \$12,600 an acre, it would have made them a very desirable piece of property so that this property could be used for railroad purposes. That appraisal was just previous to 1930.

- 1276 I figure that the land would be suitable for smelters, a refinery or a tire factory. Yes, I think we could sell it for the value that we appraised it. Of course, I think that the easiest party to sell the land to would be to someone wanting to go in the stockyards business, and I believe that if the land was stripped of all the improvements, located as it is on main highways, with paved roads leading from all sections of the State to that direction, I believe it would be a very easy matter to secure some other stockyards to buy that property at the value at which we have appraised it. As far as selling it
- 1277 to a smelter or a refinery or a rubber factory, that would be very much like the example of the assembling of the Blayney-Murphy Packing Company in this immediate vicinity. There was a tract there 10 or 15 feet below grade, and if you would ask me if I thought I could sell that property for what I got for it, it would have seemed almost an impossibility, but the Blayney-Murphy Company bought that property and paid me a good value. If I were to drive out today to the Brannan gravel pit with a purchaser, he would probably say it wouldn't bring any value, yet with the knowledge and experience of years I know it is not going to be very long until we will have to pay to dump refuse and that there will be no places for city dumps. The tract has brought good value as a gravel pit and now it will bring a value for a dump. If you asked me today if I thought I could sell a

Believes land could be sold at appraisal figure.

Trans.

Believes land
could be sold
at appraised
value.

1278 piece of land, a large tract, in Denver for a sub-
division, it might seem almost impossible, yet within
the last three days a man has come into the office
and asked me to find him 300 acres suitable for
sub-dividing. Now these are all things that you
have just got to trust to the future, but I believe
that this ground could be sold at the value at which
we have appraised it within a fair time, which might
be a year or two years. If it could be used as a
stockyards, I believe with my acquaintance with
people in the stock business and certain people
in the investment business, I could sell the tract
within a period of not to exceed three months.

Zone 1.

1279 Yes, referring to Zone 1, we appraised 3.6 acres
at \$15,000, because we considered it more compar-
able to the land in Zone 2, which we appraised at
the same figure. It is very similar land to that in
Zone 2 and the access to the stockyards is by the
subway which enters into the part of Zone 1 join-
ing the Chicago, Burlington & Quincy Railroad
1280 near 46th Street. The 3.6 acres is a triangular
piece of property paralleling the Chicago, Burling-
ton & Quincy Railroad south of the south line of
the stockyards building and adjoining the railroad
on the west. It does not have accessibility. The
traffic in there now comes over the Burlington right-
of-way, but the accessibility to the land that we
valued at \$17,500 per acre (in Zone 1) either for
stockyards or for another industry, in my opinion
would center its activities from that point. Any
industry other than the stockyards might rearrange
their properties and increase the value of property,
but as the land now stands, we consider that with-
out the buildings and without the pens, it would
be the point that people would improve and make
a development of the tract.

Resp. Exhibit
4 admitted:

1281 For clarity, the map to which the witness had
been referred, was marked respondent's exhibit 4,

Trans.

and by agreement of counsel was offered and received in evidence.

1282. Yes, the remaining portion of Zone 1 adjoins the triangle which I have just described and runs up to Zone 2. Yes, the greater part of the pen construction is on Zone 1, but Zone 2 is also under pens. Yes, Zone 1 is the most intensively used part of the stockyards. Our instructions were not to include improvements and therefore we have to give weight to the location, and the location to the stockyards of Lafayette Street and the entrance to the stockyards, makes that a center for an industry such as the stockyards or any other industry, and I believe that the remaining part of Zone 1 would be intensively used by any industry.

- Yes, I considered Zone 2 and the triangular part of Zone 1 as comparable. They are similar lands, are practically on the same grade and have practically the same accessibility to a railroad. The Burlington Railroad is where a switch track could be run into Zone 2 or into this part of Zone 1, and the Union Pacific has a right-of-way on the other side of Zone 1. Zone 2 is accessible to other railroads. There would have to be switches put in for any industry but at the present time there are railroads running in or through the property, but they belong to the stockyards. Race Court is a public highway which touches Zone 2. There is no highway that touches Zone 1. The C. & S. Railroad is near enough to have a spur track built into Zone 1, but it does not touch it today. I would consider all of this property located for industries so that tracks could be put into the property suitable for the type of industry that might wish to use the property. Yes, I know that the Burlington and Union Pacific have joint track agreement in the stockyards area and throughout other areas in the city.

Trans.

Highways an
element of
value.

As to how and why I think highways add value, I had a talk with Charles D. Vail, Colorado Highway Engineer, and it is summarized on page 2 of the report. He went into more detail than we had in that report. He explained how the cattle come by trucks in increased volume, and because of the roads there was a tendency for more people to come to the yards than five years ago. *If you have roads*
 1286 coming into a section, and accessibility throughout the State, whether it is for a stockyards or any industry it would be valuable inasmuch as there is more trucking business at the present time, growing all the time, taking business away from the railroads, and it is very valuable to have that accessibility for any business industry. A rubber factory, such as the Gates Tire Company, can distribute its tires all over the State by truck if it has good roads, and I would consider it a valuable factor in the value of the land. For a smelter it might not be valuable, yet good roads might be valuable for trucking the ore instead of shipping the ore by railroad. I cannot answer the question as to how many head of livestock has come to the stockyards on account of the highways. I repeat Mr. Vail's statement that cattle which formerly went to Kansas City and Omaha are coming here, and also that a large number are coming from the southern part of the State. I can't say whether the influence was great or not, but only that in a general way I would consider that it was a benefit. It is beneficial to any business to have increased
 1288 business. It creates values for adjoining land and gives industry a potential earning power. Yes, boiling it down it is my opinion that those highways bring business to the stockyards, but as to
 1289 whether that means profit, I do not know, because I have no knowledge as to whether they are making
 1290 money or losing money. The stockyards might

Trans.

be losing money there but another industry be placed there with roads and accessibility that I have spoken of and would find it beneficial. I will say this, that I think the highways, the accessibility and all those things lead to increased land values and that you base your land value on accessibility and the various things that I have enumerated heretofore. No, I would not say that that was only because it permits of making profit. I consider that land has a certain value as vacant land and that is what I have appraised it for, and with 33 years of experience in handling trackage property, —and I have handled a great deal of property for various industries,—you do not go into the economic conditions as you would for investment property.

- 1291 For instance, the Ford factory came into Denver and they wanted a certain location. They did not select that location on earning power; they wanted a direct line from the city of Denver to the railroad track and they explained their object that they wanted to be able to take people from the main part of the city in a Ford car, drive them out to their factory on a direct route and be able to demonstrate their car while they were going out there. Another man will have an industry that he will want to be close to the Union Depot. Take, for instance, this postoffice building when we assembled this property. The qualifications were from the Government that it was to be so many blocks from the Union Depot. An industry may want to be near another industry of the same character, and those are factors, and in selling land to industries there are certain factors that come in and they don't go into the economic but enter into our knowledge
- 1292 of selling real estate and trackage property. For instance, the Burlington Railroad had me assemble a block of ground for them between 22nd and 23rd on Market Street. I bought two corners. The eight

Trans.

lots on the inside I was two years finding that ground. They made me an offer of \$40,000 for those eight lots. The people who owned them thought they were going to build a depot and began to raise the prices. The railroad didn't want the land for a depot but had in mind at that particular time that they were going to put up a refrigeration plant and increase railroad facilities. Afterwards the railroad changed their minds and the property was immediately sold at a profit to the American Steel & Wire Company, showing that you may have someone that wants the property for one purpose but it 1293 was sold to another for another purpose.

Our instructions from the stockyards was to give the land a fair market value and not to consider any improvements on the ground. We were similarly instructed in 1930 and to the best of our ability we followed those instructions.

Q. Did you in the present, the 1935 appraisal, give any weight to the fact that the stockyards was doing a good business or doing business at all?

A. Well, in 1930 we tried to keep away from that and think we did, but having had an experience of one appraisal we had been very careful, ~~more careful in this appraisal~~ to keep away from that than we might have been in the other. Now, I will not say that we did, but you have in mind all the time that there is an industry there and the whole thing is to keep in mind the use of the property for the highest and best purpose that it can be used.

Q. According to your testimony in 1930 you did give weight to the fact that they were doing a good business out there. I am reading now from your testimony, Page 894, you did give weight to the fact that they were doing a good business out there?

Trans.

A. Well, we appraised the land and we did not, I do not mean to convey that we took an economic idea of it.

Q. Did you do the same thing in 1935 with reference to giving weight to the fact that they were doing business?

A. I have been very careful in 1935 to avoid that because it has been impressed more by your cross examination and studying the testimony and the general knowledge that I know that we must keep away from that thought and the experience of the other appraisal has led me to be very careful this time not to get into that.

Q. You have been careful, did you succeed?

A. I don't know.

Q. You do think you gave some weight to the fact that they are doing business out there at the yards, don't you?

A. We have considered the property for the highest and best use.

Q. Yes sir.

A. And we have tried to comply with the Government regulations on the appraisal to the best of our ability.

Q. In the 1930 hearing at Page 895 of the record you testified that you gave very little weight to the earnings but gave much weight to the intensive use of the land.

A. Yes sir.

Q. Are both of those statements correct for your 1935 appraisal?

Intensive use
considered.

A. Yes sir, I gave thought to the intensive use of the land.

Trans.

(Tr. 1293-1295.)

1295 (Witness continuing). Yes, I mentioned the Dotsero Cut-off and that livestock which heretofore went East is now diverted to Denver by reason of the saving in time. That was one of the factors, but I cannot give you any percentage of the extent to which it affected my values.

1296 The general situation with regard to real estate is that some properties have had a decided decline. If I could draw a chart I could get it on the record, but industrial property does not fluctuate as widely as investment property and residence property. The rent may go down for a period but the value of the property does not decline correspondingly, and I considered that in industrial property. I consider that industrial land in and about Denver has
1297 been more stable than other property. There has been very little selling between 1930 and 1935 and there have been very few industrial properties that have been forced to sell under mortgages as other properties have been, and therefore the properties have been about stable. There has been no industry located in Denver requiring a considerable tract of land between 1930 and 1935.

1298 Yes, I testified that in assembling the Blayney-Murphy tract much time was taken with the city and Blayney-Murphy finally agreed to pay the cost of a bridge of about \$5,000 over Race Court and the effect of that was that it diverted the traffic from Brighton and the country in that section which used to go down Race Court over the new highway. It made a new thoroughfare near the stockyards. Yes, I believe it is more valuable and a factor to
1300 be near a main highway. No, if it should show that no one but the city paid the \$5,000 it was not
1301 a recognized value of the stockyards land. We used
778 the Blayney-Murphy sale to demonstrate a reflected

Trans.

value. An example of what I mean by that is that there have been no sales of land on 16th Street for a considerable time; the property is mostly owned by estates. If we found there was a sale of inside lots, and with our knowledge based on 33 years' experience in watching the City grow, that would give us an idea of values, and whether those values were going up or down in that location. The itemized figures in our report of the total cost of the land to Blayney-Murphy is to give the information of the expenses in sales made in that locality. Yes, among those items we have included \$5,413.27 for railroad sidings, which I think are back of the plant. I wouldn't say that they are used wholly for packing house purposes but I don't know of any other purposes for which they might be used.

1304 Yes, the viaduct or cattle runway runs up to the building, I think to the killing floor. From the conversation I have had with Mr. Murphy I don't think that it was put there for the particular purpose of getting the cattle to the killing floor. Yes, The Blayney-Murphy tract. the viaduct starts in the stockyards and runs over the railroad tracks to the Blayney-Murphy plant. It is approximately 300 feet from the railroad right-of-way to the Blayney-Murphy plant, I mean there is about 300 feet of that viaduct on Blayney-Murphy land. They had to build the viaduct to get to their land and I suppose that if it was an advantage to build it to the killing floor, that is what they did. I don't know about the killing floor. I consider it a necessary element to get access from the stockyards to the Blayney-Murphy location. Yes, in the 1930 report we stated that the portion of the viaduct paid by the stockyards was \$20,000; portion of the viaduct over the railroad was \$11,000 and the portion of the viaduct from the railroad to the plant \$9,000; I got those figures from Mr. Murphy who was an officer of the Blayney-Murphy Company

Trans.

- 1307 at that time. No, I did not think then that the part of the viaduct over Blayney-Murphy land should be classed as a plant utility. I believe it is necessary to have a viaduct to this land to make it accessible to the stockyards and that was an element of the cost of the land. Of course, if the stockyards paid a portion of this amount it should be deducted from the cost to Blayney-Murphy Company.
- 1308 No, I do not think that if we took the cost of land alone of \$40,781.11 that it would affect my values of any zone in the stockyards property. This Blayney-Murphy tract is not comparable with the
- 1309 land appraised in the stockyards and is merely a factor in helping to arrive at values. No, I cannot say whether it affected my values one cent, one dollar or a thousand dollars. I do say that the valuation of the stockyards is very hard to establish by any sales that have been made in the immediate vicinity. There are a few sales that are comparable with the lands in the stockyards, and I have appraised the value of the stockyards by my experience and best judgment of this character of property. We considered the sale but I don't think you can appraise the value of the stockyards ground by sales that have been made in that vicinity. There are not sufficient sales to place a valuation on such a large tract of ground as that and it has to be appraised by experience and general knowledge of real estate values in this section and other sections of the city.
- 1311 Yes, we appraised Zone 5 higher in 1935 than we did in 1930 and the factors in reaching that value are the channel of the Platte River being widened and the flood control dikes being completed, removing any possibility of floods, and that there has been paid on that property by the stockyards, something over \$1,500, a special improvement tax for the curbing since 1930. That curbing does not

Trans.

affect the value of the land for stockyards purposes but gives an item of cost of the land.

No, I did not testify that we had paid little or no attention to the sales of property. Where the land was similar ground, we did consider them.

- 1312 On the Stadium property, for instance, the property across the street was practically identical, and we would give considerable weight to those sales. Yes, I think we would have reached the same conclusion as to value if we had ignored the sales on all the property. Yes, we appraised Zone 7 in 1930 at \$3,000 an acre, and in 1935 at \$4,500. In 1930 this land was subject to overflow, and in 1935 that danger was eliminated. I do not know of my own personal knowledge that it was ever flooded. I think the 2.34 acres in Zone 4 were flooded. Yes, that is the same acreage that was called Tract 6
- 1313 in Zone 1 in the 1930 appraisal. It is located right along the river in Zone 4. We gave the same values to that acreage in 1930 as we did in 1935 because
- 1315 the conditions are about the same. The ground is a little low there. They were working on the dike in 1930 and we took that into consideration and anticipated that improvement. Yes, we took that into consideration in appraising Zone 1 in 1930. In 1935 we all submitted the appraisal to be influenced by what we call freedom from flood in certain tracts. Tract 7 is one of them. In 1930 the ground had not been filled.

- When I testified concerning the Burlington property, I was talking of appraising the land and not buying the land. I was merely giving the Burlington Industrial Agent an opinion on what it would cost to secure certain lands for budget purposes for the railroad company. Yes, a purchase was contemplated. I don't think it would be ethical to tell you just where the land is. No, the Burling-
- 1318

Trans.

ton has not bought large tracts of land in the last 12 years; they have bought little parcels, but nothing to speak of, and those were bought through the land agent and I know nothing of their location or price.

**Zoning
Ordinance.**

- 1319 Yes, I mentioned the zoning ordinance. I could not say what influence it had on my value. I know it has made lands in other localities very much more valuable; for instance, one piece of property I have in mind was sold for \$2,500 before it was zoned and after it was zoned for a filling station, it was sold for \$15,000. Another piece, before it was zoned for a store, was sold at \$1,500 and after zoning was sold for \$6,500. No, I wouldn't say that zoning was toward a higher and better use. It was from residential to business property. Yes, there are instances where the zoning ordinance has had a contrary effect. Residential property would
- 1320 be lowered if it adjoined business property. As to the stockyards, there is only one piece of property in Denver that is available for stockyards purposes and that lessens the competition in property for sales for that purpose, and when you lessen the competition in property for any purpose, it creates a higher value for that property for that purpose. Yes, the zoning of the property for industrial B uses would tend to depress residential property, and there is residential property near the stockyards. The stockyards land is where the winds blow to the north and take the odors to the north. Naturally, if residences are built near there, they bring a less value. This fact adds to the labor situation for the stockyards by giving employees rents at a more reasonable figure and an opportunity to buy homes at a less value than they would in other sections of the city, which, in my opinion, adds value to the land of the stockyards being so situated. I
- 1321 don't think single residence lots are comparable

Trans.

to the stockyards tract. I don't know just how much land is included in the industrial B district, but there is no tract in my mind in Denver the size of the Denver Union Stock Yards that is zoned for industrial B uses. Yes, I assembled the Blayne-Murphy tract. I think the people that sold got a good stiff price, but not more than the property was worth for the use to which it was put.

1323 Yes, I think the lands east of zone 10 are vacant. I would say that there is about 100 acres in the triangle on the map Government Exhibit 21 east of the platted land north to the Union Pacific tracks and east to Brighton Boulevard north of 49th Avenue. I wouldn't say that it is all vacant. There have been sales in there at very low values, but I don't think it is comparable land to the stockyards. Judging from the map that land is accessible to the Northwestern Terminal Railroad and the Union Pacific and the Chicago, Burlington & Quincy. York Street, which is a main artery to the city, runs through the center of the tract, and I don't believe it would be possible to cross that street for cattle or other industries.

1327 Q. Now, it is interesting to me, Mr. Newcomb, without taking the particular tracts unless you have to do it, just what the basis for your added values were over your 1930 appraisal?

Reasons for 1935 increased appraisal.

A. Well, we took each street and placed a value of what we thought that street or zone was worth today, and the result is an added value over 1930.

Q. What elements have given that added value for 1935?

A. Increase of population of the city, the better road conditions, general improvements

Trans.

of access to the stockyards from the city, paved roads and general wealth of the city is a big factor.

Q. And that has given this added value to lands whose highest and best use is for stockyard purposes, is it?

A. It adds an element to the increase.

Q. And those are the only factors that you had in mind when you gave a higher value in 1935?

A. Well, no, there were elements of value that we gave weight in 1935. In Zone 5 we considered the flood control, the channel being completed, the special improvement taxes paid on that zone, and in Zone 7 the completion of the fill along the Platte, and I think that covers it.

1328 (Witness continuing). As to our method of appraisal, when the committee met the first thing we did was to assemble the sales of all the property in the neighborhood, then we went out and inspected the sales and judged whether they were comparable or had any bearing upon the immediate vicinity of the stockyards. Where there was a sale which was comparable as in Zone 5 and adjoined the property, we gave weight to the adjoining sale. We gave weight to the sales of property opposite the Stadium property.

I first went out there with Barclay Ivins to show him the property that we were to appraise. I told him that I had appraised it in 1930, that I wanted him to go over every piece of property, examine the property and not express to me in any way his opinion of its values; that I wanted him to get an independent slant of the value of the property and that when he had done that, we could get together

Trans.

and talk over values, and that is the way we proceeded. The only instance where values were raised as the result of discussion, as I remember it, was in Zone 8; it was raised to a value of \$10,000 per acre from \$8,712, as I remember it. Mr. Eppich and Mr. Ivins felt like Mr. Zelinski did that the property had value for a filling station or other
 1330 business use and I began to realize that fact. In every other instance, such as the value on tract 5 and tract 10, the values were lowered as the result of the discussion.

Yes, we gave some weight to the sales on Lafayette Street in connection with the Stadium property. They had some reflected value, but I do not consider it comparable property. As Mr. Zelinski said, the property has business possibilities. No, that does not mean that the stockyards use is not the highest and best use. There is not enough business to take any amount of ground and use it for business. All the business that could be placed
 1332 there could be confined to a small area.

Re-Direct Examination.

Yes, the sale of the Burlington shop tract was
 1334 in about 1923 but I think Mr. Zelinski had in mind some other sales in another district where I know there have been a few sales. The Burlington shop tract is about two miles from the stockyards and is not similar land at all. It was sold at a very reasonable figure. It was a big tract that needed
 1336 considerable filling. I bought some lots over there and it is not comparable land at all. It is all of a mile away, I may be stretching it on two miles. Yes, that is the only large acreage that I know of that the Burlington has bought.

As to the rail accessibility on Zone 2, the Burlington abuts it on the east, the Northwestern Terminal comes into it on the north and the Union Pacific

Trans.

1337 right-of-way touches it on the south.

Yes, I believe it is correct that the zones used in 1930 appraisal were such that Zone 1 then included all of Zones 1, 2 and 4 in the 1935 appraisal.

Comparable
sales
considered.

We did consider the sales of the lots on Lafayette Street opposite the Stadium and wherever the land 1338 was similar in our opinion. We considered the Hollis-Platt or Joe Murphy barn, and we gave consideration to the sales adjoining Zone 5, such as the Averich or Ruedy Products and Capitol Packing sales, and to the offers made by Burkhardt. We checked every sale that we thought had any bearing, in fact, we checked everything that we had covering every sale made in that section and then we began to take the sales and compare them and see if they were in any way similar to the stockyards property. No we did not rely exclusively on contiguous sales in fixing the valuation of any zone. We considered the elements which we summarized in our reports.

1340 On the area north of Brighton Boulevard, which has been described, there is considerable dumping going on. I would not attempt to describe the ground; I have been over every foot of it but it was some time ago and it is a big territory and I would want to check it.

The witness was asked to check the property following the recess and to report the next morning as to its comparability to the stockyards land.

1341 L. F. EPPICH, a witness called by the respondent, testified as follows:

Qualifications.

38 years
experience.

I am engaged in the real estate business in Denver and have been so engaged for 38 years, covering sales, rentals, building management, leases, insurance, loans and appraisals. I am a member of and past President of the Denver Real Estate Exchange,

Trans.

1342 The Colorado State Association of Real Estate Boards and The National Association of Real Estate Boards. I have been a member and chairman of the appraisal committee of the Denver Real Estate Exchange at various times.

I have had an extended experience in appraising, **Appraisal experience.** having served on the committee which appraised the Railroad Terminals in Denver; on the committee that revised the values of the business district of the City of Denver for the then Assessor of the City and County of Denver; also made appraisals for the City and County of Denver in condemnation proceedings, notably the Broadway Extension; also for such organizations as The Denver Tramway Company, the Public Service Company, Fairmount Cemetery Association, the various banks of the city and other corporations and individuals.

I am, and have been for eleven years, the Loan Correspondent and Appraiser for the Metropolitan Life Insurance Company of New York City.

I am, and have been for twenty-three years, appraiser for the Equitable Life Assurance Society of New York City and for eleven years for the Jefferson Standard Life Insurance Company of Greensboro, North Carolina.

I have also served on the Building Planning Service Committee of the National Association of Building Owners and Managers, of which organization I am a member. These planning committees are appointed by the officers of the Association, as investors make requisition on the Association for a committee. The selection of these committees is based on the experience of the members. They study the proposed locations and buildings, particularly as to the economic values and desirable layout of the structures, making complete reports of their findings.

Trans.

I have served on assignments in Denver, San Francisco and Los Angeles, and taken part in assignments elsewhere.

**Zoning
experience.**

I was Chairman of the Zoning Commission that prepared the Zoning Map and Ordinance for the City and County of Denver and have been a member of the Board of Adjustment—Zoning since 1344 February 11, 1925, when the ordinance became effective. I have served as Chairman of this Board three times.

I am, and have been for nine years, a member of the Executive Committee of the Denver Planning Commission.

**Has made 4
appraisals of
Stockyard Co.
land since
1920.**

(Witness continuing). Yes, I am the same Mr. Eppich who testified in the 1930 hearing. I have made appraisals of the lands of The Denver Union Stock Yard Company four times, including this appraisal. The first appraisal was made approximately in 1920; the second in 1925, the third in 1345 1930 and this fourth one as of March 23, 1935. We started our work on this last appraisal some time in February; I do not know the exact date but I think it was about the middle of February. Mr. Harry Newcomb and Mr. Barclay Ivins worked with me. Yes, respondent's Exhibit 3 is the written report of our appraisal and the first signature on the letter of transmittal is my signature.

**Appraised
land as
naked land.**

We appraised the land of The Denver Union Stock Yard Company as naked land with all of the improvements of the stockyards removed but with the packing houses and other improvements in the neighborhood in place. By other improvements I 1346 mean other related industries. Yes, we appraised the land on which the stockyards railroad tracks are located but in our estimate and appraisal the tracks themselves were removed.

Trans.

1347 The letter of transmittal states the elements of value which we regarded in connection with our appraisal, and the total value of the land as found by us, and in my opinion, is \$1,645,552.50. Yes, I have with me the figures showing the appraisal and the acres involved in each of the other appraisals made by me. On January 22, 1920, the value was \$1,157,579 for 139.709 acres. In the 1925 appraisal it was 132.867 acres and the value was \$1, 1348 308,940. In 1930 it was 131.515 acres with a value of \$1,597,944.50, and in 1935 131.045 acres and the valuation, as I have stated, is \$1,645,552.50. 1935 appraised value.

The zone figures as used in the 1935 appraisal do not correspond in all zones with those used in the 1930 appraisal. I was informed that the zones in the 1935 appraisal were those fixed by the Government Appraiser and we were requested to use those zones in order to avoid confusion.

As an appraiser I feel that accessibility to highways and railroad transportation is an element of value to land for any industry, because it adds to its availability and usefulness and utility. In appraising the stockyard land I did not appraise it solely for stockyard usage. I appraised that land for any purpose of any industry for which it would be available and which might require a large area. Yes, I think I can give an explanation of why, in my opinion, these lands have consistently increased in value as shown by my appraisal since 1920. There has been an increase in values of adjoining lands, the increase of industry in that period, the increase in trackage facilities, the zoning, the increased population of the city and the State, the improved traffic or transportation facilities and the improved paved streets. Also the straightening of the Platte River channel has had an effect, because it has widened the channel of the river, confining Elements of value. Reason for increase in 1935 over 1930.

Trans.

the stream to that channel and avoiding flood damage. Yes, I remember, in a general way, the relative location of the river prior to the establishment of the official channel. The old channel had numerous bends. I am looking at a map attached to my 1920 report. The river came into the north portion of Zone 7, as the land has been designated in the 1935 appraisal and swung over close to the Armour and Swift plants: This bend in Zone 7 extended over into Zone 6, then went into Zone 4 back of the packing plants, went through Zone 5 and bent slightly northeast again into Zone 4. Part of it was in the old Coffin Packing plant site. The channel now is relatively straight and the bend at the south end has been eliminated. Much of Zone 4 at the present time on the east side of the river was either in the bed of the river or on the west side of the river. Prior to 1930 the banks of the river were not high because a part of the territory was subject to overflow. A part of those banks extending from a line back of Swift & Co. plant through to Franklin Street was started in 1929 or 1930, and was completed some time later. It was completed along the northern end of Zone 4 when we made our appraisal in 1930.

**Zoning
Ordinance.**

Yes, all the elements which I have mentioned are, in my opinion, elements of value for any use that might be made of a large tract of this nature. Yes, among those elements I mentioned zoning. The Zoning Commission was a committee that was appointed by the City Council in 1923 to prepare the zoning map and the zoning ordinance. The Board of Adjustment-Zoning administers the law.

(A portion of the Government Appraiser's report was read to the witness, being a portion wherein the Government Appraiser stated that "it would thus appear that the stockyards location, from a zoning ordinance standpoint, was so located as to

Trans.

be virtually the only location possible for such a utility.")

- 1354 I agree entirely with Mr. Zelinski's statement. I think it is possible, perhaps, to erect a stockyard in some other industrial B district, but not with the advantages that this land has for stockyard use.

Yes, there is a tract of land on the easterly end of B district coming down to Brighton Boulevard.

- 1355 I agree with Mr. Zelinski that the development of that area could not be made without considerable expenditure for drainage and other utility facilities. The eastern end of the Zone B district, which is out Colorado Boulevard, is two miles and it is a little better than half a mile north and south in width. Yes, I have inspected that land recently.

- 1356 Along York Street there are several industries such as serum plants, the Eaton Metal Products Com-

- 1357 pany and the Navy Gas & Oil Company. Toward the Colorado Boulevard end it is fairly level. York Street (running through the middle of the tract) is a through street,—(an arterial highway), and as a member of the Planning Commission I think there would be a very remote chance of closing York Street in any way. It handles a great deal of

- 1358 arterial traffic. The land south of Brighton Boulevard is pretty level but a great portion of it is in gravel pits and dumps up to Columbine Street. East of Columbine Street there are some more gravel pits and then unimproved land. In my opinion the land is not comparable in any way with the land of the Stock Yard Company at the present time.

Yes, I noted Mr. Zelinski's statement that the present stockyards has no dedicated streets in it. As a member of the Planning Commission I know that it is easier to dedicate streets than it is to get them vacated. If a person has a piece of land and wants

Lack of highways not serious.

Trans.

Lack of
roadways
beneficial.

to sub-divide it, the City of course will accept the dedication of streets provided they coincide with the contiguous area, but it is always difficult to get
1359 a street vacated. From my experience and viewing the stockyards tract as naked ground, in my opinion it is an element of value not to have streets in a tract like that. The accessibility of the stockyards tract is excellent for any large industry, and by accessibility I mean roads, not necessarily dedicated. When roads are not dedicated the owner retains control of them but the public can use them. Therefore, I think it is very much better not to have so many
1360 roads in a large tract under one ownership. There are plenty of roads (dedicated highways) that come up to this tract. From the railroads' standpoint, it is considered terminal property.

Zone 4.

Zone 4 is a long strip of land extending from the Colorado & Southern right-of-way on the south, north along the Platte River on the eastern boundary of the Platte to the old Coffin Packing plant location and bounded on the east by the Swift and Armour packing plants and the sheep division of the stockyards and goes up on the east to the railroad right-of-way of the Burlington and the Moffat Road or Northwestern Terminal. It is generally level except a portion of the north end nearest to
1361 the river. It is hard filled over most of the tract.

The Zone cuts into the Union Pacific at the southeasterly end of the tract. Viewing the entire area as naked land and as an industrial tract, I consider Zone 4 an integral part of that tract. I valued 16.382 acres of the zone at \$12,000 per acre and 2.340
1362 acres at \$10,000 per acre. My value of this tract is based upon its adaptability as trackage use. It is equal to a belt line in that all the railroads in Den-
1363 ver have a right to use it. It serves the packing houses and the sheep division and as I said before, is a level piece of land and is therefore very much

Local Beef &
Mutton tract.

Trans.

more valuable than ordinary land without adaptability for trackage use. Yes, I mention in my report the Local Beef & Mutton sales, and also the Averich or Ruedy-Capitol Packing sales. The Local Beef & Mutton bought two tracts in 1920 and 1922 and paid \$2,500 an acre. The Averich sales ranged from \$2,584 per acre to \$3,000 per acre in 1926. The Averich tract is very much better than the Local Beef & Mutton tracts, the latter being subject to overflow but none of them are as good as Zone 4 because the trackage facilities are not as good. The Local Beef & Mutton has the Moffat Road but the Averich has no trackage facilities.

1364 Neither of the tracts has any possibility of unified use with any large industrial development which might use the stockyards area. Improvements in the Platte River have not been carried beyond the City limits at Franklin Street, so that the Local Beef & Mutton tracts are now subject to overflow. Both the Averich tract and the Local Beef & Mutton tracts are across the river from the main stockyards area.

1366 Witness then described the area between 52nd Ave. to on the north, 48th Ave. on the south, Race Court
1375 & Brighton Boulevard on the west and Steele Street on the east, which the Government witness had impliedly indicated as possibly available or comparable ground. It was described as containing 35 to 40 acres of level ground and the balance either deeply pitted or used as dump—partly on fire.

1375 (Witness continuing). In my opinion there is not a single possible layout of a tract from 75 to 130 acres in this territory which is comparable in any manner to the lands I appraised for The Denver Union Stock Yard Company. I agree in toto with Mr. Zelinski that there is no other tract than the stockyards which could be utilized for any such purpose except at great expense.

Trans.

Q. Well, one final, general question: your written report, respondent's exhibit 3, does that report express your opinion of the value of the lands of The Denver Union Stock Yard Company as of March 23, 1935, based upon your experience as an appraiser; your knowledge of the real estate condition in Denver and the various factors outlined in your letter of transmittal?

1376.

A. It does.

Cross Examination

Present sale
possible.

Yes, I think I could sell the stockyards land today if they were vacated. My first effort would be for a stockyards industry, and as to whether another industry could be found to take such a tract that is a matter of effort on the part of the salesman. I think it is possible. Personally I do not think that I would go outside of the stockyards industry bearing in mind that the packing houses and related industries are all in place as they are today. It seems to me that it would require no particular effort right in the city of Denver to secure a purchaser for that piece of land with all these other industries in place. No, I did not say that I felt another industry would take 131 acres. After I exhausted the stockyards chance it seems to me that an oil refinery, a steel mill or a smelter or something in the rubber industry might be found to use the tract. Yes, it has been some time since any industry requiring 131 acres has located in Denver. I could not say just how long. The Chamber of Commerce' efforts in this regard have evidently not met with success.

1377

Yes, my appraisal is at roughly \$1,600,000 or \$12,500 per acre. No I am not familiar with prices paid by the steel industries of the country for land when they locate in a new location, nor

Trans.

I familiar with the prices an oil refinery pays under such circumstances.

Yes, I speak of Zone 4 as serving the sheep division. In pricing the land I theoretically eliminated the sheep division from the yards but the land is available to serve those industries, and if the sheep division is eliminated, the tract is there to serve the packing plants and to get the benefit of the trackage. If the sheep division were removed, the tract would be served by the tracks of the Colorado & Southern on its right-of-way lying between Zones 4 and 6 and will be available for other industries besides the packing houses. Yes, the transcript shows that I testified in 1930 that I did not strip the land of the sewers, but that was a mistake; I did not understand the question right. I was confused. After the 1930 hearing was over I saw that I misunderstood the thing entirely. What I thought I was answering was that the sewers that were off the district were available for the stockyards purposes; that is, the city sewers would be available for the stockyards purposes. Accessibility and utility are not wholly synonymous. Utility is the use of a tract. Yes, accessibility is one of the elements of value and utility is another. Utility also means usefulness but that does not necessarily mean the ability to make money. What I considered was the use to which the land could be put; the element of the ability of the land to make money applies to their use. I considered it in connection with the stockyards area from the standpoint of potential use. Yes, I mentioned the fact that the land was available for any industry but it is true that no industry within my memory has sought an acreage of that extent in the city of Denver. No, I do not know of any tract of land in the city of Denver outside of the stockyards area that would be available for an industry requiring 130 acres. Of

Trans.

course, if any industry wanted it we could get it and it could be gotten if an industry wanted it at all kinds of different prices depending on the location. No, not at the moment do I know of any place in Denver where I could acquire 130 acres at a cost of about \$4,000 per acre.

Highways an
element of
value.

Yes, I mentioned the increase of trackage facilities
1385 as one of the elements of value. I would not say that was an additional value in my 1935 appraisal over my 1930 appraisal. I use the phrase "increase in trackage facilities" probably referred to expansion, i.e. that additional trackage could be placed upon lands owned by the Stock Yard Company. It
1386 is a potential increase. When I spoke of the improved transportation facilities I had in mind the highways. There are a great many more improved highways in the last five years, and that adds value to the stockyards land by reason of the fact that more and more trucks are able to come in and bring packing house products, cattle and sheep. I am looking at it from the standpoint of capacity,
1387 not earnings. I am not referring only to cattle and sheep. I say that the increase of highway facilities to that piece of land increases its value to that industry that might be able to use that land. Yes, it is my viewpoint that these improved highways bring livestock to The Denver Union Stock Yards and judging it from the standpoint that the stockyards use is the highest and best use, I think that
1388 the highways would naturally increase the value of the land, but that is only a factor for potential value of the property. I do not know anything about the earnings of the stockyards. I know it is a good concern and that it is in business but its earning capacity has nothing to do with my valuation of
1389 the land. Yes, I mentioned in my report under the head of "transportation" that livestock which heretofore went east is now diverted to Denver because

Trans.

- of the Dotséro Cut-off. No, I don't know how much livestock did go east. It is merely a factor and that information was gathered from the Rio Grande Western Traffic Department. I don't know where
- 1390 the livestock went previously. As to the section from which livestock comes now by truck, I have no personal knowledge, but generally speaking I know that it comes from the farms of eastern Colorado and northern Colorado over these roads to Denver.
- 1391 I gave that factor some weight but I cannot state the proportion. It is a potential element of value of the land.

- The list of industries on page 4 of our letter of transmittal I would estimate had settled here within the last 10 to 25 years. I do not know definitely. I do not know what price they paid for their land except the Blayney-Murphy, the Pepper plant, the Capitol, the H. & M. and the Local
- 1393 Beef & Mutton. Those have been reported as sales in our report. Yes, in my work with the Committee I secured a number of sales of adjacent lands. I do not remember the number that I obtained from the abstract company nor how many we discarded. Some of them we considered as affecting our opinion of the value of the land. Most of the sales which appear after our letter of transmittal were considered in arriving at values, but some of them were listed merely as an index giving one the opportunity
- 1394 of judging the value of the land. We listed 38 sales that were considered in the value but sometimes the sale, for some reason or other, the price was less than the fair value and the sale was simply listed indicating that we had considered them. As an example, we considered Sale 1, which is the sale from the Hollis-Platt Horse Co. to The Denver Union Stock Yard Company. Yes, the sale of the Hollis-Platt barn had its influence on the value of Zone 1, but I could not say in what percentage it

Trans.

was a factor. No, I did not give it considerable weight. That is all I can say. The location of the Hollis-Platt barn has accessibility being close by Zone 1 by passing under the subway.

Zone 1.

1396 Yes, in Zone 1 we broke that into two parcels, one containing 3.06 acres and the other 34.934 acres, to the latter of which we gave a higher value. We

1397 gave a higher value to the 34.934 acres because it is a center of activity in the land. Taking for instance a sale which might be said to influence Zone 1, I think the effect of that sale would carry wherever the activity is about the same. A sale on the Burlington, for example, would carry clear across to the sheep barns because of the intensive use of the land and I think that would be my limitation rather than actual distance in feet and miles. Yes, I think the Blayney-Murphy sale was a factor on

1398 values which influenced Zone 1. No, we would not have considered that land on the basis of \$40,000 instead of \$80,000 plus. I do not see how I could

1399 have considered it that way. That is a manufacturing, packing house plant. If I assume that it was only a \$40,000 sale instead of what our figures show, I don't think that would have affected my value of Zone 1. It is a hypothetical question. No, I don't think that a great many lands actually

1399 cost more than they are worth. Yes, it is my understanding that the Stock Yard Company paid for the part of the viaduct that is inside the stockyards limit, but that would not affect my setup of the Blayney-Murphy sale because I am simply figuring

1400 the cost of reproduction of the land area of the Blayney-Murphy plant. It required the cost of this viaduct, grading, etc. to make it comparable land in Zone 1. It required these structures to make it

1401 comparable. The item of \$5,413 for railroad sidings on the Blayney-Murphy tract is included because it goes to part of the cost of preparing that

ins.

site for packing house purposes, and from the standpoint of Blayney-Murphy I regarded that just as much an element of cost as I would the title examination, surveying and expense in connection with the purchase of a piece of land. I did not include the cost of the building because I was making a cost of the site and not the building and I think the railroad sidings go to the cost of the site. The officials of the company thought it was such because they gave us the information. These figures were furnished by the Blayney-Murphy Company and they furnished them as the cost of the site and not of the improvements, which I think is eminently proper. I do not consider the viaduct as a plant facility going with the building, but as part of the land value.

Yes, in connection with sale 5 in Zone 4 I show a cost of grading to stockyards level of \$30,000. I obtained those figures from Mr. Neihaus, who was the land and taxation man of the Colorado & Southern Railroad. I don't know who did the grading. My only knowledge of the lease is what is shown on the statement. Mr. Neihaus gave me the information from the lease. Yes, I assume the railroad obtained access to and use of the unloading chutes, docks and so forth by means of the lease. I am not informed as to whether the stockyards themselves do the unloading, and I don't know whether the railroad, by virtue of the lease, obtained certain rights and privileges that do not show in the lease, but I don't think that would affect the valuation of any zone.

Referring to the Blayney-Murphy land, yes I know there is about 300 feet of viaduct on the Blayney-Murphy land and that the viaduct goes over the railroad. I am not an engineer and do not know whether it would have been more economical to have constructed a subway under the railroad.

Trans.

Yes, our appraisal really contemplated that the railroad tracks are stripped off of Zone 4. Armour & Company has access from the Union Pacific line on the east side of the plant, but I don't know whether the only service tracks of Armour enter
1406 from the east side. As to Swift & Company, I don't know the distance but I would think that it would have a connection from the Colorado & Southern property to reach every service track of Swift & Company.

My estimate of cost of grading was not from personal knowledge but from what engineers have told me. The estimate was based on one small tract and that was some time ago.

1407 The witness also testified concerning the Mur-
phy barn sale, but since the government witness
1412 admitted that his figures were transposed (Abst.
136), this testimony is no longer material and is
omitted.

1413 (Witness temporarily excused).

to HARRY W. NEWCOMB, a witness called by
1434 respondent, returned to the stand and testified concerning the impliedly comparable tract east of Brighton Blvd. and between 52nd Ave. and 48th Ave. He described its pitted condition, necessity for extensive fills, the burning dump heaps and the amount of the level ground. He stated that certain photographs (subsequently introduced as Respondent's Exhibits 47, 47a to 47i) accurately portrayed the area. Since the Secretary's final report lays no stress upon the tract, this testimony is omitted.

1435 MR. L. F. EPPICH, a witness previously sworn,
returned to the stand.

Cross-Examination continued.

Trans.

Yes, I carried the Murphy sale on a figure of \$16,000 for the land and \$6,000 for the improvements, while Mr. Zelinski carried it just the other way.

Murphy Barn
sale figures
reversed in
Govt.
appraisal.

Re-Direct Examination.

In my memory in Denver it is a fact that industries have not started by requiring 130 acres of land. They have started in a smaller way and expanded as the businesses expand. That is personally true of the stockyards industry and of the Denver Rock Drill.

Land
appraised
from general
utility
standpoint.

Yes, I considered and viewed this tract from the standpoint of general utility use and possibly its sale in smaller tracts if necessary. Yes, I believe that over a period of time the tract could be sold either as one big tract or cut up into small tracts.

1437 Prices paid 15 to 25 years ago may have a bearing upon our appraisal in this respect, using for example the Pitkin tract, which was sold more than 25 years ago for \$4,375 an acre and that is part of Zones 6, 7 and 8. The development of the neighborhood and the territory, and increase of industries during that period, are all facts in the increased values of the land. I would not base today's price on a cost of 30 years ago, but simply as an indication that the land has become more valuable in a period of time and of the increased facilities. Original cost would be merely an index as to whether or not my present value was up or below original cost and I think that is the only extent to which

1438 I would use it. In purchasing ground for an industry I would not just buy enough, I would consider the expansion ground if I had an industry that I expected to enlarge. Yes, as an appraiser. I deem it necessary to carry in mind the possibility of expansion ground.

Trans.

Highway
accessibility
valuable to
any industry.

In stating that highways were an element of value in land, I did not intend to confine it to livestock in the use of highways. They are valuable to any industry. When I spoke of Zone 4 I testified that it was valuable as the possible trackage location for any industry, but I did not mean the existence of actual tracks in place now, but the possibility of tracks.

I couldn't state in percentage what weight I had given to the sales of contiguous property compared to the weight I had given any other element. Zoning has a considerable weight, and I think that sales of contiguous property might have greater weight on one Zone than on another. My appraisal and estimate of values is the sum of all the factors, the advantages, the sales, my experience and the knowledge of the value of property all considered.

1441 Yes, I am pretty well familiar with the values of property throughout the city, and my experience has been citywide.

Counsel for respondent then renewed his offer of respondent's exhibit No. 3, being the land appraisal.

MR. MILES: To respondent's proposed exhibit No. 3 the Government objects on the ground that it is shown by the examination of the witnesses that they have not complied with the law pertaining to valuation of real property as laid down by the Minnesota Rate Case.

MR. BOSWORTH: If any argument is made on that, it seems to me thoroughly apparent from the Government witness Zelinski, as well as from our own witnesses, that they proceeded in this matter on the same theory, namely, viewing the land as naked land, and that was not denied by any of the witnesses, and I therefore submit that it is a proper exhibit.

rans.

MR. MILES: No argument.

THE EXAMINER: Objection overruled. Respondent's Exhibit 3 will be received. Res. Dep. 11 2 admitted.

443 HARRY JAMISON, a witness called by respondent, testified as follows:

I am in the cattle business and live at Navajo, Arizona. I have been in the cattle business 25 years,—in the ranch business, raising, growing and aging cattle. My herd is from four to five thousand head, that is, I market every year about that number. My ranch is all leased and deeded,—about 150,000 acres.

Yes, I am familiar with the marketing of livestock in general and with the Denver market in particular. The shipper sends his livestock to market to sell them and he is certainly interested in the buyer outlet and the development of that outlet is a thing of value to the producer in my opinion. The producer always figures that the more buyers you can get the better price he is going to get for his cattle. That has always been my opinion of it. Yes, the yard traders or dealers are certainly a part of that buying outlet on the market and are certainly beneficial to the producer. I have had the same experience as the other witness, who testified that the traders sometimes were the only market.

Shipper interested in buyer outlet.

Traders part of buying outlet.

Sometimes trader only market.

Q. Now, there is apparently a viewpoint on the part of the Government which perhaps is not properly described as an attack necessarily, that the yard trader receives a certain measure of free service at the market. In your estimate, or in your opinion, does the yard trader or dealer receive free service, or is that included in some manner in the charge which the pro-

Trans.

ducer pays as a marketing charge for the privilege of the market?

No proper charge on buyer.

A. Well, I think that is all taken care of with the producer; he pays his yardage, and I do not know why the other fellow should; you should not have to pay to buy, the man who is selling is the one who pays usually.

Trader charge not warranted.

Trader essential part of buying outlet.

Trader helps maintain price level.

(Witness continuing). A big per cent of the traders' operations at Denver are in the nature of order buyer transactions. I don't think that the fact that he may keep his livestock in the yards for a longer time than the ordinary feeder buyer shows that he is receiving any free service. My impartial viewpoint absolutely is that since he is on the market buying and is a necessary part of the buying outlet, he should have whatever is necessary for him to complete the operation without additional charge. The yard trader buys all kinds of livestock. There are times when he is a competitor for fat stuff and then he buys chiefly in carloads. Sometimes they buy in carloads because they think the stuff is worth more and at other times because they have orders for it. Yes, the yard traders increase the competition on the market and in doing so compete with the packers on fat stuff. That surely tends to hold up the prices and I know that of my own knowledge. At other times he assembles odd-lot stuff and makes up carloads. I do not know what we would do without the yard traders.

1447

Q. Now, in the 1930 hearing, Mr. Jamison, we had here investigations of the rates, the order of the Secretary came out with what was then called the half yardage charge to traders which was figured at about half the charge which the Secretary found in his order to be the full charge which should go against the

Trans.

producer. In recent hearings over the country and recent orders of the Secretary, there seems to have been a change and it is now spoken of as a reweigh charge. In your opinion if any such charge, whether it be a half yardage charge or a reweigh charge, who in the long run, in your opinion, would pay the charge?

Producer would pay charge against trader.

A. The producer.

Q. And your position is, as I understand it, that the producer is already paying for what service is given to the yard traders.

Charge on trader lessens competition.

A. Yes, sir.

1449 (Witness continuing). It would lessen the competition on the market to charge the traders for reweigh or yardage or whatever you call it. Present price on a thousand pound steer is from 10 to 12 cents a pound, or from \$100 to \$120 gross. The effect of the charge would be determined by the year's business and not the individual case. If you assume that it might amount to \$15,000 to \$20,000 a year, it certainly would lessen competition on the market.

Effect of charge determined by year's business, not by individual case.

Q. I am going to ask you a rather broad question, Mr. Jamison, one of policy for your opinion: in your opinion is the producer better off to maintain or to have maintained through the present rates the existing competitive situation and the buyer outlet on the market than to have that situation jeopardized by a reduction in rates?

A. I think the producer is better off to have them stay right the way they are and pay the regular charge that they have always paid and leave the gate open for the buyers. The more buyers we have got, the better off we are.

Charge on trader not warranted.

Trans.

**The Denver
Show.**

(Witness continuing). I have been familiar with the Denver Livestock Show for twenty years; think it is the greatest thing they have ever had to improve the breeding of cattle and general conditions.

1451

Q. In your opinion has it had any effect upon the, you might say, the advertisement of the western, you might say, mountain type cattle?

**Show benefits
producer.**

A. I think it is about the only advertisement we have ever had that has done us any good.

Q. Do you know or can you state whether or not buyers have been attracted to the market who have become permanent buyers, say, your livestock?

A. They sure have, lots of them.

Q. And have been attracted by reason of the Show, you feel?

A. Yes, sir.

**Has bettered
price.**

Q. Do you think the Stock Show has had any effect on prices paid for cattle?

A. It certainly has.

Q. In what way and to what extent do you feel that?

A. Because it has encouraged the people to raise a better grade of cattle and naturally they bring better prices.

**Prices higher
during show.**

(Witness continuing). Prices are usually about \$1.00 a hundred or \$1.50 a hundred better during the Stock Show than they are at other seasons of the year. Cattle are held off the market for the show. There are always quite a number of cattle held back for the Show because they know the buyers

Trans.

are going to be here and the buyers know that the cattle are going to be here and consequently there are lots of cattle held back off the market when they have got about all they can handle anyway. **Livestock held for show.**

The owners hold these cattle back and ship them in here during the Stock Show and they are sold. **Show prevents**

It has a tendency to keep down what we call a "glutted" market. Yes, I have bought and sold live- **glutted market.**

stock at the Denver Show during Show week. To my knowledge cattle are brought to Denver by the Show which could not come here otherwise. If it wasn't for the Show they would probably go to other markets, at least a percentage of them. Yes, I guess Denver is the largest market on carloads of bulls in the country. I have bought carloads of **Show means increased business.**

1453 bulls here on order myself.

Q. Now, does a person in the country who doesn't come to the Show in your estimation get any of the educational benefits, and if so, how?

A. Well, you know the neighbors that come, they go back home and tell them what they have seen at the Show and of course a man that stays home, he never sees no cattle but his own, and he naturally gets to thinking that they are the best there is, and if he takes a trip, say, to the Denver Stock Show and sees the cattle up there, he is liable to go back home and say, "Our cattle aren't near good enough, we have got to do something to improve our cattle. We thought they were good, but they are not nearly as good as I saw at the Show." That is the general talk of visitors when they go back home. **Show benefits those who do not attend.**

Q. And also isn't it true that he perhaps sees a neighbor's cattle that have been improved by that neighbor's observations of the Show **807**

Trans.

and he immediately starts in?

A. That is where it does the good.

**Feeder auc-
tion in Denver
yards.**

(Witness continuing). Yes, I am familiar with the feeder auctions here at Denver; lots of feeders are sold at that auction. There is no argument about it, more feeders are sold at Denver during Stock Show Week than any place in the United States. No, such an auction could not be held at the Denver yards at any other time; they wouldn't have a buyer, the buyers wouldn't be here and it takes buyers to make an auction. Yes, the buyers are attracted by the Show and to my knowledge buyers come from as far east as Ohio.

- 1454 The big range movement of cattle is generally over around the first of December, and there is not
1455 much fat stuff starts back before the middle of February or the first of March. No, there wouldn't be any reason except the Stock Show that would make the receipts of cattle during January at Denver larger than they are in the month of December. If it wasn't for the Show they would be less.

**Show only
reason for
increased
business in
January.**

Cross-Examination

**Show attracts
buyers.**

There are lots of buyers attracted to the Denver yards by the Show but I wouldn't say how many. As to educational methods, we don't have so many; there is an agricultural school at Tuscon, but I don't think they do very much along the line of better cattle. No not all of the improvement in livestock in this locality, and in my own State, is due to the Stock Show.

- I don't believe there is any difference between the trader and the order buyer, at least, I couldn't
1457 say there is any difference. If you can show me that there is a difference, there might be a difference in my testimony. Yes, I know that the order buyer buys on an order while the trader takes title

Trans.

to himself and sells wherever he can. No, I do not market all my livestock at Denver; I sell lots of my cattle at home at the ranch. I suppose I sell half of it that way. There are lots of times when northern buyers, who are my regular customers, buy 2,000 or 3,000 cattle to one man; that would be a lot of cattle to put on the market, and in that particular case I find it to my advantage to sell direct. I suppose I have been around the Denver market here a third of my time. Yes, I know that the trader makes his money by buying at the lowest possible price and selling at the highest possible price. Yes, I testified that the trader would compel the shipper to pay the yardage charge. As to how he would do that, he has got a lot of people that keep him right up in line with the market. He can't buy them under the market, you know. There is a lot of competition, and if there is a lot of competition on the market, he is not going to steal them. No, he won't pay over the market if he can help it. It would be a small percentage of the cattle bought by the trader that is put back on the Denver market to be resold, but I would not know the number exactly. I would say from 10 or 15%. I don't know of a single instance where the yard trader put his cattle back the next day to be sold by a commission man. He sells them himself. Yes, possibly there might be competition with fresh arrivals if the fresh arrivals were the same kind of cattle and everything. No, I wouldn't think that would tend to depress the price. The big arrival is usually on Monday, and aside from the order lots, or the cattle that is being picked up here and there and finally sorted into carloads, a big per cent of the carloads of the stuff that is bought by the trader on Monday's market is sent out the same day on orders and to different markets. Assuming that the trader is acting only as

Trader
competition
with fresh
arrivals not
serious.

Trans.

a trader, he would probably sell to some of the order buyers that the commission men employ. Yes, in some cases the order buyers would buy the fresh arrivals, so there is some competition with fresh arrivals.

As far as the service the traders receive is concerned, he has pens allotted to him and he buys his 1464 hay the same as anybody else. That is about all I can say that he gets. Yes, it is my opinion that he does not pay for those pens; he pays for his hay and he pays for everything that he gets. Yes, the producer pays for his hay and also pays for the pen space by way of a yardage charge.

Q. But you would make the difference, then, between the shipper and the trader?

A. In my opinion the producer, if the trader wasn't there, there would be a lot of days that he might have to feed them three or four days, and by not having the traders on these markets, if a producer shipped his cattle into the market and he had to wait for a farmer or somebody to come in and buy the cattle, he might have to feed them three or four days. For my part I would rather pay the yardage charge and get my cattle sold the day they are offered, the first day they are offered on the market, and then if the trader has to keep them, he has to pay for his feed.

Q. That is correct. But do you not recognize that the producer is of more importance to the yards and the industry than the trader?

A. Well, we have got to have both of them.

Q. Surely, and you think that the producer should pay all of the charges?

810 A. I do.

Trader
benefits
shipper.

Producers and
traders both
necessary to a
market.

Shipper
should pay
all charges.

Trans.

1465. (Witness continuing). My opinion is that the yardage charge would come off of the producer any way. I think most of the traders would quit if the half charge was imposed upon them. No, I am not familiar with Chicago. If it is true that Chicago has a half yardage charge and the traders did not quit, that might possibly change my opinion, but I know that Chicago is a different market from Denver, and has a different class of cattle. They handle more fat stuff. As to a charge at Omaha, I still think the producer would have to pay it, probably 50 cents a head instead of 35; I am not familiar with the prices paid at Omaha.

Producer
would pay
charge on
trader.

1466 *Re-Direct Examination.*

Denver is a different market from Chicago or the River markets. We have more feeder cattle and stuff of that kind than they do on the eastern markets. Yes, the slaughter at Denver is relatively lower than at the River and Chicago. We are a transit or a transportation market and more or less of a concentration point on livestock.

Yes, I know that the Denver market has constantly grown in its buyer outlets. Yes, I know that has been a benefit to the producer.

1467 I think the Stock Show has had more effect in arousing more interest in livestock than the agricultural college or the county agent. Yes, surely, the agricultural college works with the Stock Show.

MERLE M. MITCHELL, a witness called by respondent, testified as follows:

1468 I am engaged in the livestock business at Brush, Colorado. We produce and feed cattle and sheep. We raise about 5,000 lambs a year and we run a cow herd. We generally feed about 25,000 to 30,000 lambs every year and run from 1,000 to 1,500 head

Trans.

The Denver Show.

Show benefits the industry as a whole.

Personal proof of benefits of show.

Show has created year-round demand.

Show results in increased business at yards.

of cattle. No, I am not a member of any livestock association.

Yes, I am familiar with the Denver Stock Show and have been familiar with it for 16 years. I have been in the livestock business all my life. Yes, I patronize the Denver market both as a buyer and a seller. When I say that I have been in the livestock business all my life I mean about 30 years. I think the Denver livestock show has been the 1470 biggest benefit, the biggest advertisement for the western cattle of anything that could happen in this western country, and I think that benefit covers the industry in the western states and is not limited solely to those who attend or exhibit at the Denver Show. It has a tendency to draw people to this country to buy up cattle other than at Show week, and that has resulted certainly in the increase in the buyer outlet.

Yes, from my own experience we have customers who now buy from us direct whom we first made contact with at the Denver Show. We ship cattle to Indiana, also to Ohio and Missouri to people who came here to the Show whom we got in contact with. I think that situation is very general among the traders and producers and has brought into prominence the Rocky Mountain type of animal. It sure has created a demand for that type at all times of the year.

As to prices, take Stock Show week these cattle would bring anywhere from 75 cents a hundred to two dollars a hundred more than they would the ordinary week before or three weeks before or possibly three weeks afterward, and the producer sure receives that additional price.

Yes, to my knowledge livestock is held off the market for the Show. I hold my stock off year after year waiting for the Stock Show week to

Trans.

1472 come. I think that if it were not for the Stock Show week in Denver, there would be times that your market would be just kind of glutted with cattle and would have more cattle than it could handle. The effect of a glutted market is that the producer would try to find some different market to put his cattle in. No, I do not think that the cattle would come to Denver at other times of the year if you did not have a Show. There would be a certain percentage of them that would come and I think there would be quite a few cattle that would

Show prevents
glutted
market.

1473 not come here that would go to other markets. As to bulls, it is known through the southwestern and northern cattle country that Denver is the best place to buy bulls in the United States during the Stock Show week because they assemble more good bred bulls at that time and people can come here and see maybe a thousand or fifteen hundred of them in two or three hours, if they wanted to look at that many, and if you had to drive over the country, it would take thirty days to get what he really wanted. Yes, there are State regulations covering bulls. In Colorado you cannot turn a bull loose on the range or on the forest reserve unless he is a registered bull and a good individual with it. I have had a little experience myself with that. He has to come up to certain specifications and you cannot turn him loose unless he is registered and is a fair individual. I think there are these same requirements in Wyoming and Montana.

Benefits of
the bull
market at
show.

1474 Yes, I am familiar with the feeder auction at Denver. It is the largest auction in the United States by far, I guess. Stock Show week is the most probable time for an eastern man to buy his cattle that he is going to put to graze in the Spring. He buys a few carloads to finish out on corn and blue grass. Yes, the Stock Show brings the buyers to Denver, and unless there was a concentration

The feeder
auction.

Show brings
buyers.

Trans.

of buyers, I do not think that such an auction could be held. In other words, I figure you have got to have the buyers or you couldn't have that kind of an auction, and the buyers have to come from a lot of States to take the cattle in as big runs as they have there at Stock Show week. I don't think the buyers would come here in numbers like they do at Stock Show week unless it was for the Stock Show.

Increased
business due
to show.

As a rule, comparing one year with another, the range movement of grass-fed or mountain grass-fed cattle, would end the latter part of November or the first part of December. A good many of those cattle go into the feed lots for finishing or grain and come back to the market, some in February 1475 but mostly in March and April. Yes, those that come back in February would be known as short 1476 feeders. They would have to be somewhere between a packer animal and a feeder when they were bought. Yes, that is what was formerly called a 1477 "two way" animal. If it were not for the Show, receipts for January would be very much lighter than they would be in December.

January
receipts due
to show.

Traders
essential to
producer.

I think the development of the buyer outlet and the buyer outlet is one of the most important things; it is practically as important, if not more important, to have these order buyers or yard traders as it is to have the packer buyers from the producers' standpoint. It would be a great thing if they could get twice as many buyers on the market as they now have for the man who is producing the livestock. 1478 Yes, I heard Mr. Jamison say the more buyers the better off the producer is and you bet I subscribe to that. I like a lot of them when I come to town any time. Yes, the yard trader is very much of a valuable asset to the producer whether he buys as an order buyer or for himself and gambles on the market. In fact I wouldn't want to ship cattle to

Won't ship
to market
without
traders.

Trans.

a market or any place unless I had competition like a yard trader or a speculator or an order buyer with the packers.

As far as my feeling goes on the question of whether the yard trader uses pens for a longer period and whether he should be charged for that, I think it is the producer who pays that and in order to have your competition your yard traders and order buyers can't be charged a yardage on their cattle. It looks to me as though they would have to quit business. I don't believe a yardage charge could be put on at Denver as it may be in

Charge on traders would destroy competition.

1479 Chicago without hurting the market. You take the Denver market as compared to the Chicago market. You are practically at the end of your string in the Chicago market and that is about the last market you can ship a feeder steer to or it is the last one I ever shipped one to anyway, and I have shipped a good many thousand. I have an idea they could do things at Chicago that they couldn't do elsewhere. I think they do that anyway and get away with it. Yes, I heard Mr. Jamison testify that he thought the charge would come out of the producer anyway. Where else would it come from if it didn't come out of the producer? He has got to pay it all anyway. I think the charge, whether on the order buyer or the trader, would revert right back to me.

Chicago not a criterion.

Producer would pay charge on trader.

Cross Examination.

1480 Yes, I think a certain percentage of the traders would leave the yards if an extra charge was imposed upon them. I am not familiar with Omaha, although I ship a good deal of livestock there, but I really would not know what effect the reweigh charge has had down there. I don't believe they are paying it down there. I just had a conversation with a commission man from Omaha last Saturday

Trader not paying yardage at Omaha.

Trans.

1481 who was at my place and I am under the impression from his conversation that they are not all paying yardage down there. Yes, they may have to pay it in time. Yes, if there has been no decrease in traders it might affect my opinion. I do not know for sure if there has or hasn't been.

Yes, I know the rule about registered bulls was made by the Department of Agriculture and the Forest Service. I don't know whether it was made from their own studies. Maybe they got some of their schooling from what they observed, like myself, through our Stock Show advertisement.

1482 We handle from 4,000 to 15,000 cattle a year,—it varies, and I expect we ship that number and sometimes more. We handle from 50,000 to 100,000 to 250,000 head of sheep. No, I do not sell all those cattle and sheep at the Denver yards. We are east of the Denver market with our lambs and can't come back this way with them when they are fat. We have to go to Omaha, Chicago or St. Joe.

Producers
patronise
show.

1483 We have a good many cattle through Denver, I would judge around 1,500 to 2,000 head. Oh, I expect there are some shippers who do not patronize the Denver Show but there are very few in this western country that don't patronize it. I expect there are mighty few cattle men in this western country in this locality that ship cattle to the Denver market but what have cattle here Stock Show week. I couldn't name you one and I know several hundred producers over the country. Yes, I think the producer who don't come here Stock Show week should pay part of the Stock Show expenses because I think his cattle will bring more money through the advertisement of this Stock Show, like fellows from Indiana and Ohio that come here and buy these good cattle. I think that is the biggest advertisement that our western country has got.

Producer
benefits
though not
attending
show.

Trans.

I know a lot of people back at Schleswig, Iowa, and I think it is just the last six or seven years that they have gotten to come here buying their cattle, and it was through the cattle that went from the Denver yards back into that country that made them see how they fed out and the growth they put on and the way the cattle finished out. I have received a personal benefit of many thousands of dollars worth in the sale of cattle from the Stock

Personal
proof of
benefits of
show.

1485 Show.

Re-Direct Examination.

No, I do not know how long the tariff in Omaha has been in effect, and I do not know the date of the final decision in the rate investigation there.

1486 Yes, my shipments to the Denver market are fairly regular throughout the year. Yes, every year I hold back livestock for the Denver show, but I have shipments on the Denver market pretty near every week.

L. M. PEXTON, a witness called by the respondent, testified as follows:

1487 I am Assistant General Manager of The Denver Union Stock Yard Company. I first entered this service in 1924 as Traffic Manager. In 1928 I went to Oklahoma City as Manager of the Oklahoma Stock Yard Company at that point. I returned to the employ of The Denver Union Stock Yard Company as Assistant General Manager. I first came to the Denver yards in 1915 as Cashier for the C. B. & Q., the D. & R. G. W. and the D. & S. L. In 1917 I was promoted to agent for these companies. In 1918 I was appointed joint agent for all roads entering Denver at the Denver yards, holding this position until employed by the Stock Yard Company in 1924. Yes, I was located in Denver prior to the major changes in the yard which were made in 1917. It was part of my duty

Qualifications.

Trans.

to supervise the handling, the loading and unloading of livestock from a railroad standpoint during the period 1915 to 1924. Yes, I am familiar with the changes made in the yards in 1916 and 1917 and since that time. I was out over the yards practically every day, was here prior to and during the construction of the first sheep barn, the tracks along the river, the river chutes, the extension of
1488 the Burlington chutes, the building of the U. P. chutes, the extension of the cattle yard, the building of the new Exchange Building and other changes made at that time. I was also here during the building of the new sheep barn in 1929. The only development or additional construction which occurred while I was not here was the building of a few cattle pens in 1928. That was when I was vice-president and manager of the Oklahoma City yards. Yes, it is a part of my duties to know and study the territory from which the Denver market receives a majority of its receipts of all kinds of livestock and I am familiar with that territory. I make frequent trips all over this territory and have for many years. I attend numerous livestock conventions, visit daily with livestock producers, keep in touch with local conditions in all our territory,
1489 and generally try to keep informed on live stock conditions, weather conditions, range conditions, feed conditions and other matters which may affect our business. During the past year I have been over our territory in Nebraska, Kansas, Colorado, Wyoming, Idaho, Utah, Oregon, Washington, New Mexico and Arizona. These trips are usually made by automobile with frequent stops made to visit and consult with bankers, producers and anyone
1490 else interested in the livestock industry. For more than 20 years my entire time and experience has been with stockyards, the livestock industry and transportation intimately connected with the indus-

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try and with stockyards. I am a licensed practitioner before the Interstate Commerce Commission.

Yes, I have heard the testimony of the Government witnesses in this case. Dr. Dozier testified **Receipts defined.**

that when he spoke of receipts he was speaking on the basis of figures given him by the Yard Company. By "receipts" we mean all livestock that is "booked in," so to speak, at the Denver Stockyards, no matter how received. Receipts are by no means the same as sales. "Sales" refer to the livestock which is actually sold on the market, while "receipts" includes, in addition, through shipments which merely stop for feed, water and rest, as well as shipments which try the market but for one reason or another do not sell. **Receipts and Sales not synonymous.**

I have an exhibit showing the percentage of sales to receipts at the Denver market which has been marked for identification as respondent's exhibit 5, and is entitled "Receipts and Sales of Livestock at the Denver Market for the years 1913 to 1934, Inclusive." This shows receipts and sales of cattle, calves, sheep and hogs separately and the percentage of sales to receipts of each species at the Denver market during that period.

1491 Yardage, or, as it is properly called, the marketing charge, is not charged at Denver on shipments which do not use the privilege of the market and do not sell for various reasons. It obviously would be impossible and improper to collect the marketing charge on shipments feeding at Denver to comply with the 36-hour law while moving from range to range, range to feed lot, or from point of origin to another market, because such shipments do not use the market. There are numerous central markets east of Denver, which, in the past, have received the majority of the fat livestock from the west. To attract this business, it has been neces- **Marketing charge.**

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- sary to grant the same arrangement on this traffic as on traffic handled for the railroads. If a charge were made regardless of whether the livestock sold or not, many shipments would not come to Denver.
- 1492 If a yardage charge were made on shipments handled for the railroads for feed, water and rest under the 36-hour law, other feed yards would be built adjacent to Denver or the livestock would be fed at other points. We have found this practice materially increases the amount of traffic trying the market and actually selling.

The year 1934 includes arrivals of substantial numbers of government cattle, calves and sheep. The year 1933 includes government pigs. 1933 may be considered normal at this time for cattle, calves and sheep, and 1934 for hogs. It will be noted the cattle average for recent years is from 83% to 93% sales of arrivals. An average for the future would be about 87%. With calves, the per cent is from 76 to 90, with about 82% to be expected. Hogs have gradually been going down as California has become more active in purchasing in our territory and has been using Denver as a feeding point. Yardage was collected on 64% of the hog arrivals in 1934, this including packer directs, which pay yardage. Sheep have steadied off to an average of about 74%. When I say that yardage is paid on packer directs that is because at Denver we have a contract with the packers which provides they shall pay yardage until the year 1936.

- 1493 Respondent's exhibit 5 shows the progress which has been made over a 20-year period in increasing the percentage sold at Denver. In 1913 the percentage of cattle sold was 51%. 20 years later, in 1933, that had been increased to 93%, or in effect, from a revenue standpoint, it was an increase in receipts paying the marketing charge of about 80%. Calves increased from 57% sold in 1913 to

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76% in 1933 and, at times, have run as high as 100% sales. Hogs, because of California direct buying, have decreased from approximately 100% in 1913 to 70% in 1933. Sheep increased from 39% sales of 620,431 head in 1913 to 71% of 2,902,316 in 1933. All of these have been caused by increasing buying demand at the Denver market, by development of the market in various ways, as shall later be covered.

Increased percentage of sales due to development of buying demand.

Respondent's exhibit 5 offered in evidence. By stipulation of counsel, right to object was reserved until after cross-examination.

Resp. Exhibit 5 offered.

1494 Yes, I testified that no shipments pay the marketing charge unless actually sold with the exception of packer directs. The packers pay full yardage on their direct slaughter at Denver due to their contract relationship.

The receipts at Denver vary very materially. I have prepared an exhibit concerning this, which has been marked for identification Respondent's.

Peak loads and seasons.

1495 Exhibit 6. This exhibit shows the monthly sheep, cattle and hog receipts at the Denver market for the years 1930 to 1934, inclusive, also the variation between the high and low months of each year, and the average variation for the five-year period. Sheet 1 shows the variation in sheep receipts. The average variation for the five-year period between the high and low month in this species is 485,964 head. It will be noted the maximum receipts come during the months of August, September and October, this being the time when it is necessary to get the lambs out of the mountain forest reserves. Producers have no choice except to market during these months. If they hold them longer on the forest reserves, they might become snowed in and there would be danger of extreme losses. They cannot ship them earlier because the lambs are not

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ready. We have endeavored by intense solicitation to build up our receipts during the light months, and, it will be noted, have been reasonably successful in doing so. The periods May, June and July, prior to recent years, have always been light sheep months for us. In 1930 the total receipts for this three-month period were 187,314 head. In 1934 total receipts for this same period were 747,332 head. We have been able to change these months from deficit into profit months for the company by this work. If our peak period only lasted for a week or two, we might be able to get along with less facilities, but when it lasts three months we must provide facilities to take care of the receipts or not render the patron the desired service.

I call attention to the fact that receipts during the months of May, June, July, August and September, 1934, were the largest for these months for the past five years. Our sheep receipts during the Fall arrived in a steady stream and it isn't a case of receiving exceptionally high receipts on one day and having two or three days to clean them up. As these lambs come off the range they are mixed fat and feeders and it is necessary to sort off the fat end, they being sold the first day and the feeder end usually the next day. This results in receipts piling up and a larger number being on hand than the daily receipts might indicate. During the week starting October 8, 1934, our receipts on successive days were as follows:

Range conditions create peak loads.

Monday	58,782
Tuesday	27,246
Wednesday	42,480
Thursday	21,830
Friday	41,218
Saturday	20,131

Trans.

year period being 86,694 head. The same conditions are true with reference to cattle as with sheep, i.e., these cattle must be moved off forest reserves before winter sets in. We have no choice but to provide facilities for these cattle at the time producers must ship them or not render service. It will be noted the peak in cattle receipts comes at substantially the same time as the peak in sheep receipts, i.e. during the Fall months.

Page 3 shows the variation in hog receipts, the average variation for the five-year period between the high and low months being 53,249 head. The peak is usually in December, January and February.

- 1497 The number of head of livestock loaded in a car varies greatly, depending upon the weight of the animals, and it has been necessary to reach the average figure. I have a statement which is marked for identification Respondent's Exhibit 7, showing the actual loading of cattle, calves, hogs and sheep per railroad car received at the Denver market for the years 1933 and 1934. The calf average in 1934 was increased on account of the Government drought program. It will be noted sheep load approximately $7\frac{1}{2}$ to 8 times the average head per car of cattle. Witness Christensen commented on the sheep division only occupying approximately one-fifth of the cattle division for about four times the receipts in number of head. The sheep division is double-decked—the cattle division is not. There is no similarity between the room needed to handle these two species. Our sheep receipts are largely single ownership per car, while cattle are mixed ownership. There are also many more sorting and selling classifications on cattle than sheep, which require more pens. We endeavor to furnish the facilities required by our patrons in both departments without reference to each other, and do not

Average car loadings of livestock.

Trans.

enlarge until necessary to render proper service. Our cattle receipts in 1934 totaled 765,000 head, or, on an eight to one basis, equal to about 6,000,000 sheep.

Resp. Exhibits 1499
6 & 7 offered.

Respondent's Exhibits 6 and 7 offered in evidence. The Government reserved the right to object per stipulation.

Stockyard
business not
monopolistic.

Yes, I have read the testimony of the Government witnesses concerning the competition between this market and other markets and the impression has been given that there are some monopolistic features in the stockyards business similar to what is usually in public utilities of the gas and electric type. Any such impression is far from the facts. The livestock shippers in the territory tributary to the Denver market have many different markets they can ship to, as well as numerous local outlets, and are in no way compelled to market their livestock in Denver. On the contrary it is a continual effort for those on the market to keep the traffic coming to Denver and, even with these efforts, they have not always been successful. In my following testimony I do not wish to leave the impression that the Denver market is obsolete and going on the rocks, but simply wish to show that

Competitive
nature of
business.

1500

Rates must
be substan-
tially uniform.

the business is highly competitive and that the solicitors of other markets invade what might be termed Denver territory, that the producer has the right and opportunity to market with equal facility at any one of several markets or in any one of several ways, and that for these reasons the Denver market cannot have widely divergent rules or rates compared to other markets or other methods of selling. For these reasons our rates must be substantially the same as those at other competing markets, irrespective of whether or not such rates give a reasonable return. Competitive conditions govern and we have no monopoly.

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The Denver Union Stock Yard Company has at this time three traveling representatives, who put in all of their time on the road. The territory we work for cattle is Colorado, southern Wyoming, northern New Mexico, and to some extent, western Nebraska. The hog territory includes Colorado, western Nebraska and Kansas. The sheep territory includes Colorado, southern Wyoming, northern New Mexico, Arizona, California, Utah, Idaho, Oregon and parts of Washington and Montana. All of this territory is worked by our men at different times of the year. In addition to this, we carry annual and seasonal advertising in magazines and bulletins such as the Producer, The National Wool Grower, The California Wool Grower, The Idaho Wool Grower, and others. We also send out circulars, daily sales sheets, The Denver Daily Record Stockman and other matter of an advertising and promotional nature. We will hereafter describe the various forms of marketing that exist for producers in our territory for cattle, sheep and hogs, and the competition they give to the Denver market. At the outset we point out that solicitors from other markets are at all times active in all of this territory attempting to secure shipments for their markets. The competition from other markets is very definite and very real.

As to the specific competition which the Denver market encounters in each species:

- 1501 Denver receives 90% of its cattle receipts from the States of Colorado, Wyoming, Texas and New Mexico. On a five-year average, ending with 1933, 68 per cent of its receipts came from Colorado. Colorado receipts at Denver are divided about 65 per cent from range territory and 35 per cent from feed lots and small farm cattle.

**Competitive
nature of
business.**

In the case of range cattle, many avenues of sale

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are open to the owner. He may market at Denver or he may ship to any one of the Missouri River markets or Chicago. Railroad service is excellent to any of these other markets. *Livestock may now* move from Rifle, Colorado, a representative western slope shipping point on the D. & R. G. W. Railroad to Omaha without feeding en route. Improved railroad service and the opening of the Dotsero Cut-off has brought the majority of these loading stations at least 36 hours nearer the northern Missouri River markets. Cattle from the North Park section of Colorado, which must move through Laramie, Wyoming, to reach Denver, may move to any Missouri River market without feeding en route. Receipts of Colorado cattle at the four river markets in 1933 totaled 74,953 head, or 25 per cent of the Denver receipts. In 1934 they received 215,497 head, or 44 per cent of Denver. However, this included some Government cattle. We do not have Chicago's receipts, and, therefore, cannot make a comparison with them.

California demand has been growing in our territory for cattle during recent years. California packers actively buy and California markets actively solicit shipments in Colorado. In 1934 the movement of cattle from Colorado to California exceeded 100,000 head. A large part of these formerly came to the Denver market. Part of this movement in 1934 was caused by the excellent range conditions in California, and part were Government cattle, however, the movement has been growing steadily for several years and will continue to be an increasing menace to cattle receipts at the Denver market.

Direct selling 1503
and buying.

There is a growing tendency for producers to sell direct and for feeders to buy direct, this apparently being one of the trends of the times accelerated by the provision of the Interstate Commerce Commission that the 85% stocker and feeder rates

rans.

will apply around central markets but not through them or if the shipments are sold on such markets. By this 85% rate I mean that the Interstate Commerce Commission has established what might be termed 100% rates on livestock from all points of origin to practically all destinations and has made a specific provision that 85% of this 100% rate will apply on stocker and feeder animals when not moved to or sold at markets where the other rate applies. For example, the rate from Rifle, Colorado, to any Missouri River point is 61c per hundred. To points adjacent to the Missouri River markets where the same rate might apply, the rate on stockers and feeders purchased at point of origin and moved to such adjacent points, would be 85% of 61c or 52c per hundred pounds, but the full 61c rate would apply if the stockers and feeders were moved to the markets. The same thing applies at 1504 Denver. We find a tendency to avoid the market on account of the 85% rate especially marked among the larger feeders. One large Nebraska and Wyoming feeder last fall purchased over 60 carloads of cattle at Gunnison, Colorado, moving direct to his feed lot. Had he not made this purchase, the cattle would undoubtedly have come to Denver. In another case, an operator on the Denver market received an order for 10,000 cattle from a corn belt feeder. He filled 25% of this order on the Denver market and the other 75%, or 7,500 head, in the country in order to get the 85% rate.

**The 85% rate
on stockers
and feeders.**

As to the competition on fat cattle from the feed lots and cattle from small farms, much the same competitive conditions exist. Fat cattle from northern Colorado may move readily at express train speed to the Missouri River markets or Chicago. Greeley, Colorado, is in the heart of the northern Colorado beef feeding section, 55 miles north of Denver. A fattener, or as he is generally called,

**Fat Cattle
competition.**

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a feeder, loads his cattle for either Denver or Omaha in the evening. If coming to Denver, he arrives there about midnight, while if going to Omaha, he will be at that point, 500 miles away, 1505 by 7 o'clock the next morning, in plenty of time for the same day's market on which he might sell in Denver. If he desires to go to Chicago, he can reach that point without feeding en route. Just a few years back, one feed was required to reach a Missouri River market and two to reach Chicago. Any geographical advantage we may have enjoyed at that time has been destroyed.

**Auction Sale
Competition.**

County auction sales also affect the situation decidedly. Auction sales have sprung up all over this territory, as well as in eastern Colorado and western Nebraska and Kansas. Greeley, Colorado, has four different auction sales, or almost one for every day of the week. I recently attended some of these auctions, as well as auctions in other localities, and found cattle selling up to \$90.00 per head and, because auction sales at such points are not regulated by the Secretary, paying selling fees three and four times the entire cost of selling at Denver. There are two auction sales at Sterling, Colorado, 100 miles northeast of Denver, and others at Holyoke, Colorado, Brush, Colorado, Yuma, Colorado, Wray, Colorado, Benkelman, Nebraska, Imperial, Nebraska, McCook, Nebraska, St. Francis, Kansas, Goodland, Kansas, in addition to many others in Denver's territory. New auction sales are springing up weekly in all of Denver's feed lot and plains territory.

Direct Buying. 1508 The competitive nature of the business is further augmented by direct buying. As stated previously, California has been in our territory for both fat and feeder cattle in recent years. This Spring interior Iowa packers were in Denver territory purchasing

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direct. On one trip, a buyer from Morrell of Otumwa purchased 2,000 cattle out of feed lots within 40 miles of Denver, and has made additional trips into Denver territory since then. We have found no way to combat this, for such sales would be made if there was no marketing or feed charge at Denver, but it illustrates that we have no monopoly. The conditions of which I have been speaking are more or less general in all of the States which supply the Denver market with cattle. The majority of Wyoming's shipments to Denver come from southern Wyoming, and those from New Mexico come from northern New Mexico. Conditions in both of these sections are comparable to Colorado. Texas is more removed from Denver and has additional outlets through Fort Worth and Oklahoma City. These trends, we believe, are the cause of the decrease in Denver's cattle receipts over the past five years in the face of an increased supply. Colorado's shipments to the Denver market have decreased from 438,000 head in 1929 to 299,000 in 1933, a decrease at Denver of 139,000 head or 32% in the face of an increased supply.

1509 In the case of sheep, the same central markets are open to producers as in the case of cattle. Northern Colorado is one of the larger lamb feeding districts of the nation. Lambs from this section can load and make any Missouri River market or Chicago without feeding en route. There is no geographical or railroad condition which forces the business to the Denver market. In 1933 the River markets received 640,296 Colorado sheep or 50% as many as Denver, and 1934, 767,577 Colorado sheep, or 55% as many as Denver. **Sheep Market Competition.**

The same is true with Idaho and California lambs moving through Laramie, Wyoming. These lambs must move 110 miles out of line to reach Denver. The majority of them feed at Laramie. They can

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reach any River market from Laramie without feeding en route.

Direct buying of feeder lambs has been practiced to some extent for many years in this territory. This usually increases as the supply of feeder lambs decreases, and we are faced with a decrease the coming few years, principally due to curtailment of range by the Taylor bill plus the fact that the industry has been over-expanded in the past. Direct buying of fat lambs in Denver sheep territory has not been practiced except in the case of California within the past two years. Last year the large packers started purchasing fat lambs in Idaho and western Colorado. In Idaho in 1934 Swift & Company took 175 cars from one shipper who had previously been marketing at Denver. Swift, Armour and Cudahy bought large numbers of lambs 1510 on the Moffat Line and the D. & R. G. W. in western Colorado last fall. Just where this will end we do not know. We do know that there is a trend in that direction and that producers marketing at Denver have many avenues of sale open to them. The Denver market by no means has a monopoly on this traffic.

Hog Market
competitive.

With hogs, about the only business the Denver market now receives which sells on the market is the trucked-in shipments. California buyers have invaded every part of our territory and, regardless of prices paid at Denver, pay an amount sufficiently higher to make the purchases. Practically every town has a buyer representing California. Practically every town has an auction sale where hogs are sold. Denver packers meet this competition by also buying direct; however, this condition does not give the market any assurance that a good volume of hogs which will pay yardage will be received from this source. If prices get too high, it results in a movement of dressed product into Den-

rans.

ver territory. For example, Denver packers, in attempting to attract a supply of hogs to Denver, got the Denver price 70c over Chicago. They attempted to pass this cost on to the consumer. Interior Iowa packers noticed the prevailing prices of hog products at Denver and immediately shipped in several cars of dressed product, underselling the market. Denver packers, could not, of course, continue to take this loss and had to get their prices back in line with corn belt prices.

1511 A resume of our evidence along this line is that the Denver market in no way had a monopoly on the livestock produced in its territory; that producers have many outlets open to them and use all of these outlets; that in order to maintain our supply we must keep our market in line and facilities adequate; that other sections of the country having a deficit of livestock are gradually encroaching on our territory; that selling costs at Denver in no way bar this traffic from coming to Denver, but on the other hand, producers patronize other marketing agencies which are much more expensive, are not regulated, and are not as efficient.

1512 In my opinion the prospects are that the average supply of livestock coming to the Denver market will be greatly reduced. I cannot say how long this condition will continue, no one can, but I am certain that for the next two to three years the supply will be much below normal and hence the five-year average will necessarily be low. I base my opinion on my own knowledge and observation of conditions in the territory tributary to the Denver market, and also on the published forecasts of the U. S. Department of Agriculture. The year 1934 witnessed the most severe drought in the history of the West. It covered all states west of the Missouri River to the Pacific Coast Range of States, where its effect was not as acute. In order to accord re-

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lief to range men and particularly to the cattle and sheep owned by them, the Government entered into a relief program, which finally resulted in the purchase by the Government of over 8,000,000 cattle and 3,500,000 ewes. The result of this program is that the cattle population, and especially that of female or producing cattle, in the States west of the Missouri River and tributary to the Denver market, is much less than it was on January 1, 1934, or for several years prior to that date.

- 1513 A paper was marked Respondent's Exhibit 8 and witness asked to identify it.

**Resp. Exhibit
8 offered.**

Respondent's Exhibit 8 is a statement of Government purchases of sheep and goats issued by Harry Petrie of the AAA, and includes all Government purchases up to February 16, 1935. It is a cumulative report as it is headed, and as indicated in the lower left hand corner "Program Concluded" is the final report of the Department except for such corrections as might be made later.

- A similar exhibit shows the same information with reference to cattle and was issued by the same
- 1514 Department showing all cattle purchased up to April 8, 1935. The Government program was concluded prior to that date, and shows \$111,531,383.00 total payments by the Government on account of drought cattle. The first column shows the number of producers who sold cattle to the Government, and totals 696,679 separate producers. The second column shows a total of 25,253,425 cattle owned by the above number of producers. The third column
- 1515 shows the total number of head sold by these producers to the Government, namely, 8,290,741 head of cattle, and the fourth column shows the number condemned on ranches and not shipped to any point for slaughter. This last totals 1,479,679 head. This figure is included in the figure of 8,290,741

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- head total purchases. The States listed, namely twenty-four where cattle were purchased, and twenty where sheep were purchased, are practically all west of the Mississippi River. Of those States,
- 1516 Colorado, New Mexico, Wyoming and Texas originate the majority of Denver's cattle supply. California, Colorado, Idaho, New Mexico, Oregon, Texas, Utah and Wyoming originate the majority of Denver's sheep supply. We occasionally receive cattle from Utah, Arizona, Idaho and Nevada, but the past few years, due to the enlargement of demand in California, the movement of cattle from these States to Denver has been rather light.
- 1517 Respondent's Exhibits 8 and 9 offered in evidence subject to such objection as the Government may desire to make following cross-examination. **Resp. Exhibits 8 & 9 offered.**

Respondent's Exhibit 10 is a statement of the U. S. Department of Agriculture of the Agricultural Outlook for 1935, being labeled Miscellaneous Publication No. 215. Pages 51 to 70 cover thoroughly the outlook for cattle, sheep, hogs and horses. It is stated in the foreword that the conclusions are conservative and are based on the best information obtainable from all sources. We will briefly quote from various pages to indicate just what the Government itself thinks the prospective supply will be for the next two years. The pamphlet was issued in November, 1934. None has been issued since which contradicts it.

Witness then quoted from pages 58, 59, and 60 of said Report, concerning cattle, wherein it is stated, among other things, that 80% of the cattle purchased by the Government and slaughtered were cows and heifers. Based upon this statement, and comparing the government census of January 1, 1935, of female producing cattle on Colorado farms with the five-year average, 1930-1934, the witness esti-

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mated the calf crop of 1935 and 1936 to be less than 276,000 head.

In normal years a State which is short of breeding cattle can go to adjoining States to secure its shortage. There is no State to which any of the western States tributary to Denver can go for an additional supply because such States are all short. The cattle that are gone on account of the drought are gone for several years. Rain in 1935 will not replace them.

- 1523 It is true that during the past two months we have had very good rainfall in our mountain districts and rainfall above normal in northern Colorado, in the area around Denver and in the part of the plains section east of Denver. The water level, that is the water level below the ground has been restored in some cases near the mountains but in eastern Colorado it is still much below normal. This recent moisture has considerably alleviated the situation. Grazing conditions are probably better at this time than they have been any time for the past three or four years. This will, of course, restore our herds much sooner than if the rainfall had not occurred. Naturally if the drought had continued as severe as it was a return to normal would have been impossible. This rainfall with continued precipitation in the future should result in the restoration of our cattle population—oh,—by the end of 1936 for example. However, rainfall does not immediately replace animals that have been lost on account of a drought by any means. It does not have in-
- 1524 stantaneous effect upon the calf crop; after the female cattle have been removed the calf crop has gone forever. The female calves must be held off the market for a couple of years to replace the cows which have been destroyed in order that normal production will again recur.

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During the period 1929 to 1933 there was a definite downward trend all of these years until, in 1933, receipts had decreased 139,000 from 1929. No consideration has been given to this factor although we know it is likely to continue in the future to some extent, it having been caused by direct buying, auction sales, application of 85% rates around the central markets, the west coast reaching into our territory, etc.

By the same method of calculation the trend of receipts from the remaining three States tributary to the Denver market as employed before, namely New Mexico, Texas and Wyoming, are as follows:

STATE	Average Cattle on hand Jan'y 1st, 5 years	60%	Government Purchase	Average Received at Denver 1929-1934	Prospective Receipts 1935-1936
Colorado	1,558,000	951,000	289,000	364,000	276,000
New Mexico	1,445,000	867,000	545,000	37,000	18,000
Texas	6,740,000	4,040,000	1,955,000	37,000	23,000
Wyoming	1,023,000	600,000	285,000	41,000	25,000
					<u>342,000</u>

The prospective receipts of 342,000 equal 93% of Denver's receipts. 100% equals 370,000 or only 48,000 under the actual of 418,000 received in 1933.

For the five years ending with 1933 Denver's cattle receipts totaled 2,563,732 head. Of these 350,476 or 13.7% were calves. 13.7% of the prospective receipts of 370,000 for 1935 and 1936 equals 50,700 head of calves. For this reason it may be estimated that Denver's cattle and calf receipts for the next two years will be as follows:

1527

319,000 adult cattle
50,700 calves

These statements of receipts and prospective receipts are not synonymous with cattle sold because the Denver market is a large feeding point for shipments en route to ranges, feed lots or other mar-

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kets, and because there are markets east of Denver at which producers often think they can do better and frequently forward their shipments unsold from Denver to those points, all shipments received at Denver are not sold. The marketing charge is not charged unless shipments are actually sold. The average sales of cattle and calves for the five years ending with 1933 were as follows:

Year	Cattle	Calves
1929	83%	90%
1930	86	83
1931	87	90
1932	90	79
1933	93	76

Because of the number of Government cattle forwarded unsold in 1934, on which yardage was not charged, the 1934 cattle percentage of sales was 77%. We have not used that figure because it would reduce the prospective sales for 1935 and 1936 and would not be a fair figure.

For rate making purposes, the estimated number of cattle and calves which will sell at Denver in 1935 and 1936 is as follows:

Adult cattle 87.8% of 319,300—280,345 head.

Calves 83.6% of 50,700—42,385 head.

1528 The numbers on which yardage was actually received for the years 1929 to 1933 inclusive are as follows (this includes everything that paid the marketing charge, including resales through commission firms):

1528	Year	Cattle	Calves
	1929	461,796	61,567
	1930	433,275	72,989
	1931	381,915	58,224
	1932	329,090	46,802
	1933	321,642	53,379

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I have eliminated 1934 because it is not representative on account of the receipts of Government cattle last year.

Our estimate of prospective sales for 1935 and 1529 1936 is only 41,000 cattle and 11,000 calves, or approximately 14% under those actually sold in 1933, and our estimate is conservative.

Witness then quoted from pages 61 to 66 of the Government report (Resp. Ex. 10) concerning sheep, indicating a sharp reduction in sheep marketings in 1935. Of the 3,606,000 ewes purchased by the government in 1934, 75% were from the Denver market territory. The witness then analyzed in detail prospective sheep receipts from Colorado, California, Idaho, New Mexico, Oregon, Utah, Wyoming, and Texas, giving in detail his method of computation and analysis. The testimony on this feature appears at pages 1530 to 1539 of the Transcript.

1539 It was stipulated by counsel that the detail of the figures comprising "Stockyards Company's net worth December 31," and referred to in the testimony of witness Dozier, at Transcript page 889, may be placed in the record after the adjournment of the hearing. Counsel for the Government objected on the ground that the information was immaterial, which objection was overruled.

1544 (Witness continuing). All sheep received in Denver are not sold. As is true with cattle, Denver is a large railroad feeding point for shipments en route to feed lots or ranges. Numerous lambs are also forwarded unsold by owners who feel they can do better at some market farther east. In either case no marketing charge is made. Following is the percentage of sheep sales at Denver for the five

Trans.

years 1929 to 1933, inclusive:

1929	66%
1930	76%
1931	74%
1932	78%
1933	71%
AVERAGE	73%

Percentage of sales in 1934 was 76%, which was below 1932, equal to 1930 and, eliminating government ewes, about the same as the five-year average. Applying the 73% average sales to the estimated 1935-36 receipts, we have the following result:

73% of estimated receipts of 2,340,000 equals 1,708,200 on which the marketing charge would be collected. These estimated sales of 1,708,200 exceed any year up to 1931, and is, therefore, a liberal estimate.

The witness then quoted from page 53 of Resp. Ex. 10 wherein it is stated that 1934-1935 marketing of hogs would probably be the smallest in 20 years.

(Witness continuing). During the past few years there has been a definite change in the marketing and destination of hogs produced in Denver territory. For many years and up to about 1925, practically all the hogs produced in this territory came to Denver or moved east. When they came to Denver they were sold. Prior to 1925 there was practically no west coast demand for hogs in Denver territory. For the period 1913 to 1922, inclusive, 98 to 100 per cent of the hogs coming to the Denver market sold and paid the marketing charge. From 1923 to 1925, inclusive, the sale percentage was 95%. Since 1926 it has gradually been decreasing, this reflecting the use of the Denver market as a feeding point for hogs en route to the west coast.

Trans.

The percentage of sales in 1930 was 89%; 1931, 77%; 1932, 75%, 1933, 70%, and 1934, 64%.

1933 and 1934 were the largest years Denver has ever had in hog receipts, as distinguished from hog sales. These years more accurately reflect the present and future normal condition than years prior thereto.

I estimate receipts and sales, that is to say, the number of receipts and sales upon which The Denver Union Stock Yard Company will collect yardage for the year 1935, is as follows:

	Receipts	Sales
1555 Cattle	319,000	280,345
Calves	50,700	42,385
Sheep	2,340,000	1,708,200
Hogs	426,000	276,900

The Exhibit identified as respondent's Exhibit 11 takes our estimated receipts and sales for the years 1935 and 1936 and compares the revenues from such estimated sales at the prevailing rates with the actual results of the year 1933. It is assumed the same quantity of hay per car or head will be fed during the year 1935 as was actually fed in 1933. The same margin of profit on hay is used for the year 1935, that is, 61.7 cents per cwt. on hay put on the fence, and 71.4 cents per cwt. on hay fed out, as was actually the margin in 1933, although our actual margin of profit at this time is somewhat below that estimated. Loading and unloading, weighing and miscellaneous yard revenues were reduced in the same ratio as the estimated decrease in receipts. Other income, such as the Exchange Building, was assumed to be the same. Operating expenses which are more or less controllable, such as labor and repairs, were reduced in the same ratio as the estimated decrease, although we know from experience that when business drops off we can-

Trans.

not reduce our labor costs in the same proportion.
 1556 When we are able to lay off men and still accord good service, it is always the lower rather than the higher priced men that are laid off. We have assumed local taxes, depreciation, administrative expense and other such expenses to remain normal. This exhibit shows prospective earnings of our company to be \$189,430.71 for the year 1935. The addition of reweigh charges totaling \$10,000 would bring this up to approximately \$200,000. This addition of \$10,000 will be explained later.

Trader
yardage.

When I refer to reweigh charges I mean the apparent tendency on the part of the Department to insist upon some sort of a reweigh charge. I do not mean in any way that it could be collected or that it would be appropriate at the Denver market, or proper, or that any such reweigh charge is now made at the Denver market. If the term "reweight charge" were changed to "half yardage charge on traders" my testimony would be exactly the same. I have the earnings of The Denver Union Stock Yard for the first five months of 1934 compared to the same period in 1935, both being figured the same way and with the same overhead deductions. The earnings for the first five months of 1934 were \$58,232.34. For the first five months of the year 1935 they were \$26,529.63, a decrease in 1935 of
 1557 \$31,702.71, or 54 per cent. This earning figure is the net earnings, after the deduction of bond interest, which we deduct on a monthly basis, the deduction being the same each month of the year. Last year we deducted 1/12th per month of approximately \$66,000, and this year we are deducting 1/12th of approximately \$57,000. The difference in the amount of deduction is due to the fact that certain bonds were called in between 1934 and 1935. We called in \$250,000 in bonds effective January 1, 1935.

rans.

(Continuing with respect to respondent's Exhibit 11).

On page 2 of Government Exhibit No. 7, witness Christensen states, among other things, that if the Government had not purchased the cattle they did in Colorado last year, a large number of them would normally have died. The Government purchased in Colorado last year 289,000 cattle. The Bureau of Agricultural Economics reports that in Colorado 25,000 adult cattle and 26,000 calves died in 1932, this being a normal death loss incident to cattle production. The total was 51,000 head. In 1933 these deaths were 30,000 adult cattle and 33,000 calves, a total of 63,000. In 1934 the death loss reported by this Bureau was 35,000 adult cattle and 36,000 calves, a total of 71,000. In other words, probably on account of the drought, the death loss in 1934 was materially higher than during normal periods. We have given no consideration to this in our figures. The Government purchases did not decrease this death loss, but, on the other hand, the death loss was higher for the same reason that the Government purchased cattle. The actual conditions are just opposite to the inference Mr. Christensen places on the Government buying.

Respondent's Exhibits 10 and 11 were thereupon offered in evidence. Ruling was reserved until after cross-examination.

Resp. Exhibits
10 & 11
offered.

(Witness continuing). I have heard the testimony in this case including the recommendation of Mr. Christensen that the so-called Show property be excluded as not being used and useful within the Government construction of the Packers and Stockyards Act, and as a matter of fact I have read Mr. Christensen's recommendation and heard his testimony from the stand with regard to it. The history of the Stock Show at Denver and the part

The Stock
Show.

Trans.

it plays in the handling and marketing of livestock in commerce at The Denver Union Stock Yard is as follows:

Scrub cattle
not good
feeders.

1559 Thirty-five years ago, or about 1900, the type of cattle produced in the territory tributary to the Denver market was mediocre in quality and breeding. They were the Southern Longhorn type, which had been driven north largely from Texas as the country developed. They were hard to fatten, were not a desirable meat when fattened, were not good units of meat and did not give a good account of themselves, in ratio to the time and feed consumed, either on the range or in the feed lots. At that time Colorado cattle were not known as being particularly good feeders and did not command a premium at Denver or other markets. This condition with regard to mediocre cattle was general in the territory tributary to Denver market at the time of which I have been speaking, namely 1900 and the
1560 early 1900's, and in my opinion resulted in penalizing the producer of those cattle as to price and outlet. As a result of this situation it was felt by the majority of the producers of the west and the owners of the Denver Stock Yard that much could be done to improve the type of cattle produced in Colorado and adjacent states, to advertise the better cattle that could be produced, to create a premium for them, and to enlarge the outlet on the Denver market. It was apparent that such action, with the expected success, would result in a major benefit to the livestock producers and a minor
1561 benefit to the Denver Stock Yard in the proportion with which the additional returns would be divided. I say that because it costs no more to market a high-quality animal than a poor or mediocre animal. The marketing charge is the same, while the producer receives a larger net return.

Cost of
marketing
scrub animal
same as
good animal

ans.

The Stock Yard Company undertook this work primarily because of producer demand. Complying with this desire on the part of its patrons, in the year 1906 a Stock Show was started in Denver. The first show was held in tents and other temporary structures. It met with such success that steps were immediately taken for the Stock Yard Company to provide permanent buildings and take other action to see that the Show became an annual fixture and of national importance. This led to the building of the Stock Show Stadium in 1908 and other buildings to properly house the Show, which is now known as the National Western Livestock Show, which is admittedly the third largest and most important livestock show in the United States—and the largest show in some respects.

Producer demand caused Show.

Denver Show third largest.

- 62 Outside of the Stadium and the Sales Arena the Stock Show is handled in connection with the horse and mule property, the buildings being used by the latter 51 weeks of the year and being vacated by the horse and mule people the one week of the year the Show is being held. By handling in this manner, we have been able to secure 100 per cent utilization of all buildings, except the Stadium and the Sales Arena. We also use a larger part of the main cattle division during Stock Show in the handling of Stock Show livestock. Approximately 200 pens in the south end of the yard are used for the handling of bulls. Fat cattle in the Show are yarded in the pens just north of the Exchange Building. Feeder cattle, usually over 100 carloads, entered in the Show, are yarded north of the fat cattle to about the 22 alley. During this week commission men are moved down to the north end of the yard and regular market arrivals are yarded there. The horse and mule division is moved out of its location on the hill into the lower deck of the sheep barn, where their sales are held Stock Show

Much of yard proper used for Show.

Increased receipts due to Show.

Trans.

week. Sheep receipts are light enough at this time for us to do this. In other words, the bulk of the stockyards property during Show week is devoted to purposes of the Stock Show and not merely tract or Zone 9. This development occurred before the 1563 adoption of the Packers and Stockyards Act, and it was undertaken by the Stock Yard Company for the purpose of benefiting the producer and the Denver market without any thought of its possible effect one way or the other on rate regulation.

Purposes of
stock shows.

With respect to the purposes, the stock shows have what might be termed three distinct purposes. The first is to show producers the kind of livestock that can be produced by better breeding and higher quality animals; also, the results that may be obtained on the same amount of feed and time with such animals, compared with the kind formerly produced. Second, to exhibit and have on hand, for purchase if desired, these higher type breeding animals; and third, to advertise, create a premium upon and provide an outlet for these better type animals after they are produced.

Show has
attained all
three
purposes.

The Denver Show, that is the National Western Livestock Show, has most decidedly achieved these purposes, in my opinion. There can be no question but that the National Western Livestock Show has assisted materially in improving the quality of the livestock in this territory, and I do not believe that any producer who has been in this territory raising livestock since 1900 would testify to the contrary. The Show has been a great educational medium for the benefit of both the producer and the fatterer of livestock. It has shown the producer how to raise better livestock in less time and at less expense, and has given the fatterer an article which he could more promptly and at less expense prepare for market. It has also been of material educa-

Trans.

1564 tional benefit to the fatterer in showing him the result of better feeding. Today, Colorado and the adjoining states marketing at Denver produce the highest type feeding cattle and sheep in the nation. Compared to what producers would receive for scrub animals, these producers are receiving at least double the amount for the high type animals they are now producing, and are doing this at substantially the same production expense. The same is true with fatterers of cattle in the Denver territory. They have found that they can put gains on these high quality animals for a less amount of feed per pound gain than it took to fatten the mediocre local type. They have also found that because they have a more desirable product for the consumer, their outlet is immeasurably increased.

As to the second purpose, namely: the supply of higher type breeding animals, the record of the Stock Show demonstrates its achievements in this regard. It is obviously an advantage to both the buyer and the seller, and to all other interested growers and fatterers, that there should be a good supply of pure bred bulls available at some adjacent point where they may be acquired at reasonable prices. The Denver Show now has the largest number of pure bred bulls offered for sale at any point in the entire nation, offerings having exceeded 200 carloads at a single show. Distributions of these animals have been to all of the range states. Because of this concentrated supply, volume movement and reasonable buying and transportation expense at the Denver Show, it has been possible for growers to obtain the best bulls obtainable anywhere.

1565

**Denver largest
bull market
in U. S. during
Show
week.**

The third purpose has likewise been accomplished by the Show, and definitely to the benefit of the producer and of this market. As is true with all products, livestock is manufactured by the producers of the west for sale. For this reason, feeder

Trans.

Shows advertise product.

Show creates buying outlet.

Producers derive benefit though not attending.

livestock should be advertised among prospective buyers, the same as any other commodity, if the highest possible price, market conditions considered, is going to be realized. Many industries plan on spending 10% to 20% of the gross cost for advertising and merchandising and in other ways to call the attention of the consumer to the quality and attractiveness of the product. Probably because of scattered production and a consequent lack of co-operation among all concerned, high quality livestock has never been advertised to any extent except by stock shows or stockyard companies. The result of this advertisement, coupled with the improvement of the herds, has been to provide an outlet at Denver at all times of the year for the high-type feeders of the west after they were produced, and to create a willingness on the part of corn belt and other feeders to pay the higher price for them to which such animals are entitled. Denver is now the point where the largest feeder auction of the nation is held every Stock Show, this sale having sold as many as 600 carloads, or approximately 20,000 head, of feeder cattle at one auction. These cattle are distributed from Colorado to New York State, from Minnesota to Tennessee, and to practically every state in the corn belt where other feeders see them and learn where they can secure a like kind of feeding cattle at any time of the year.

Even though the producer does not exhibit at the Show, he most emphatically derives benefit therefrom, in my opinion. It has increased the year-round outlet for his herd. He derives a material benefit during the other 51 weeks of the year when he might sell at Denver, or if he does not sell at Denver at all. The advertising of Western feeder cattle by the Show has created an outlet for such cattle at all times of the year and has led to the large volume of sales of such cattle at the

Trans.

Denver market during the fall. It has also created an outlet for these producers both at home and at other markets where generally Colorado cattle, improved on account of the Show and thereby advertised, justify a premium. It also would appear that the producer who exhibits at the Show does receive some direct financial benefit by way of increased prices. Based on many years' experience and comparison of prices obtained during Stock Show week in January with current market prices during the month of December preceding the Show, it is our opinion that Stock Show prices for like quality feeding cattle will average from \$1.00 to \$1.50 per hundred higher than during December. Due to a lighter supply, December prices are usually higher than October and November prices. Feeder cattle during Stock Show week will average from 600 to 650 pounds per head. In order to be most conservative, we are using an average weight of 600 pounds per head, and an average higher price during Stock Show than during December of \$1.00 per hundred. This figures \$6.00 per head additional to producers selling at Denver during Stock Show.

Increased prices at Show.

1567

I have prepared an exhibit showing the actual cattle receipts during certain periods of the month of January, including the Stock Show period. That exhibit is marked by the Examiner Respondent's Exhibit No. 12. This exhibit shows the actual cattle receipts at Denver for the first week of January, the last week of January, and for Stock Show week for the past six years. The average number of head received during the first and last week was 6,600 head, and during Stock Show week 20,712 head, the average heavier arrivals during Stock Show week being 14,112 head. The average larger return to patrons on the market, selling during Stock Show, was \$84,672.00 per year. This is in

Resp. Exhibit 12 showing January receipts.

Trans.

addition to other profits received by patrons during the entire years as previously enumerated.

January earnings in large part directly due to Show.

1568 The Stock Yard Company also receives some income directly traceable to the Show, in my opinion. It has received and continues to receive material benefits because of the Stock Show. We can definitely allocate the additional earnings to the company during the month of January to the Show. Ordinarily January would be the lightest month of the year at the Denver Yards if it were not for the Stock Show. January is after the range marketing is over and before cattle and sheep in feed lots are ready for market. The fall range marketing usually extends up into December, at least until the middle of the month. The marketing of feed lot cattle and sheep starts about the first of February.

Resp. Exhibit 13 showing Dec., Jan. and Feb. earnings.

Excess revenue due to Show.

I have also prepared an exhibit comparing the earnings of December, January and February at the Denver Yards, which is now marked Respondent's Exhibit 13. Respondent's Exhibit 13 compares the average earnings for the past six years of December preceding the Show, and February after the Show, with the month of January during which the Show is held. These are the net earnings with general overheads, taxes, bond interest, labor costs and other expenses deducted. It will be noted that the average earning of January over the average of December and February is \$11,592.14 per year, or the carrying cost of 7% on \$166,000.00. Obviously, if the investment in the Stadium is thrown out, the revenue of the Stock Yard Company caused by the Stock Show also should be thrown out.

1570 We also know that the Stock Show has resulted in additional earnings throughout each entire year. Respondent's Exhibit No. 5 shows the percentage of livestock sold at Denver for the period 1913 to

Trans.

1934, inclusive. This exhibit shows that cattle receipts in 1913 totaled 448,758 head, of which 229,061 head, or 51 percent, were sold. In 1931 receipts were almost identical, 439,562 head being received, of which 381,915 head, or 87 per cent, were sold. As the Secretary knows, it is only when an animal is sold that any marketing charge is collected by the Stock Yard Company, and this increase in percentage of sales, therefore, has meant an increase in earnings to the Stock Yard Company on 150,000 head of cattle, which at 35 cents per head, is \$50,000 annually. It, of course, cannot be shown definitely and directly by numbers of head how much of this increase is directly traceable to the Stock Show, but we verily believe that the great bulk of it is so traceable because had it not been for the Show, the market would not have developed this outlet. There can, of course, be no doubt as to the definite increase in the month of January.

While it is true that livestock is held out and prepared for the Show, it cannot be asserted that this revenue would come to the Stock Yard Company at other times of the year if the Stock Show did not exist, because that is not true. The lower
 1571 part of this Exhibit 13 shows the revenue to the Yard Company on pure bulls sold during the Show. These animals are usually in the yards for a week or ten days consuming feed the entire period. January earnings also include feed and bedding used by animals on exhibition. The feeder cattle would not necessarily come to Denver at other times of the year if the Denver Show was not operated. These cattle would normally be marketed during the fall, possibly at other shows such as Omaha, Kansas City or Chicago. During the fall, Denver receives about all the cattle it can handle with a steady outlet, and it is extremely doubtful if pro-
 849

Cattle marketed at Denver during Show would not come at other times.

Trans.

ver during the normal marketing season. We have found the inclination is to supply Denver with the amount producers feel can be readily disposed of, shipping the remainder to more distant points. This undoubtedly is what would happen with these cattle if there were no Stock Show at Denver. Shipments are also received in good numbers from states which, during the remainder of the year, do not market at all or in the same numbers at Denver as they do during Show week. The Denver Show results in cattle being held out from normal marketing and prepared specifically for sale at Denver. Lack of the Show would result in the same cattle being sent to other points for sale during the normal fall marketing season, when Denver is well supplied. It serves an additional purpose in reducing offerings at Denver and other points when movement is heavy and supplying some cattle for purchase when the movement is light. If there were no Stock Show at Denver, there would not be the same incentive to build and mature this livestock to show the 1572 advantages to be derived from expert handling, with the result that the general improvement of the quality of livestock would have been retarded.

Yes, the Stock Yard Company does derive some return from the Stadium and other Show buildings. In 1934 we received \$5,475 return, but nothing during the preceding four years. We have also already received \$5,000 rent for the 1935 Show. The Company endeavors to gain such income. An effort is made where possible to collect rent on the show buildings if and when earned. During the early years of the Show this was not possible. Since 1920 it has been possible the majority of the time.

If income is recognized, Show carries itself except for taxes, depreciation and upkeep.

I have prepared an exhibit showing the rents and income received from the Stadium and hook-up shed and strictly Show business. It is now marked

Trans.

Respondent's Exhibit 14. Respondent's Exhibit 14 shows the collections for the past ten years, the total amount from this source being \$35,475, or an average of \$3,547.50 annually. At seven per cent, this is the carrying cost on an investment of \$50,000. This revenue, plus that of \$11,592 previously shown, at seven per cent is the carrying cost on an investment of \$216,000, or the investment we have in the Stadium and the land it occupies. In other words, for the taxes, upkeep and depreciation of the stadium, we and the patrons of the market receive the many material benefits the Show has made possible. The investment in Stock Show facilities and the expenses of the Show have been handled in two ways. Investment in buildings are concrete and so remain. They are, therefore, capitalized because they are part of the equipment for the successful operation of the Denver market just as much as any other part of the yard. Obviously, pens, scales and other facilities in the stockyards proper would be of no use unless a demand existed in Denver which would furnish an outlet for the livestock that might come. The Stock Show helps create a ready sale at a good price at all times of the year, and the pens in the stockyards proper are necessary for the handling of this livestock; however, pens in and of themselves do not create outlet or demand. As a matter of fact, the majority of the pens at the Denver yards were constructed after the Stock Show had been developed and other demand had been created. At the time the buildings of the Stock Show were constructed, the cattle and sheep facilities at Denver did not exceed one-fifth of its present capacity. These were constructed as the need for them appeared, after it had been demonstrated that the development policy of the Denver yards was proper and was securing results. It is as reasonable to capitalize and have in our

Trans.

investment account the property that made the pens and other handling facilities necessary as to have the pens themselves.

- 1574 In line with good business practice, expenses incident to the Show have been charged off as an operating expense, the same as other running costs of solicitation, advertising, development and so forth. Because of the far-reaching and permanent benefits such Stock Show expenses have had to the Denver market, these expenses might well be capitalized and put in the investment account. The Directors have followed a safe and sane course, charging these expenses off to operation, and we are not asking that such expenses be included in our investment account, but are asking that they be included as an operating expense the same as other business-getting and maintaining expenses. Obviously, if this company sent representatives into the corn belt feeding territory to attract buyers to the Denver market and build up a demand at Denver, such expenses would be allowed. For the same reason, if we provide facilities at Denver which attract buyers to the point that it builds confidence in the market, enlarges outlet at all times of the year and contributes to the general prosperity of the patrons of the Denver market, such expenses should also be allowed.

Show facilities properly housed.

In my opinion the Show is properly housed and I know that such housing is necessary for a successful Show and I do not think that any of it could be eliminated without serious injury both to the Show and to the purchaser.

- 1575 In my opinion the Stock Show is used in the handling in commerce of livestock. Without question it is used in connection with the other facilities of the Company in the feeding, marketing and handling of livestock in commerce.

A Stockyard facility and service.

Trans.

Now with respect to hogs and sheep, they are not neglected by the Show and the same benefits to the producers of those species and to the market therefore apply as in the case of cattle. The Show carries departments for all classes of livestock, including these and horses. The Show has continually offered premiums for and contributed to the improvement in breeding and feeding of hogs and sheep in the same manner that it has to cattle. The Show has assisted in demonstrating the feasibility of hog production in the State of Colorado and that such production was profitable to producers in the plains area. In 1913 Denver received 63,229 Colorado hogs, this being practically all of the production there being at that time no California demand. In 1933, twenty years later, this had increased to 220,237 head, with a substantial amount of hogs moving from Colorado to California not via the Denver market. In 1924, before California demand had increased to its present volume, Denver received 386,978 Colorado hogs.

Show has fostered hog production.

1576 In the case of sheep, due to improved breeding and feeding, both intermountain territory fat range and feed lot lambs are recognized as being of the choicest quality and command premiums wherever they sell. On January 1st of each year Colorado feed lots contain substantially 25% of all of the lambs on feed in the United States. The Denver Stock Show in a measure assisted in this development. It has offered prizes to Colorado fed lambs and Colorado fed cattle for many years. It has had on exhibition western fattened cattle, hogs and sheep at every show so that visitors might see what others were accomplishing and go home and do likewise. The benefits of the show are spread among all producers and its cost should be likewise spread among all rates.

Show benefits all sheep producers.

Trans.

**Nature of
Stock Show
Association
organization.**

Obviously, the more direct interest in the show by the largest number of people, the greater success it will have. The Stock Show proper is operated by the Western Stock Show Association, which is an association of various persons interested in the livestock industry. This association has a Board of Directors consisting of 39 members which includes all phases of the industry. Additional Directors are provided from time to time as producers or others appear who are willing to work for the good of the industry. The directorship includes 1577 officers of the Stock Yard Company, of the packing plants, of Denver banks, railroads, producers of all kinds of livestock, and others. It has been found that by handling in this manner much greater interest can be created, more support is received from local people as well as others, and a large free ticket list is avoided. Obviously, when several business men, serving as Directors of the Show, call on a certain industry or certain people for support, they receive a much better hearing and more consideration than if someone from the Stock Yard Company did the calling and solicitation. Any additional support or revenue, of course, reduces the expense of the Show and, therefore, the expenditure of the Stock Yard Company for this purpose. By handling in this manner we have made the Show more efficient, we have created greater interest, we have accomplished better results and have reduced expenses as well as adding to income, all of which rebounds to the financial as well as the educational interest of the producer.

The Stock Yard Company, through its President and General Manager and Secretary and Treasurer, attends all meetings and generally supervises actions and expenditures. All money paid out must be approved by the Secretary and Treasurer of the Stock Yard Company. The General Manager of

Trans.

the Show reports at frequent intervals to the President of the Stock Yard Company and takes no action of any consequence without consulting with him. The existence of the Stock Show Association is in no way a leasing out of facilities or delegation of authority that the Stock Yard Company may own
 1578 or have. We have substantially the same authority over the Show that we would have under any circumstances, and, in addition, in handling it in this businesslike way, have a great deal of support and interest that might not otherwise exist.

During the Stock Show the large auction of feeder cattle is held in the main yard. It is held there because these feeder cattle are on exhibition adjacent to the point of this auction. The Government does not attempt to throw this facility or any part of it out. The auction of pure bred cattle is held in Zone 9 in the sales pavilion adjacent to where these pure bred cattle are exhibited. This pavilion the Government throws out, although admittedly these pure bred cattle are livestock being handled in commerce. Witness Christensen has stated that the amount of time a facility is used is not a controlling factor; that it is the actual use for which it is used that makes it used and useful. There is no difference between these sales except perhaps the volume handled. Cattle in commerce are handled at each. One, however, for the good of the livestock industry, is as important as the other. The feeder auction facility is rebuilt every year because we need the room it occupies at other times of the year. The sales pavilion is permanently constructed because we have room for it in the location it occupies. **The feeder auction.**

Respondent's Exhibit 12, 13 and 14 were there-
 upon offered in evidence and the ruling thereon
 deferred until after cross-examination.

**Resp. Exhibits
 12, 13 & 14
 offered
 855**

Trans.

The marketing charge. 1579

It is only when livestock sells or takes advantage of the market that the so-called yardage or marketing charge is collected. When livestock stops off for feed, water or rest, or when livestock tries the market, no yardage or marketing charge is made or collected. The only exception to that is that to which I have already testified, namely packer directs. With that exception in mind and without hereinafter constantly and specifically adverting to it, it is true that livestock can occupy pens at the yards and pay nothing for the use thereof if the livestock does not sell. Use of the pens, is in a sense, paid for in the profit on hay. The longer livestock is in the pens, the more hay is consumed, and the profit from hay and grain covers the use of the pens very largely. This hay profit is distinguished from the yardage or marketing charge. The marketing charge is only assessed and collected when the livestock is sold or when it takes advantage of the market. It is purely a marketing charge.

Profit on hay pays other use of pens.

The development of a market. 1580

In the development of a central market, a great deal more than the bare investment in handling facilities is necessary. Anyone with sufficient capital could construct a stockyards at any point he saw fit. Making it a paying institution for the owners and its patrons is an entirely different matter. The Denver market is an outstanding example of the necessity of material investments over and above the cost of the land and facilities to make it a paying institution. The Denver stockyards and the Pueblo stockyards were established at substantially the same time, that is, between 1880 and 1890. Both were originally established in a small way as feeding yards for shipments moving by rail. Both had an equal chance to provide an attractive point for the sale of livestock and thereby develop. Both knew that for a feeding stockyards to develop into a central market it had

Trans.

to provide an attractive selling point with reliable outlet for the livestock which might be offered and at prices comparable to other markets, expense considered. Both knew this took buying demand on the market which was dependable and there every day. Pueblo, if anything, had the advantage over Denver because it was on the main line of an east and west railroad which handled a large amount of livestock to and through that point. The size of a city does not make a livestock market. Ogden, for example, is a much larger livestock market than Salt Lake City, although the latter is a much larger city. Dallas is larger than Fort Worth, New York larger than any other, yet neither Dallas or New York City have successful livestock markets.

- 1581 Compared to Pueblo, Denver was on a side track, being 120 miles north of the main line through Pueblo and 110 miles south of the main line through Cheyenne. Very little traffic came to Denver on a silver spoon by being forced to stop there for feeding en route to some other market. These additional mileages from the north and the south meant higher freight charges and greater shrink to Denver. For this reason, Denver had to be especially zealous in its building, in its willingness to make investments which would make it an attractive livestock market with a dependable and daily outlet. It had to meet the competition of the already established central markets at the Missouri River—Chicago and St. Louis. It had to overcome the extensive out-of-line hauls which still exist. It could not overcome these handicaps by sitting idly by and letting hoped-for increased traffic build the market, for there never would have been any increased traffic. The owners accordingly decided to build a livestock market at Denver and make whatever investment might be necessary to accom-

Trans.

plish that result, over and above the investment in the property itself.

In my opinion, the Government land witness gave no consideration to the value of the market in the fixing of his land value. It is obvious that he could not when the value of adjoining property is the basis. It cannot be contended that when an engineer places a reconstruction value on physical property, that he allows for the value of the market, for the reason that the facilities are built in answer to a demand for them and as they are needed. In the event the property was abandoned, the salvage value of such physical property would, of course, be small; however, such facilities are not built to be abandoned or salvaged, but in answer to a demand for them which has already been created and which the owners have reason to expect will be permanent. No business man would invest three million dollars in a stockyards expecting to use it only a few weeks. Neither would he make such an investment until a going market with an active demand and a permanent life had been created. The latter is actually more important than the former. It is usually after a dependable demand has been created that the demand for proper facilities becomes imperative. There has been and is today no indication that livestock production will cease in the west. The Denver yards were built to handle that production, not to be abandoned and salvaged.

Privilege of
the market
defined.

1583 In paying the marketing or so-called yardage charge at Denver in the past, the patron of the Denver market has been paying for the privilege of the market, which includes much besides the actual use of the facilities and the labor incident to their use. The privilege of the market includes competition on the market; a ready outlet to buyers furnishing a reliable and steady demand; dealers

Trans.

in the market for various kinds of livestock; advertisement of the market among buyers all over the country and a knowledge on their part that a dependable supply of livestock exists for them, and all the other factors which go to make a market place for livestock. This is not going value in the sense it is usually used, but is a true outlay of capital to make all of these things possible. We contend that the going value of the Denver market is something over and above these expenditures.

I have prepared, or there has been prepared under my supervision, an exhibit or statement showing the actual cash expenditures for the development costs of the Denver market, which exhibit has been marked as Respondent's Exhibit 15. This exhibit is a statement of the expenditures made by the Stock Yard Company since 1891 for this distinct purpose, that is, to create a value of the market for which the patron has willingly paid in the past and which, it is our experience, he is glad to pay for, because a better market has been created for him by these expenditures.

Costs of
developing
market.

1584 MR. MILES: Will you pardon me, please, and permit now an objection to this entire line of testimony on the ground that it is immaterial. This is specific rather than general.

THE EXAMINER: Objection overruled.

(Witness continuing). It is the difference, for example, of a patron selling, if he could, at Pueblo where nothing has been done to create a market, where no outlet and no competition exists, where there is no reliable daily demand for his livestock, and selling at Denver where all of these things do exist. Practically no livestock is sold at Pueblo, Colorado, or Laramie, Wyoming, a feeding point, although large amounts are received there under the

Trans.

36-hour law. It is the difference between a point which has established a market for which the patron is willing to pay, and a point which has similar physical facilities but no market. In the latter case, although the point has facilities comparable to Denver, there is nothing to pay for in a marketing charge because there is no market.

The Pitkin tract.

The Denver Union Stock Yard Company was incorporated in its present location in the year 1886. On July 26, 1888, The Denver Union Stock Yard Company purchased from Robert Knox Pitkin 11.43 acres of land for \$52,500.00, this being land located between the Burlington right-of way, the old Platte River and the C. & S. right-of-way, partly embraced in Zones 6 and 7 in the present case. This land carried some minor improvements, consisting of an old shed and some cattle pens which were in after years torn down. The value of these was nominal and the land was not purchased for the improvements but rather for expansion purposes. \$2,500.00 has been allowed for the value of the improvements, leaving \$50,000.00 as the value of the 11.43 acres of land, or an average value of \$4,375.00 per acre. Other land near the Stock Yard has been given the same value in arriving at the development cost, even though that land undoubtedly carried a higher value. The same price of \$4,375.00 per acre has been allowed for land at the northerly end of the yard, although such land was nearer the seat of operations and the point of largest industry than the so-called Pitkin tract. Other prices used have been the actual cost of the land when we were able to ascertain it. When I say that \$4,375.00 per acre has been allowed for the land at the northerly end of the yard, I mean merely in making up my tabulation or computation, Respondent's Exhibit 15, and without regard to the

Trans.

question of actual present day value from a reproduction standpoint.

Prior to 1886 there were one or two small packing plants along the river in the present stockyards district. Hoeffler Bros. owned a slaughtering place about on the site of the present Swift plant, this being taken over by a firm known as Burkhardt and Mills about 1881 and operated as the B & M Plant. Later Henry Gebhard became interested in this plant. On January 24, 1891, contract was entered into between Henry Gebhard, operating as the Colorado Packing Co., and The Denver Union Stock Yard Co., whereby, in consideration of the 1586 Colorado Packing Co. erecting a packing plant of certain specifications on the present site of Armour & Co. and that it would receive at, purchase and pay or cause to be paid, yardage to the Stock Yard Company on all of the livestock it slaughtered, the Stock Yard Company agreed to grant the Colorado Packing Company 11.158 acres of ground and to purchase the machinery and equipment belonging to that company then in the B & M Plant for the sum of \$25,000, which in reality was a grant to assist in the building of the proposed plant. Item 1 on Exhibit 15 shows the grant to the Colorado Packing Company of 11.158 acres. The value used in column 1 is that of the cost of the Pitkin tract of \$4,375.00 per acre, which is fair and reasonable for the reason that the 11 acres granted to the Colorado Packing Company were nearer the center of industry in the stockyards than the Pitkin tract. At that time the Exchange Building of the Denver yards, a small frame building, was about in its present location, with the yards and their scale facilities north thereof. For this reason the actual value of the land was greater than the Pitkin tract, in our opinion. The agreement with the Colorado Packing Company provided the deed would be

Grant to
Colorado
Packing Co.

Trans.

placed in escrow until the sum of \$100,000 had been expended on the packing plant, and carried a 20-year reversion clause; however, we have only computed simple interest at 6% carrying costs up to the date of the contract, January 24, 1891. Column 2 carries the land at \$4,375 per acre, plus carrying costs, or an actual value of \$5,028.33 per acre, and a total value of \$56,106.11.

Item 2 covers expenditures for machinery and equipment of \$25,000; this amount being paid to the Colorado Packing Company and being, in effect, a grant to that company to assist in building their proposed packing plant. This packing plant continued to develop from the time that it was built, furnishing a dependable and daily outlet for livestock received at the Denver market. Today, enlarged, expanded and improved, it is the property of Armour & Company, and it, together with the Western plant, later described, is the reason Swift and Armour are located at Denver. The present value of the Armour plant is around \$5,000,000: The expenditure of approximately \$75,000 on the part of the Stock Yard Company and the dependable outlet it creates to the patrons of the Denver market have resulted in this size plant being located in Denver.

Grant to
Becker &
Degen.

Item 3 of this exhibit covers a grant to Becker and Degen under contract dated February 16, 1898. This firm was a large dealer in livestock at Missouri River markets. Under the contract and in consideration of the stock in the company granted them, they agreed to come to Denver, maintain offices, purchase cattle on the market and otherwise contribute to the buying demand on the market in a reliable and dependable way. It was known that if some substantial firm could be attracted to the market, it would only be a matter of time un-

Trans.

til others would follow, and this has been the history of this company.

From 1891 to 1902 the B & M Plant, containing machinery received in the grant of the Colorado Packing Company, was operated under lease, and in other ways contributed to the general welfare of the Denver market. It, however, did not grow and was not the factor on the market the Stock Yard Company desired. The Company sought to interest others in the building of a packing plant at Denver, and, after a time, was able to prevail upon various Denver people to agree to establish a packing company known as the Western Packing Company. Items 4 and 5 cover expenditure incident to the establishment and building of the plant of this company, which is the present plant of Swift & Company. The contract between the Western Packing Company and The Denver Union Stock Yard Company provided that in consideration of the Western Packing Company building and equipping a packing plant to cost not less than \$250,000, and with the further agreement that they would agree to conduct a slaughter and packing house business for not less than 10 years, and to purchase and handle all livestock slaughtered through the yards of The Denver Union Stock Yard Company, the latter company would grant them 7.252 acres of land, \$100,000 in cash, and the building, machinery and equipment of the so-called B & M Packing plant and the Hoeffler Slaughter House, which was owned at that time by The Denver Union Stock Yard Company, and which were on the site to be granted to the Western Packing Company. The machinery and equipment in these plants was that received from the Colorado Packing Company under the 1891 agreement. The records do not disclose how the ownership of the B & M Plant and the Hoeffler Slaughter House rested with the Stock

Grants to
Western
Packing Co.

Trans.

Yard Company, or what expenditure that company made in securing these plants, and, as we do not wish to include any items which are doubtful, nothing is being shown to cover the buildings themselves. This land, the present site of Swift & Company, is also nearer the Exchange Building and center of industry than the Pitkin tract in Zone 6 and 7. However, we are only showing the value of the more distant Pitkin tract at actual cost.

Item 4 covers the land consisting of 7.262 acres, at \$4,375 per acre, or an actual cost of \$31,771.25. In column 2 the value of the land, including carrying costs, is \$7,962.50 per acre, or a total cost of \$57,823.68, the latter being the original cost, plus 6% simple interest. Item 5 covers the donation of \$100,000 cash, being the same in each column. This contract provided that in the event the Western Packing Company did not live up to their agreement for a period of ten years, the plant and the land would revert to the Stock Yard Company, the deed being put in escrow for that period. At the end of ten years the Western Packing Company, having fulfilled their obligations in every way, and the Stock Yard Company having received the benefit of their demand toward the building up of the Denver market, title to the land and the other property went to the Western Packing Company. Inasmuch as this plant has developed, has brought the large packers to Denver, and has contributed substantially to the growth and building of the Denver market since its establishment in 1902, and will undoubtedly continue to do so in the future, it is apparent that the investment of the Stock Yard Company of \$131,000 or \$158,000 in this plant was an investment of good judgment.

Item 6 covers a land grant of 1.563 acres to Chas. Burkhardt, which later developed into the Coffin

Grant to
Burkhardt.

Trans.

Packing Company and following that into the Blayne-Murphy Company and the Cudahy Packing Company. The value of the grant in column 1 is \$6,720.00, and in column 2, \$12,556.40. The increase in value of column 2 over column 1 is due to the carrying cost computed in the same manner, namely 6% simple interest.

Item 7 is a cash grant of \$4,000.00 to this firm made in consideration of their vacating the old B and M plant, which was granted to the Western Packing Company, and to assist in the building of their new plant in its proposed location. Inasmuch as this grant eventually led to the establishment of a large packing plant at Denver, and the taking over of that point by one of the National Packers, it obviously was a good investment.

1591 Item 8 was a grant to the C. B. & Q. Railroad of one-half acre in 1905, it consisting of a strip of 17½ feet wide and 1,247 feet long in order to facilitate the loading and unloading of livestock and thereby make the market more attractive and more efficient for both buyers and sellers. Grant to C. B. & Q. R. R.

Item 9 was a grant of .46 acre of land to the Western Packing Company to provide room for expansion for the same reasons as outlined in Items 5 and 6. Grant to Western Packing Co.

Item 10 is a grant to the Coffin Packing Company of 1.78 acres to enlarge their property and help develop that company, it having expanded materially since the original grant made in 1903. Coffin Packing grant.

Item 11 was a grant of 1.431 acres to the Western Packing Company to increase and facilitate their slaughter and thereby increase their buying demand on the market. It was made for the same reasons as the original grant explained under Items 5 and 6. Grant to Western Packing Co.

Trans.

**Grant to
Coffin Pack-
ing Co.**

Item 12 was an additional grant to the Coffin Packing Company in 1917 of .308 acre made on account of that company, in their expansion program of 1913, having built the easterly side of their plant upon the property of The Denver Union Stock Yard Company. A nominal price of \$1,300 was received by the Stock Yard Company for this land, or at the rate of \$4,300 per acre; therefore, nothing is shown in column 1. In column 2 the carrying cost price is used, less \$1,300 realized in the grant.

**Grant to
U. P. R. R.**

1592 Item 13 is a grant made in 1918 of .362 acre to the Union Pacific to enable them to widen their curve and thereby handle livestock into and out of the stockyards more efficiently. The old curve was quite sharp at the point of this grant, resulting in engines being able to handle only a small number of cars, which delayed both in and out-bound shipments and increased our labor expense on account of waiting for settings of cars to load or unload.

**Grant to C. B.
& Q. R. R.**

Item 14 is a grant to the Burlington Railroad of 2.05 acres, made necessary on account of our desire to close Franklin Street when we extended the yards across that street and to the north, it being necessary to give that company additional land in order to prevail upon them to move their tracks from Franklin Street. In this transaction it was also necessary to give the Burlington a free perpetual right to use one of our river tracks, value of which is not included in this statement, for the reason that we received an off-setting value on the land that they vacated along Franklin Street.

These investments are as much a part of the property of The Denver Union Stock Yard Company for its efficient and successful operation as the pens, scales, barns or other property, which, without demand on the market, would be of no value and would never have been built. It cannot proper-

Trans.

ly be contended that this development expense has been allowed for in the reproduction cost of the physical property because it was this development expense that caused the investment in the physical property. It will be noted the majority of this development expense occurred prior to 1916. Since that date the property of the Stock Yard Company has practically all been built or reconstructed. **Development expenses were prudent investments.**

1593 Since 1916 both sheep barns and the New Exchange Building have been constructed. Since that date practically all of the cattle yard has been reconstructed and extended from Franklin Street north.

The success of the company shows that these development expenses were prudent and that both the company and its patrons are daily receiving the benefit of it. The major items in this statement are costs of developing packing plants which later led to the coming of Armour, Swift and Cudahy to Denver. No one can deny that these companies are valuable assets to the market and its patrons. No central market in the country has developed in a large way without some of these large packers being located there. When the present Cudahy plant was built, we expended \$25,000 in the building of a viaduct to serve them, which is also used by ourselves. There is no question about the allowance of this viaduct in the rate base.

These investments are in no sense a capitalization of earning power, for the investment remains regardless of the earnings of The Denver Union Stock Yard Company. Our investment of substantially \$150,000 in the Swift plant and \$75,000 in the Armour plant remains regardless of what our earnings are. If the investments had not been successful, they might be criticised as being imprudent, but we have shown no investments which have not been material factors in the success of the company. **867**

Trans.

Value of the market.

The proper definition of these investments or expenses is "Value of the Market." They were necessary in the building of the public market at Denver, the same as the general overheads in construction costs. They are tangible when one looks
 1594 at the present Swift, Armour and Cudahy plants at Denver and has knowledge of the daily buying demand of these companies on the Denver market. In 1934 these companies bought a total of 1,967,841 head of livestock on the Denver market. Allowance of these items in the rate base in no way causes assumptions to be made, nor is it a matter of opinion or judgment. It does not require that a certain percentage allowance be made. It does not consider past deficits and attempt to capitalize them. There is no unsupported opinion, hypothetical calculations or conjecture, but it rests on actual experience and solid facts. We have shown the actual grant of 26.847 acres and the actual cost, which is \$254,489.38. We have shown the actual costs plus carrying costs on land purchased for this purpose at the cost of the land plus six per cent simple interest, but have not added taxes and other carrying costs. The latter amount is \$325,547.10. We believe this amount should be allowed in the rate base as the actual development cost because the land was purchased for this distinct purpose and was so used. We have not shown in this statement the carrying costs of land used in the expansion of the stockyards because we believe they should be carried by the patron of the yard who receives the benefit and charged off as an operating expense.

Development costs summarized.

Resp. Exhibit 15 offered.

Respondent's land all used and useful or necessary for expansion.

Respondent's Exhibit 15 was thereupon offered in evidence and the ruling thereon deferred until after cross-examination.

1597 (Witness continuing). Describing the land by using the Government zone numbers, we claim that

Trans.

all of the various zones are now used and useful in stockyards operation except Zone 5, a portion of Zone 6 and Zone 7, which latter tracts are useful and necessary for expansion. Portions of Zones 3 and 4 may have greater utilization in the future. The present use, in my opinion, clearly shows them used, useful and necessary in the handling of live-stock in commerce at the Denver yards without any further utilization being necessary, and that if they were not owned by the stockyard company at this time, it would be necessary to purchase Zones 3 and 4.

I have a progress map showing the years when the various parts of the property were constructed or reconstructed which is now identified as Respondent's Exhibit 16. This Exhibit 16 was compiled from the records of the Stock Yard Company and under my immediate supervision. The year of acquisition is identified by the coloring of that portion of the land. The key to such coloring with
1598 the pertinent year will be found on the map. In the upper right hand corner of the map all that portion within the red boundary line was acquired in 1916, not just that part of the land lying to the north of Race Court. For example, although there is no date opposite "Hay Barn No. 4," it is colored the same as a part of the manure dump. Both of those were constructed in 1917. The manure dump was entirely reconstructed and enlarged in 1934.

Progress
Map, Resp.
Ex. 16.

1599 Respondent's Exhibit 16 was thereupon offered and received in evidence.

Resp. Exhibit
16 admitted.

(Witness continuing). The Denver Union Stock Yard has found it both to the advantage of itself and its patrons to have land available for expansion purposes when such land is needed. When additional facilities are necessary there are only two ways in which they can be provided. One is to

Expansion
land
869

Trans.

extend the yard out over other land, and the other is to go up in the air by double decking.

In the case of our sheep division, which is surrounded by the plant of Armour & Company, Swift & Company, the Platte River and the U. P. right-of-way through the yard, there was no alternative but to go up in the air, at a cost, based on present Government reproduction cost, of over \$55,000 per acre, without a roof. For the 5.56 acres double decked in our sheep barn, the total reproduction cost is \$567,719, or \$100,000 per acre, this including a roof.

In the case of the cattle yard, double decking has not been necessary, and this has resulted in material savings to the patrons of the yard. For various 1600 reasons, double decking does not work as well for cattle as for sheep and, if it were necessary because of lack of land, would materially increase operating expenses.

In the years 1915 and 1916 the yards of The Denver Union Stock Yard Company became very congested in all departments. At that time the hog and sheep division was located immediately north of the present Exchange Building. The cattle division extended from this area north to Franklin Street. Exhibit 16, the progress map, shows the year of construction of various parts of our property. Franklin Street is that line running north and south just to the right of the center of the map and is so marked. In 1917 the hog and sheep division was moved to its present location, the area formerly occupied being changed to cattle pens. The cattle yard was extended from time to time as shown on the map. The original cattle yard is that part shown in white in the center of the yard.

Trans.

In 1916 it became apparent that more area would be necessary for cattle and for the handling of manure. In order to avoid either the necessity of double decking or of purchasing property subsequently at a higher price, with costly improvements thereon which the company might then find it necessary to wreck, the company availed itself of the opportunity to purchase the 30 acres of land in the upper right hand corner of the map from the Riverside Cemetery Association for \$3,000 per acre. This tract is outlined in red and includes all of the land in Zone 3 and that part in Zone 2 north of the line running from A to B. (See Resp. Ex. 16). The management deemed this necessary for enlargement of the cattle yard, although the cattle pens were not actually extended into this tract of land until 1928. It was necessary to obtain this 30 acres in order to be able to close Franklin Street, which then divided our property and was a distinct detriment, and it was also necessary to have land for the building of a hay barn, for manure dumping, storage of hay in stacks, the material yard and for other uses. Had we not been able to close Franklin Street, it would have been necessary to viaduct or subway this street between the two parts of the cattle yard which it divided. This would have been expensive and would have materially increased our operating expenses since 1917. The patron has been receiving the benefit of this more economical operation caused by our purchase and the ownership of this 30 acres since that time. Had we not been able to close Franklin Street and use that area for pens, we would have been forced to construct pens further north into the 30-acre tract much sooner. It was absolutely necessary to purchase this land at that time. Had we waited or delayed its purchase, we would have been bottled up. We had an option to purchase this land for \$3,000.00 per acre, and had

Reasons for
acquiring 30
ac. in 1916
of which
Zone 3 is
part.

Trans.

had that option for some time. We learned that another option was subsequently given at \$4,000.00 per acre, or for \$1,000.00 per acre more than our option, on 10 acres immediately north of the line from A and B in the north end of Zone 2, where our cattle yard, hay barn and manure dump is now located. The seller was naturally anxious to have us lose the option and refused any extension. On the last day the Company exercised its option. Had we not exercised our option to this land in 1916, it would have been purchased by others, and a packing plant would have been erected on this site at a cost which would have made any subsequent purchase impossible. This, naturally, would have handicapped our operations, would have limited our possibilities of expansion, and would have left us no land for the hay barn, manure dump and other facilities on this tract. Lack of this 30 acres would have made it impossible for us to close Franklin Street unless we had paid for a highway viaduct over that street from point A to point C, a total of 1,600 feet, and at a cost of \$135.00 per foot, or over \$200,000.00 as computed by our engineer. The Omaha yards were forced to do this at a similarly great cost, which was allowed in its rate base, as shown by the order of the Secretary in that case. It would have been necessary to build such a viaduct to cross the Burlington main line, clearing its tracks 23 feet. The closing of Franklin Street was contingent upon the opening of Race Court. The Stock Yard Company does not have the right of eminent domain. If it did, it would nevertheless be necessary to pay for buildings on property condemned. It is readily apparent that the purchase of the entire 30 acres was a prudent investment and one of good judgment. When I speak of a viaduct from points A to C I am referring to the designations on Respondent's Exhibit

**No right of
eminent
domain.**

**Prudent
investment.**

rans.

16. It is shown on that Exhibit outlined in red as a viaduct site extending across the cattle yard and across the Burlington main line. It is the old location of Franklin Street.

Now, with respect to the 30 acre tract of which I speak, it is more than present Government Zone 3,—a part of it is included in Government Zone

604 2. That part extends from the southerly line of the 30 acres north to Race Court. The remainder of this original 30 acres is now approximately 19 acres and is what is known as Government Zone 3. There are then roughly 11 acres of the original 30 acre tract now either in cattle pens or with a hay barn and manure dump on it. There is also included therein Race Court, the roadway, which, according to the scale of the map, is about 60 feet wide.

605 I feel that this purchase was a prudent investment and one of good judgment because its purchase has materially reduced the amount of expenditures which otherwise would have been necessary and the amount of operating expenses we would have had had we not made the purchase. Portions of the tract were immediately utilized by the hay barn, hay storage and manure dock and by Race Court and new pens on the Franklin Street area.

At this point I would like to explain the distinction between a manure dump and a manure dock. We use the manure dock in Zone 2 for dumping into railroad cars and for dumping during the wet weather on concrete that we have laid at that point. We dump manure on a large part of Zone 3 where the land is vacant. The manure dock is an elevated dock of wood construction, high enough so that we can dump into railroad cars on one side and on a concrete base on the other and has a ramp or in-

**Manure dump
and dock
distinguished.**

Trans.

1606 cline up to this level. We dump on the concrete where it is loaded on to trucks by the people purchasing the manure.

The cattle pens at the northerly end of the cattle yard were extended into the 30 acres in 1928. The benefits of this 30-acre purchase, which required an outlay of \$90,000.00, were that we were able to close Franklin Street, thereby consolidating all operations and saving an expenditure of \$200,000.00 for a highway viaduct. We were able to avoid the building of a large packing plant at this end of our property, thereby avoiding the expenditure of \$55,000.00 per acre for double decking when the room was needed. We were able to have land where hay barns could be built and hay could be stored, with a material saving to producers as will be explained later. All of these other items would have been in the rate base without question, both initial expenditures and operating expenses. It is my opinion and the opinion of the management that all of this land is used and useful in the handling of livestock in commerce and that the purchase of all of it was a matter of good business judgment.

1609 It would not have been feasible to have purchased only that portion of the tract south of Race Court for several reasons. In the first place, we could not have gotten that portion at the price of our option, to the best of our knowledge and belief. If we had paid more for the 10-acre tract than our option price, it would have fixed the balance of the tract had we attempted to buy it later, and all of the time we would have been running the risk of not being able to purchase it. Had we only purchased the smaller tract, it would now be completely utilized and we would have no land for expansion at this end of the yard. Lacking the power of eminent domain, we cannot afford to take

No power
of eminent
domain.

ans.

these risks,—that is to say, the producer cannot afford to have us take the risk of not being able to meet his demands.

The land in the northerly end of Zone 4 was not available for expansion of the cattle yard, hay storage, etc., at the time of this purchase. The Platte River at that time ran through this tract and the bulk of that area was in the bed of the river. The establishment of the official channel of the Platte River to lessen the flood danger and the filling in of the old river bed has made this piece of land in Zone 4 available. That, however, was not until about 1931 or 1932.

How land
in Zone 4
was created.

Q. Assuming that the Yard Company, even though it had to pay an increased price for land with possible improvements thereon requiring wrecking, in order to obtain ground for expansion, would that meet the Yard Company's needs and be fairer to the producer, in your opinion, than permitting the Yard Company to own and hold land for expansion and include it in the rate base?

A. No, I don't think so. Suppose, for example, that the packing plant at the north end of the yard had been built and it was imperative for us, irrespective of the cost, either to acquire that land and wreck the packing plant in order to utilize the area for pens, or to double deck the yard at a cost of \$55,000 per acre. The need being there, these expenditures would certainly be allowable as capital expenditures and included in our rate base, but if the price paid was such that the rates charged were insufficient to render a fair return upon that investment, we would have the theoretical right to apply for an increase in rate under the Packers and Stockyards Act,

Producer
would be
injured by
government
rule, on ex-
pansion land.

Trans.

but as a practical matter we could not do so if it brought our charges out of line with the charges at other markets. We do not have a monopoly and are in competition with the other markets and cannot be on a different basis. It therefore requires judgment on the part of the management as to how much we get into our capital account. We owe a duty to our stockholders who have this investment, as well as to the producer and patron and I think it goes without proof that if the expenditure to provide the necessary expansion land or expansion of facilities through double decking was so excessive, that the present rates would not give a fair return upon the investment, the expansion of facilities would not be made, and this would be to the detriment of the producer and patron on the assumption that such expansion was, in fact, necessary. In other words, I feel strongly that the question of when property for expansion is to be acquired must be left to the management, and, in the absence of proof of abuse of discretion, the value of such land so acquired should be included in the rate base. I think that is fair to everyone.

1611

Resp.
Exhibit 17.

1612

I have prepared an exhibit marked Respondent's Exhibit 17, which exhibit is based on the 1930 valuation case, B. A. I. Docket 301. This exhibit shows what property the Secretary, at that hearing, eliminated from the rate base as not being used and useful and what property he allowed. At this point I would like to discuss those eliminations, stating the uses to which the property is put, the reasons for its retention by the Yard Company and certain other facts which, in the opinion of the management, entitles these properties to inclusion in the rate base.

Trans.

1614 In the 1930 hearing, Docket 301, the Secretary did not allow as used and useful any of the land north of Race Court in Zone 3; the larger part of Zone 4; any of Zone 5 across the river; any of Zone 6 except the roadway; any of Zone 7, and that part of Zone 9 occupied by the Stadium, so-called hook-up shed, tile barn and Club Building. We are assuming that the remainder of the property which the Secretary allowed as used and useful in 1930 will also be allowed in this case, practically all of it being occupied by pens, buildings and facilities used in the handling of livestock in commerce.

For ready reference, and in order that the matter may be made clear, Respondent's Exhibit 17 is an airplane photograph of the Denver yards taken in the fall of 1934, showing all of the property. On this photograph, the property colored green was allowed by the Secretary as used and useful in the 1930 hearing. The property colored red was not allowed by the Secretary in the 1930 hearing as used and useful, and the area in yellow is that occupied by railroad tracks. **Resp. Exhibit 17 explained.**

Zone 4 extends from the C. & S. right-of-way at the southerly end of the property, this extending from the upper part of the photograph along the river, largely between the river and the railroad tracks, to the old Blayne-Murphy plant at the northerly or lower right center part of the photograph. All of this land has now been filled substantially to the level of the stockyards property, except a very small portion at the northerly end which is now in process of filling. The sewage and drainage from the stockyards is handled by independent sewers owned by the stockyards company, and not connected with the city sewerage system, into the Platte River at various points along this tract, the outlets being five in number. The sewer outlets of the stockyards company are marked **Sewer outlets in Zone 4.**

Trans.

with an X. It will be noted that these are at frequent intervals and that it would be practically impossible to own this property in strips for the accommodation of these sewers. If we did not own this land, it would be necessary to secure it for this purpose. The railroad tracks of which I just spoke, colored in yellow, were not allowed in the Secretary's order of 1930, the basis of such disallowance being that they were considered a transportation facility rather than that they were used and useful to the stockyards.

Fire protection.

Continuing now with Zone 4, there is a road going the full length of this zone outside of the railroad tracks which is used for general service and for fire protection, this being colored black on the red. If a fire should occur in our hog or sheep division, near the river, it would be necessary for the fire department to take this route in order to reach the fire, it being impossible for fire equipment to get to the seat of the fire through that part of the hog and sheep barns adjoining the road through the center of the yard. Owning the land to the river bank enables the fire department to use river water 1616 when necessary or desirable. Since the Chicago fire and the resulting heavy losses to insurance companies, underwriters and the fire department have gone over our property very carefully and have been insistent that access be available to all parts of the property, otherwise we would suffer a material increase in rates. It was for this reason that passageways were cleared around the Exchange Building during the fall of 1934, and the road outside the railroad tracks in Zone 4 was provided. Obviously, lack of access for fire equipment to the back end of the packing plants of Armour and Swift would create additional fire hazards for the property of the stockyards company, and an increase in rates. In the exchange of property for the improve-

ans.

ment of the Platte River channel, the city reserved for the extension of 48th Avenue across the river to a point west of Swift & Company a portion of land on the east of the river as a bridge site if and when necessary.

The owning of land, establishment of roads, etc. for fire protection is most assuredly an obligation, duty and proper capital outlay of the Stock Yard Company, both from the standpoint of our stockholders and our patrons. Both expect, need and demand continuity of the market and it would be an unnecessary hazard if we did not own and maintain means of prompt access to all parts of the yard and to the industries on which the patrons' business is dependent.

17 Mr. Christensen testified that we did not own sufficient land for a roadway at certain points along this zone. The roadway is built along the entire zone and at one point may be on Swift and Company's land to some extent. However, that does not prevent us from using the roadway. For all practical purposes we own a road along the entire length of Zone 4 at this time.

In addition to the five sewer outlets through **Sewer outlets.** Zone 4 which I have already mentioned, there are four sewer outlets through Zone 4 for the Swift and Armour plants. We were required to provide these outlets in order to secure the continuance and enlargement of these plants and the development of the market. A patron of the yard receives the benefit of these provisions through the competition and demand Swift & Company and Armour & Company provide on the market. These two companies in 1934 purchased on the Denver market a total of 1,523,307 head of livestock, and paid yardage on 146,505 head of direct hogs, thus contributing to the income and revenue of the yard

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company a substantial amount which otherwise would have to have been derived through increased rates in order to secure a fair return on the value of our property. The producer is thus benefited substantially in addition to the benefit from the increased market demand.

There are, in addition, certain other uses for Zone 4 in prospect. I will testify as to those a little later when I am dealing more specifically with land held for expansion. We feel that our present use of Zone 4 is more than sufficient to justify ownership and the inclusion of its value in the rate base, but there are other uses to which portions of this zone are now put and to which other portions will immediately be put which further demonstrate the need for this zone. The northerly 1618 end of Zone 4 is now being partially used for a hay barn and for the storage of hay in stacks. The southerly end of Zone 4 has now been filled almost completely and we expect to use the same in the immediate future for parking trucks in conjunction with Zone 6 as our trucking business grows. With the improved roads, changes of method of transportation, etc. the trucking business is growing and we feel frequently is growing with unfortunate rapidity. It is a condition, however, which we must face, and if our patrons desire to use the truck or find it more convenient than the rails, we must be equipped to handle that business, and this use of Zones 4 and 6 is very imminent. When I say that the trucking business is growing with unfortunate rapidity, I mean that it is growing at the expense of the railroads. We regard that as an unfortunate thing because we are equipped to handle a good volume of rail business. A growth in the truck business means that we must build additional facilities to handle the business in the way the producer desires it handled. We feel that movement

Growth of
Trucking
affects use
of Zones
4 & 6.

Trans.

by rail is more economical for us, and on account of our transit arrangement, better for the producer.

- 1619 Zone 3 includes all of the land of the stockyard company north of Race Court, this being the area colored red in the lower right hand portion of the photograph. All of it was eliminated in 1930. A sewer outlet of the stockyard company today exists at the point X, this having been constructed for the draining of the manure dump since the last hearing when the Secretary excluded all of this land. Manure sales of the stockyard company for the past five years have totaled \$16,786.72, or an average of \$3,357.34 per year. A very large part of this has been because the company has had land or a dump available where manure could be stored until a demand existed from truck farmers and others. These people will not haul manure while the weather is bad, during the growing season, or while harvesting their crops. For the proper handling and storage of this manure, and for efficient operation of the yards, both a manure dump for use in wet weather and for dumping into cars, and some vacant land for dumping in dry weather, is necessary. The availability of both of these results in reduced operating expenses as a result of decreased haul and lower disposal expense. If we did not so arrange our operations that we could sell manure, it would be necessary to erect a disposal plant, or to dump into cars and pay switching charges or freight charges on the manure to some point where it could be dumped, and pay unloading expense. At other yards where this is necessary, such disposal expense runs up to \$25.00 per carload. We cannot dump manure in the Platte River or along its banks in the City limits; neither can we dump on land adjacent to packing plants, because the Bureau of Animal Industry of the Department of Agriculture has forbidden us to do so. It was the subject
- Use of Zone 3 described.

Trans.

of some correspondence between us and that Bureau. I have copies of that correspondence, which are here designated as Respondent's Exhibit 18. It is a copy of correspondence between the Bureau of Animal Industry and The Denver Union Stock Yard Company relative to our dumping manure in close proximity to the Armour & Company plant in 1915. The Department advocated that we load the manure on cars and take it clear away from the stockyards and packing house area, which would have cost \$25.00 per car plus the cost of the land in the country on which the manure was to be ultimately disposed. Dr. Miller, assistant to Dr. Mohler, came to Denver, conferred with Mr. Shoemaker and agreed that there would be no objections to dumping above Race Court, which was sufficiently removed from the packing plants so as not to be objectionable. This was one of the reasons the 30 acres was purchased, as it was either that or build an incinerator requiring a large capital investment and operating expense, or load on cars and pay the disposal expense of about \$25.00 per carload, neither of which expenses and capital outlays the management then thought or now thinks to be advisable.

Manure dock. 1622. The manure dock is not on Zone 3. That is on the northerly end of Zone 2 and has been extended. For some years we had a 75-foot wooden manure dump or dock, which was erected in 1917 at the northerly end of Zone 2. It was not only repaired extensively but a 150-foot extension was made in 1934. The value of the present structure is approximately \$7,000, including sewerage and paving. It is only intended for dumping into cars and during wet weather when we cannot dump on vacant land. We cannot use this space at all times because it would soon become too full and we would have no space for dumping manure during wet weather if we did so. We must use our vacant land for this purpose during

Trans.

dry weather when we can get trucks and teams onto it.

We use a portion of Zone 3 immediately above Race Court, totaling about 10 acres, for the dumping of manure and for manure storage during dry weather. This zone totals 19.825 acres, of which 7½ acres are used as a feed lot. The average income of \$3,357.00 annually from manure sales

**Manure sales
profitable.**

1623 caused by the method in which we handle this commodity is the carrying cost on \$48,000.00 at 7%. Allocating \$7,000 to the dump, we have left the carrying cost on \$41,000 of vacant land by the manure sales themselves, plus the material saving in operating expense by being able to dispose of this manure on the property instead of finding it necessary to move it to some other location for disposal. In other words, because of our method of handling, which requires vacant land, we can carry \$41,000 worth of vacant land, or 10 acres, at \$4,100 per acre. On the land in Zone 3 where this manure is dumped during dry periods, the Government appraiser found a value of \$3,500 per acre, and our appraisers \$8,000 per acre. At the Government value, the revenue received from manure sales, deducting the value of the dump, would carry 12 acres of this land at 7% interest, or substantially all of it not used by the feed yard. This manure revenue goes into our general income from stockyards operation.

Q. Now, Mr. Pexton, Mr. Christensen implied that we only use, the Stock Yard Company only use a small portion of Zone 3 for manure dumpage or manure storage and also stated that in his opinion the area in Zone 2 around the manure dock was ample for all our manure storage; what are the facts in regard to this?

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A. We use portions of Zone 3 every year for manure storage. The amount of use is dependent to a certain extent upon the weather. I remember about four or five years ago when we had considerable snowfall during the fall that we not only used every available portion of vacant land in this zone but also other vacant land in various parts of the yards, such as land to the easterly side of Zone 2. That is, we also used the manure dump to its full capacity and piled a great deal of manure with a clam shell on a portion of Zone 2, just to the east of the manure dock. Even then we did not have sufficient room. The past two years on account of the dry fall season we have not dumped as much manure on Zone 3 as we have other years, but if we get into a wet cycle, as we undoubtedly will, based on past experience, I doubt if Zone 3 would be sufficient vacant land for a normal fall business.

1625 (Witness continuing). The difference between a wet season and a dry season is that the possible purchasers can get to it and remove it. Another difference is that more manure is created during a wet season because more bedding is used and the pens do not dry out and there is therefore a great deal more to haul out. If the season is dry there is not near as much manure to be disposed of. Also, truckers and gardeners taking our manure supply cannot get on to their fields in wet weather and will not haul manure and we have no choice except to store it until such time as they will haul it. The purchaser wants dry manure and does not like to buy or haul wet manure, and if we pile it in high piles it will not dry out so he will take it.

We made a deal some years back with a company who intended to process the manure of The

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Denver Union Stock Yard Company and contracted for our entire output. These people purchased the clam shells for approximately \$9,000 and they employed two clam shell operators to handle it. Piles were made after a great deal of trouble and expense up to 20 to 25 feet high with this clam shell. However, the operating expense was so terrific that it practically ate up any possible profit ~~there~~ might have been from processing the manure. We find during wet weather that it is extremely difficult to get a clam shell that will handle manure.

1626 We have handled it in dry weather or if it contains a certain amount of bedding, hay or other refuse which the clam shell can get hold of, but in wet weather it is practically impossible to handle it successfully.

The two clam shell operators received wages of \$10.00 a day each. However, at the present rates you could probably get one operator and a helper at about \$15.00 a day. However, in the light of that experience we would not attempt to handle our manure in that manner again.

With respect to what is done with manure at other stockyards, Mr. Christensen mentioned in his testimony the fact that at Sioux City the Yard Company was able to pile manure 15 feet high by driving wagons or trucks over manure previously dumped. We have found we cannot do this unless the manure is left on the dump permanently and packed down. This may be done at Sioux City but cannot be done if manure is sold as it is in Denver. If we did this we would lose the income from manure sales. At Sioux City the Secretary allowed 385,198 sq. ft., or 8.84 acres for manure dumping, at a value of \$5,885 per acre, or \$50,075.74 for manure disposal in the rate base.

Trans.

1627 In the Omaha case, the Secretary allowed \$70,000 as the reproduction cost of the manure incinerator at that point, plus land value. Omaha also has a material additional disposal expense in rail movement of manure from the yards to the bank of the Missouri River which was allowed.

At the time of the hearing in Docket 301, certain plans were introduced in evidence showing proposed developments in the area north of Race Court, now Zone 3, and on the land opposite the sheep barn, on the west side of the river, which is now Zone 5. The majority of the plans we had at that time have not developed, largely because of the business depression and the uncertainty that has existed the past five years. Consummation of part of these plans for expansion have also been delayed awaiting decision by the Interstate Commerce Commission on westbound meat rates from Denver, complaint of which was filed in 1931 and decision of which will probably be rendered in the next two or three months, the final oral argument before the Commission in that case having taken place last October.

1631 The part of these plans, the consummation of which has been so delayed, is the plans for increasing our hog division. Our facilities for handling hogs are quite inadequate. A new hog barn should be built. Present facilities are not sufficient for present receipts.

1632 Another matter to which we must give consideration is that of providing parking space for our patrons. This is certainly a stockyard necessity if the competition is going to be met. With modern transportation, means of taking care of the patrons of the market is a stockyard service having to do with the marketing and sale of livestock in commerce. All of the auction sales provide ample park-

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ing space for all patrons and visitors. When country people come to our market and do not find a place to park within a reasonable distance of the yards, they become vexed and are inclined to patronize other points which do provide reasonable accommodations. Many producers shipping by rail now drive *their cars to Denver instead* of accompanying the livestock on the railroad. We receive frequent complaints from our patrons about the inadequacy of our present parking accommodations.

1633 At this time the Stock Yard Company land devoted to public parking is very limited. Our patrons are using a strip of land between the horse and mule division and the Burlington right-of-way which belongs to the Colorado Eastern Railroad Company. However, this can be stopped on five minutes' notice if the owners wish.

It is true that earlier in my testimony I gave figures showing a prospective decrease in hogs for the season 1935-36 and yet I feel there is need for a new hog barn. There has been a continued increase in hog production in eastern Colorado and western

Need for
expansion
of Hog
facilities.

1634 Kansas and Nebraska for many years and the maximum production has not been reached. We also feel that when the rates on packing house products and meat westbound are adjusted, a much larger portion of this traffic will come to the Denver market for slaughter than now comes there. We feel the prospective reduced receipts for 1935 and 1936 which we have testified to is only a temporary condition which should be remedied at least by January 1, 1937, and for that reason, although we are faced with substantial decreases in the next year and a half, that production will be back to normal and will increase from that period on. We plan on erecting a new hog barn, when we build, north and back of the Exchange Building, and the Drive-in Division for cattle and hogs west of the

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Exchange Building between the chute house and the U. P. tracks. This will relieve the present congested condition in the sheep barn and permit us to use all of the facilities in that section for sheep. Mr.

- 1635 Christensen suggested we erect a double or a triple deck structure on the location of the present hog facilities, using the first floor for hogs. Such a ~~structure would not increase our present hog facilities~~ but would, in fact, decrease them to the extent that ramps being necessary to reach the second floor, would occupy space on the first floor. Additional drive-in facilities adjacent to the present drive-in dock, as he suggests, would also decrease the amount of available space in the hog barn. This plan would also shorten the so-called C. & S. loading and unloading docks which are common to all lines, and are used for all classes of livestock, from a 13-car dock to an 8-car dock, which would slow up both loading and unloading. The track for this dock is owned by the stockyard company. We, at this time, have ample unloading docks limited exclusively to one or two lines such as the Burlington or U. P. dock, but are short of docks common to all lines. A double-deck concrete barn in the present hog division would occupy a space 208 feet by 528 feet, or 109,824 sq. ft. The cost would be approximately \$300,000. A one-story frame barn in the location adjacent to the Exchange Building of the same size would cost approximately \$110,000. Our plan would save an investment of \$190,000. It would also relieve the
- 1636 congestion on the roadways leading into the present drive-in division, which is now quite serious and which will be materially more serious as the drive-in business expands and more unloading chutes are necessary. This plan will, of course, require the extension of the cattle yard into the land across Race Court. Just when this development will take

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place we cannot say, but we do know that a favorable decision in the West Bound Meat case will make the improvement necessary.

Location of the proposed hog barn adjacent to the Exchange Building will require the abandonment of the 194 carload cattle pens, and 183 catch pens, a total of 377 pens. The stockyards engineer has prepared a blue print of the proposed cattle pens across Race Court to replace the cattle pens of which I have just spoken. This blue print is now marked Respondent's Exhibit 19. This proposed division will provide 260 additional pens, or not quite the number that will be abandoned. We will also convert into normal size pens the three large pens at the north end of the present cattle yards.

637 This plan will give us better facilities, more capable of expansion; will relieve present congested roads; will provide parking space for our patrons; will enable us to compete with auction sales and others. Providing such facilities will enable us to provide better fire protection for our yards; will provide more space than Mr. Christensen's plan; and will save a very large capital investment, which, when made, would go into the rate base.

The pens from the cattle division vacated would simply be moved to the new location. The net saving would be something less than \$190,000, probably around \$125,000. Race Court divides this new cattle area from the present cattle area, but we would endeavor to close Race Court the same as we did Franklin Street. Owning the land on each side of the roadway, we believe that this could be done at relatively small expense and with little objection from the City and County officials, because we would move the highway to the county line at the extreme north end of our property, this being the county line between Denver and Adams

Plans north
of Race Ct.

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County, and the expense of maintenance of the road would then be thrown on the two counties, where it should be since the road with which it connects is an Adams County road. We have reason to believe that the officials of Denver County would not object to this change.

In order to take care of the situation caused by the fact that we are already using 10 acres of this tract north of Race Court for manure dumping it would probably make it necessary for us to purchase a part of the old Coffin Packing Company site, the improvements on which have now been torn down. We could, of course, utilize some of the ground across the river, but that would necessitate a long haul and possibly a bridge, and our present view is that it would be more economical to buy as much of the Coffin site as would be necessary.

Zone 6 for
truck parking.

The land in Zone 6 at the southerly end of the yards is now being filled as rapidly as filling is available. We plan on using this zone for parking empty trucks and also for the storage of loaded trucks which arrive faster than we can take care of them. The City and the C. B. & Q. are now proposing to put a subway under the Burlington right-of-way on 46th Avenue and to close the road running along the C. & S. right-of-way south of Zone 9. This will require a much wider approach and a wider road on Zone 6 than at present, because the subway will come under the Burlington track and will be lower than the average level of Zone 6, and therefore we will have to have a turning radius there as well as an incline, and it will take a road quite a little wider than we now have joining 46th Avenue. We have been occupying a part of the C. B. & Q. right-of-way between the Exchange Building and the C. & S. right-of-way

rans.

for a road, by sufferance only. Our truck business is growing. Our roads are narrow and our location is such that we cannot permit long lines of trucks to extend over railroad tracks and on to 46th Avenue. It congests traffic and slows up all movements. At other markets City authorities have prohibited long lines of trucks standing on streets to unload and have required the stockyard company to provide space where they may wait their turn without interfering with traffic and increasing road hazards. As our truck business grows, we will be compelled to use all of Zone 6 for the parking of empty trucks or for the storage of loaded trucks, particularly when the new hog layout is built. Conditions might also require the use of Zone 7 for this purpose; however, the volume of business will control that.

641 With respect to Zone 5, some years ago we secured from the railroad a transit arrangement to permit the stopping of sheep at Denver 60 days for shearing and further finishing. At that time we expected to build facilities to handle this traffic immediately. Due to the depression and the low price of wool and lambs, which discouraged shearing of feedlot lambs, this improvement was not made. Lack of it, however, has cost us a material amount of business because if the lambs are shorn at Denver, they will likely also sell here. If lack of facilities compels them to go east to some point such as West Chicago, Montgomery, Ill., Lincoln or Valley, Nebraska, to shear, we have no possible chance to receive the marketing charge or any other revenue from such lambs, and the shipper is deprived of the advantages of a nearby market.

Zone 5 for
sheep shear-
ing facilities.

We expect to use the land across the river, known as Zone 5 for a sheep-shearing layout. The shearing and feeding of sheep is a stockyards service in the

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marketing of livestock in commerce, the same as branding, dipping, etc. We lost the sale of 60 cars of sheep from one northern Colorado customer this spring because we did not have these facilities.

- 1642 This would be one which might not yield the full carrying cost in the shearing yard considered in and of itself, but would yield a substantial profit when the other revenue it creates for the company as a whole is taken into consideration. If a charge was provided which would yield the full carrying cost, our rates would be so out of line with competing yards that we would secure no business.

**Zone 4
entirely used.**

**Hay storage
benefits
patron.**

The land in Zone 4 is now all used and useful in the handling of livestock in commerce. We expect, however, to use it still further in the future. Land at the north end is now used for the storage of stack hay and was so used during the fall and winter of 1934. We have found it advantageous to our patrons to purchase large quantities of hay in the late summer and early fall, storing it for use during the fall and winter. During the late summer of 1934, 10,000 tons were so purchased. Our average cost of this hay was about \$18 per ton f. o. b. Denver, or \$14 per ton f. o. b. mountain loading points. During the late winter and spring of 1934-1935 hay sold up to \$24 per ton in the same localities where we purchased it for \$14. Had we waited until the

- 1643 hay was required from us, or had we had no storage space, the cost to us and to our patrons would have been an average of about \$5.00 per ton higher. It is essential that we have vacant land for this purpose.

Material yard.

At this time D. & R. G. W. shipments coming in over the Dotsero Cut-off are switched by the C. B. & Q. and are largely unloaded at the chutes of that company on the easterly side of the yards. Arrangements are expected to be made shortly whereby this traffic will be switched over the North-

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western Terminal line, which enters the yard at the northeasterly end. When this is done, we will be forced to build some additional loading and unloading chutes along the west side of the north end of our cattle yard, which will require the immediate removal of our material yard to Zone 4.

Zone 8 was allowed as used and useful in Docket 301 for the cleaning of trucks of our patrons. It is still so used and should be allowed.

Zone 9, our horse and mule and Stock Show Division, was also allowed as used and useful in Docket 301, except the Stadium, the so-called hook-up shed, the tile barn and the club building. The use of the Stadium and its value to the market and its patrons has already been shown. The so-called hook-up shed is used 51 weeks of the year for the feeding and yarding of horses and mules being handled in commerce, and should be allowed as used and useful. The tile barn is used in connection with the horse and mule business and with the Stock Show, and for such other purposes as are necessary and which will provide revenue to the Stock Yard Company. The club building was constructed about 1907 to serve as a restaurant and meeting place for the patrons of the market. At that time there were no ample or suitable facilities for feeding patrons of the yard, there not being room in the Exchange Building for a restaurant. The club building served the purpose for which it was built; it was a material factor in the building up of the market and in creating contacts between those on the market and both sellers and buyers. It was a prudent investment at the time and should be allowed, either as used and useful property or as one of the development costs of the market. The lower floor is now leased to various people for all the rental we are able to obtain.

Club building.

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**Zone 10
required for
gravel.**

Zone 10 was allowed at the previous hearing as a source of gravel to the Stock Yard Company, substantial amounts of gravel being necessary in stockyard operation. Some gravel has been taken out of it from time to time; however, the major part has been coming from Zone 3. Recent levels taken on Zone 3 indicate that all of the gravel now in that zone will be required for leveling when that land is used for pens, and for that reason we have discontinued further use of gravel from Zone 3. This will force use of the gravel in Zone 10, and that zone should be allowed. The revenue from gravel sales goes into general stockyard income. The use of gravel at a stockyards is a humane matter. The Stock Yard Company sands the alleys around
1645 scales, loading chutes, etc., during icy and wet weather.

**Resp. Exhibit
20 described.**

1646 I have prepared an exhibit which, in effect, summarizes my testimony visually. That exhibit is now marked Respondent's Exhibit 20. It is a photograph showing the various zones with the Government designation and numbering, and superimposed on these are certain colors. The area colored green is the part which I have testified and which the management now feels is fully utilized in the handling of livestock in commerce. We have included all of Zone 4 in this allocation because, as I have testified, it is now fully used and necessary for fire protection, sewer lines, roadways, hay storage, etc. We have included all of Zone 3, for reasons which I have given, and Zones 8, 9 and 10 are also included in this area. The various areas colored yellow represent the land occupied by railroad tracks and which we claim are also a stockyard facility for the handling of livestock in commerce. Zones 5 and 7, and a portion of Zone 6 not occupied by the roadway, are colored red. This

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area, as I have testified, is needed for expansion ground for the extension of our facilities and for the better service to our patrons.

1647 On page 493 of Government Exhibit 5, Mr. Christensen lists about 5.5 acres of land as easements granted to the City and County of Denver and as Class B or not used and useful facilities. We own this land and pay taxes upon it. The only right granted to the City under these easements is for a right-of-way for maintenance of the river bank. This is a facility we need whether it was granted to the City or not. We have ownership to the ground and use it for such purposes as we desire, without consulting anyone, such as sewer crossings and outlets, but we are relieved of the maintenance of the river bank, a work we were formerly required to do at some expense. Prior to the building of this channel we were also threatened with damage claims when we built up our side of the river on account of diverting flood water to the other side, causing floods on that side. Granting of these easements has improved our property, relieved us of claims and reduced our operating expense.

River embankment easements.

When I stated that due to the competitive situation the Denver Stockyards, not having a monopoly, could not be on a different basis from other stockyards, I didn't mean that we couldn't vary from them a few cents per head in our yardage charges, but I do mean that if we were to make very large investments which would raise yardage rates, say, from 35 to 50 cents on adult cattle, in order to accord a fair return, I think the business would move to the point quoting the lower rates.

We can vary from other points to some extent, but not to a major extent. In other words what I mean is that we could not be on a materially different basis from the other yards.

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Resp. Exhibits
17, 18, 19 &
20 offered.

Respondent's Exhibits 17, 18, 19 and 20 identified by Mr. Pexton and testified to by him, were thereupon offered in evidence and the ruling deferred until after cross-examination.

R R Trackage.

1649 (Witness continuing) The Stock Yard Company owns 17,559 feet of railroad tracks within the yard. It does not own any railroad tracks outside of the yard. Figuring standard clearance, these tracks occupy 5.45 acres of land within the yard. This is not the only trackage within or adjacent to the yard. The U. P., since early in our operations, has owned a 50-foot right-of-way and track which goes through the heart of the yard. This track is used jointly by the U. P. and the C. & S. It has proven most unfortunate and we wish we might terminate that ownership. It separates our yard in half and increases our operating expense. The unloading chutes adjoining this right-of-way on the east may
1650 only be used by these two companies. Also, on the easterly side of the yard, our property adjoins the right-of-way of the C. B. & Q., that company owning the tracks but we own the chutes. Because of this ownership of the tracks, other lines cannot use these unloading docks. After experience with this kind of operation, whereby one set of chutes would be congested and the other empty and unable to be of use, the Stock Yard Company started building their own tracks and making them common to all lines, this being the condition that now obtains with the so-called quarantine chutes directly across from the U. P. chutes.

Necessity for
Yard company
ownership of
tracks and
chutes.

The land and trackage owned by the Yard Company is leased jointly to all the railroads on a maintenance, interest and tax basis. The carriers pay all costs of maintenance, 6% interest on a total value of \$121,984.49, and the going car rate in the City and County of Denver on one-half this

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value. The average income for the past five years on this investment of \$121,984.49 is \$10,564.78. The value of the tracks, as found by the Government engineer, is \$58,664, leaving for the land value \$63,320, or an average of \$11,600 per acre.

These tracks are owned by The Denver Union Stock Yard Company better to serve our customers, to reduce our operating expenses, and to avoid the necessity of making larger capital expenditures. In addition to avoiding the disadvantages of single

**Advantages of
Yard Company
ownership of
trackage.**

1651 carrier ownership to which I have just testified, ownership by the Yard Company prevents restrictions which might hamper the market or the outlet for livestock and livestock products, and whatever we can do along this line is a benefit to the producer. The joint use of tracks by all carriers for incoming and outgoing shipments of livestock aids the market, but that is only part of the story. The packers are a steady and important outlet for fat stuff and if the movement of meat and packing house products is facilitated, it tends to increase the slaughter and the local buy. Accordingly, it has been and is our business judgment that it is advantageous and for the good of the market to have stockyard company tracks common to all lines serving the packing plants. This means more rapid movement and better service on these shipments without congestion.

Having railroad tracks of our own with unloading chutes has enabled us more rapidly to unload shipments of livestock coming into the market, thereby getting them on feed more promptly and the patron receiving a heavier fill on his livestock.

1652 This is definitely to the advantage of the producer. Delays in the placing and unloading of livestock have been very much less since the Yard Company developed its tracks and built unloading chutes to serve them than prior to that time. There is also

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an additional value through ownership of tracks and right-of-way to the Stock Yard Company by being able to change, remove or otherwise revamp to suit our requirements, which would not be possible if ownership did not rest with the Yard Company and it were necessary to consult other people and secure their permission. Railroads are notably reluctant to give up industrial track advantages they may have, or to permit others to use those tracks. The arrangements we have at the Denver Stock Yards result in all lines being able to use all of the Stock Yard Company tracks on an equal basis, and, in effect, places industries served by stockyards tracks on the rails of all lines entering Denver, a condition that does not obtain in any other part of the city.

Resp. Exhibit 1653
21 described.

I have an exhibit showing the land leased at various times to the railroads and others, now marked Respondent's Exhibit 21. It is a statement showing the acreage leased by The Denver Union Stock Yard Company to the various railroads and to Armour & Company; also land leased by the U. P. Railroad Company to The Denver Union Stock Yard Company for ~~roadway~~ purposes. It is introduced in order that the record may contain the accurate acreage leased for this purpose, and also the allocation as between the different zones. In the original contract with the railroads made in 1919, railroad engineers allowed a total filling of 30,000 cubic yards at \$1.00 per yard; 22,500 yards were allowed in Zone 4, and 7,500 yards in other zones.

In stating that the total acreage under tracks was 5.45 acres, and that the Yard Company has 17,559 feet of tracks within the yard, I have not taken into consideration, and these figures do not include, the recent sale to Armour & Company.

Trans.

Furthermore, the figures concerning "fill," etc., to which I have just testified, do not include any fill on the Armour track.

1655 All pens in the stockyards are the property of the Stock Yard Company, and are so considered. **Assignment of pens.** Although certain pens may be designated for the particular use of a certain firm, that is for the accommodation of the yard company and of the patron, and no assignment, lease or license for exclusive use goes with such designation. In the sheep barn, for example, certain designations are made for convenience but the yard company takes the position that the second deck of this barn is the sale division and that any sheep arriving for sale shall be yarded on the second deck until it is full, regardless of whether they may be yarded in the designated pens of the consignee firm.

For example, yesterday our sheep receipts totaled a little over 20,000 head. Some firms had more pens than they needed and others had materially less. All of these sheep were yarded on the second deck or sale division of the sheep barn regardless of any pen designation.

1656 The same practice is followed in the cattle yard. The various commission firms are expected to and do co-operate with one another in giving up pens to an adjoining firm if they are not using them, and the adjoining firm has an over-supply. The designation of pens is simply to provide a location for a firm, based on their average receipts, so that the customers of that firm, who are patrons of the Stock Yard Company may know where to locate their livestock, so that scale facilities may be efficiently apportioned, so that livestock may be weighed promptly and economically and otherwise efficiently handled through the yard, and so that the receipts of any one firm may be concentrated

Trans.

at one point, thereby reducing the costs of handling. If this practice was not followed, a most inefficient and unsatisfactory condition would result, which would not satisfy our patrons; would result in a loss of business and would materially increase our expense. One man's shipment might be yarded in different parts of the yard. One scale might be overburdened, unable to complete their weighing in one day and another be light. Livestock received could not be fed and watered promptly. Operation costs of the Stock Yard Company would be materially increased. Obviously, we would be severely criticized if this practice was not followed.

**Different Pens
also necessary
after sales.**

1657 In the efficient and economical operation of a major stockyard, it is necessary that pens be provided for the yarding of livestock after it is sold. It obviously would be impracticable to yard shipments back into the pens out of which they were sold, such pens being usually in the so-called commission firms' division, for the reason that those pens must be cleaned and prepared for new shipments which are arriving. If this practice was not followed, there would often be no pens for the handling of new arrivals. In other words, it is necessary to systematize our operations the same as it would be for any other industry. Our stockyards is three-fourths of a mile long. It is necessary to make allocations and, obviously, operating costs are less when we do properly systematize. We have an obligation to our patrons to so handle the business.

Pens are allocated to dealers, for the same reasons of sound business judgment and economy. For the efficient and economical handling of livestock by the company, certain pens may be designated for the use of a certain dealer based on his average purchases or requirements. First, it is obvious that if such a designation were not made and a deal-

Trans.

er had his cattle scattered all over the yard, his operating expense would be much higher and he would not be as good a buyer as he is under the practice followed, which would react directly against our patron. Second, it is of direct benefit to the Stock Yard Company to have all of a certain firm's livestock in one location for several reasons. In the delivery of feed, that may be done in large quantities to one point instead of to several points around the yard, as would be necessary if a designation was not made. Because a designation has been made, the firm receiving the designation is expected to and does come to pens adjacent to the scales for their cattle, removing them promptly to their designated division. This results in the company usually having pens adjacent to the scales for the temporary yarding of cattle coming off the scales. For this reason, the designation of pens to dealers results in a material saving to the yard company in operating costs, which, of course, reacts directly to the benefit of the patron. As a matter of fact, it is more expensive to the yard company to handle livestock bought on orders and yarded here and there for out-bound movement than it is to handle dealers' cattle. When loading out, all of the livestock from a certain dealer is usually in his location and the majority of it may be run to the train at one time through one lineup of gates. If the livestock is scattered all over the yard, as would be the case if certain pens were not designated, several lineups of gates and alleys would be necessary in moving to loading chutes and the expense would be very much higher. If we had a large feeder buyer show up at the yards and we expected him to be here for some time, we would give him a location and endeavor to prevail upon him to handle all of his livestock in that location for our convenience and the saving of operating expense.

Trans.

As stated previously, it should be borne in mind that any designation is only for the convenience of the Stock Yard Company and its patrons, and that such designated pens may be and are appropriated by the yard company at any time that may be necessary or desirable for efficient operation or the convenience of the patron. The pens in the so-called dealer division at Denver are only designated for a period of about two and one-half months annually. During the year 1934, for example, all of the pens in the so-called dealer division were used for the handling of Government and other cattle much more than they were used by the dealer.

**Trader charge 1660
impractical
and improper.**

There has been an indication in this and other similar cases that the Secretary contemplates including in the maximum rate schedule a yardage charge or re-weigh charge in some amount to dealers or yard traders. Such a charge at our market is, in my opinion, improper, impractical and will not produce the income which the Secretary manifestly believes it will produce. Such a rate was provided by the Secretary in Docket 301 but was enjoined, yet it serves as an index of what the Secretary believed then and perhaps still believes such a rate would produce at Denver.

**Function of
the Yard
trader.**

The chief function of this class of dealer, when operating as a trader, is to clean up the market and increase the market competition, which results in better prices for the livestock of the producer. What the producer wants, who ships to a market, is that his livestock be sold at the best possible price in the least possible time. The greater the demand, the better the price. If the demand is low or weak, prices are down accordingly and the producer must either accept the low price or ship on to another more distant market with consequent increased feeding costs and risks of shrinkage, etc. Hence, any charge, rate or practice which tends to reduce

Trans.

the market demand is definitely against the producer's interests and against the interests of the Stock Yard Company. In the 49 years of the existence of this market, the business judgment of the management has been and is that such a charge would decrease the market demand, penalize the producer and the company, and is improper, from both standpoints, in our opinion.

Long experience of management shows no charge is warranted.

1661 There seems to be an impression on the part of the Government that our yardage charge so-called is really in effect a charge for the use of the pens. This is not altogether correct. The so-called yardage or marketing charge includes many things beside the use of pens and weighing and it is one of the reasons that such a charge is provided when a patron sells or takes advantage of the market, while it is not provided if he does not take advantage of the market. Obviously, this marketing charge covers more than the use of the pens and the cost of weighing shipments. It includes continual development of the market and the holding of the present buying demand. It includes defense and maintenance of traffic arrangements which make the market attractive to prospective buyers. It includes facilities which would not exist were the market simply a feeding point under the 36-hour law. The shipper in his initial marketing charge pays for these things. The dealer is on the other side of the fence, and, the same as the packer or other buyers, provides in a measure the demand and outlet that has been built up for the shipper.

Marketing charge.

In deciding a policy or practice, all things must be taken into consideration, including the effect a given policy may have upon the expenses of the Yard Company and the price to the shipper. Our policy in this matter is based upon years of experience and the proven fact that more competition in the market means higher prices, in addition

Policy based on years of experience.

Trans.

to the knowledge that the present practice lowers operating expenses of the Yard Company. Had we felt that a yardage charge one-half the regular rates, or any amount, would have kept dealers in business and still given the patron the same competition in the sales of his livestock, it would have been established at Denver many years ago, but the management after careful consideration now and in the past, feels that any such charge is uncalled for and would be definitely injurious to all concerned at this market. There is no effort or inclination on our part to discriminate between any class of patrons. The weighing of dealer livestock is usually in carlots, whereas that for producers is in much smaller drafts. At Denver, one, or not to exceed two scales, are conveniently located for the use of the dealers. For this expense we feel that there are many compensating economies and benefits to the patron and to the Yard Company, which would not exist if dealers were not operating. It must be obvious that if the volume of purchases by traders on speculation has been materially decreasing the past few years with no charge for re-weighs, which it has, it would decrease much more rapidly and practically to the point of extinction if a toll was made which represents more than their average profit. With the possible exception of packers having plants located at Denver, no buyer on the Denver market is permanently located there, nor is his demand on the market fixed and certain. Much money has been spent by the Stock Yard Company to attract both fat and feeder buyers, and to provide an attractive point for patrons to sell. The
1663 shipper sends his livestock to a market for sale. The demand of those buyers is not doubtful, and, after all, buyers are the most important thing on a market. In all classes of business the buyer is the one who is catered to, the one to whom advertise-

rans.

ments are directed, and the one whose convenience is considered. Elaborate facilities are provided in all lines of industry whether it be union stations, department stores, hotels, packing houses or what-not, to make the use more convenient for the buyer.

Different from most markets, a total of only about 25% of the market receipts at Denver are slaughtered. The remainder of the receipts are sent on to other packing plants or feed lots, and the sale of this livestock could take place at points other than Denver. If there is large slaughter at a market such a demand is relatively fixed and in a measure stabilizes the entire demand on that market. At Denver we have built up a large non-slaughter buying demand, which constitutes the major outlet on the market. It is not fixed and certain at Denver, and if a toll or tax is placed upon it, it need not remain and may not do so. We know from experience that if a burden is placed upon a purchaser, the tendency is for him to leave and handle his business elsewhere, and that in that event the loss will be much greater to both the shipper and the Yard Company than the gain which might be received from those who happened to stay and pay the additional rate or tax. The Stock Yard Company does not care where or from whom it gets its revenue, but it is vitally concerned in any charge which might affect its buying demand, and, therefore, the income of both itself and the shipper. We do not believe our position in this is contrary in any way to the attitude, practices and desires of our patron, the producer.

Percentage of
slaughter at
Denver.

664

665

Furthermore, there has been a serious misunderstanding on the part of the Secretary as to what revenue such a charge, if made, would obtain. In paragraph 33 of the Order in Docket 301, (the 1930 case) the Secretary stated that in 1928 traders purchased 330,919 head of cattle and calves, 49,170

Trans.

hogs and 254,411 sheep in 1929. The decision does not disclose just how much revenue the Secretary estimated a reweighing charge would produce on this volume of traffic, but, based on the estimated receipts and the return allowed, he apparently felt it would produce something between \$40,000 and \$50,000 per year.

In this decision the Secretary apparently did not take into consideration the fact that a large part of the dealer purchases at Denver are on orders or for reshipment to other markets on speculation and not for sale and reweighing on the Denver market. His decision at Denver and other points does not provide for a charge unless the shipments are actually reweighed and it, obviously, would be impossible to collect one.

Reweigh
Revenue.

1666 Government Exhibit 43 shows the actual number of cattle, calves, sheep and hogs which were resold on the Denver market for the years 1930 to 1934, inclusive, and on which a reweigh charge would apply in the event it was collectible, which we deny. This exhibit shows that the average revenue over this five-year period, had the same volume of reweighs existed with a charge as we had without a charge, would have been \$10,272.89 annually, as shown by an exhibit which I have prepared which is the application of the rates ordered by the Secretary in the 1930 hearing to the figure shown on Government Exhibit 43.

Mr. Pexton's exhibit was thereupon marked as Respondent's Exhibit 22.

(Witness continuing). The basic information for this exhibit is Government Exhibits 43 and 43-A. The difference between this exhibit and the Government exhibits is that this exhibit simply takes the number of cattle, calves, hogs and sheep resold or reweighed on the market, and applies to that

Trans.

number of head the rates provided in Docket 301. which are 14 cents on cattle, 9 cents on calves, 5 cents on hogs, and 3 cents on sheep, and arrives at the total revenue per year for the past five years, also an average of that total. Government Exhibit 43 is in number of head, not in dollars. In other words, this exhibit applies the 1930 schedule of the Secretary to the number of head shown on Government Exhibit 43. It has no relation whatsoever to any charge which is now being made at The Denver Union Stock Yard Company. For example, the 14 cents on fat cattle is not half yardage of the present rate. It is one-half of what the Secretary provided in 1930. This Exhibit 22 is introduced to show what the revenue would have been the past five years at the rates provided by the Secretary had these amounts been collectible, which they would not be.

1668

Government Exhibit 43-A shows the sales by Plants bear commission firms of so-called plants or livestock full charge. resold by commission firms for dealers which have previously been purchased by them on the market. At this time, because we feel when so doing this, dealers are taking advantage of the market in the same manner as any shipper to the market, we make a full yardage charge. A re-weigh charge of one-half the regular yardage charge would reduce our past income from this source of 50%. Government Exhibit 43-A shows the total of these so-called plants over the past five years. This revenue averages \$582.21 annually. A 50% re-weigh charge would reduce this to \$291.10. This amount is deducted from the average revenue, as shown by Exhibit 22, of \$10,272.89, leaving a net of \$9,981.79. The bottom part of this exhibit shows the 1934 actual, which is within \$400.00 of the average, indicating the present actual condition is substantially the same as the average.

Trans.

1669 In 1934, including Governments, we collected full yardage on 488,012 cattle, 113,139 calves, 451,228 hogs and 2,376,234 sheep, or a total of 3,428,613 head.

Trader charge
not essential.

Our estimated average revenue from a re-weigh charge if collectible and if the same volume of re-weigh were done, would amount to \$9,981.79 per year, as I have stated, and that is on the basis that a re-weigh charge would not materially affect the amount or volume of business but in my opinion the volume of business would be materially reduced if a re-weigh charge were applied. Assuming, however, the annual income of \$9,981.79 per year, that still amounts to less than three mills or one-third cent per head of livestock paying full yardage. In other words, the application of this charge would only reduce rates paid by consignors to the market, an average of less than one-third cent per head on all livestock paying the marketing charge in 1934. Eliminating Governments, the average reduction would be a little under $3\frac{1}{2}$ mills per head. Our patrons paying the marketing charge include many others than the so-called producer of livestock.

1670 Packers pay a substantial amount of the hog yardage at Denver. Denver cattle dealers go to the country and purchase large numbers of cattle, shipping to Denver and paying the full yardage. Sheep dealers operating in the country ship large numbers of lambs to Denver for sale. Our California receipts of sheep are largely from country dealers. A substantial amount of this \$9,981.79, if the total marketing rates were reduced that amount, would go to patrons other than producers, in fact.

Charge un-
collectible.

In my opinion, based upon my experience, if such a re-weigh charge be imposed, not even \$9,981.79 per year will be received. This proposed charge and the revenue to be derived therefrom is based

Trans.

on the assumption that it will willingly or necessarily be paid, that the same volume of traffic will obtain, and that collection of the charge will decrease neither the volume of business nor the prices bid for producers' livestock, none of which, in my opinion, would follow. It is an axiom in the livestock industry that the more the competition, the higher the price. Competition is what actually makes the price. A little added competition can increase the price to the producer twenty-five cents per hundred or \$2.50 on a thousand pound steer. Competition at the market is too vital to imperil by the addition of a re-weigh charge which would, in the end, effect no saving to the patron and which might prove a charge against him. Dealers operating for themselves help make the price on the market. If they have additional tolls to pay, they will naturally reduce the price they bid by that amount, and this will leave less competition for order buyers and others to meet, in our opinion. Assuming an initial marketing charge of 30 cents per head on adult feeder cattle and a re-weighing charge of 15 cents per head, the total is 45 cents per head. If a dealer reduces his price bid by an amount sufficient to pay this 15 cents per head, as we believe he will, the effect on the patron is that he will pay 30 cents per head market charge, plus 15 cents per head loss in price, or a total of 45 cents per head on all his adult cattle, instead of the present market charge of 35 cents per head. In theory he may have saved 5 cents per head, but in actual practice he has lost 10 cents.

Transportation conditions also have changed so as to affect this problem. Until recent years, there was no incentive for dealers on the central markets to leave the yards and go to the country to fill their orders or to buy for resale as there is now. Freight rates were the same through Denver as around the

Transportation affects problem.

Trans.

market or if the shipments were purchased at point of origin. Roads were not good in our mountain districts and automobiles had not developed to the extent they now have. Feeders were not acquainted with producers and auction sales were few.

All of these conditions have been materially changed the past few years. The Interstate Commerce Commission on January 25, 1932, provided that rates on feeder livestock from country points to fattening points would be 15% lower than if the shipments moved through a central market in the West, such as Denver.

Country
prices based
on Denver.

(Witness continuing). Country prices in the West are based on the Denver market less the freight and other selling expenses. Adding a reweigh charge to the cost of operating at Denver will just drive that many more dealers to the country and the business away from the market, in my opinion. When they go, their competition is removed from the market and the price is that much lower for the producer, whether he sells at home or on the market. It should be borne in mind that on all country transactions some point or market must be used as a price basis. When prices at Denver come up, country prices follow. When Denver goes down, country prices drop also. Any condition reducing competition and thereby lowering prices at Denver automatically lowers country prices. In order that the record may show just how serious this matter is and the volume of traffic that is being sold at point of origin, the Denver market being used as a basis, and the desire of producers to secure the 85% rate, we have made a statement of cattle going through the Denver market, stopping to feed to comply with the 36-hour law, for the first four months of 1935.

The statement was thereupon marked for identification as Respondent's Exhibit 23.

ans.

74 (Witness continuing). Respondent's Exhibit 23 is a statement showing the cattle moving through the Denver market for the first four and one-half months of 1935, stopping there to comply with the 36-hour law. It will be noted that this totals 432 cars and 18,280 head of cattle. It does not include the total movement by any means, as there were many shipments which did not find it necessary to stop at Denver. The heaviest movement is during the fall. That movement includes both feeder cattle and feeder sheep. Some years back, when going to the country, it was necessary for buyers to go by rail and hire vehicles after arrival to look at the livestock. This was slow and took a lot of time. Automobiles and roads have now developed to the point where it is a short trip for a buyer to go from Denver to Rifle, Colorado, or to the Gunnison district, which produces a lot of good quality feeding cattle. Buyers drive from Denver to points in New Mexico and Texas, as far as El Paso, in one day. Buyers have left Denver in the morning, driven to Laramie, Wyoming, or North Park, Colorado, bought livestock and been back the same day. There is now no great advantage that holds them to the market.

75 Country auctions also play a part in this picture. During the past three or four years auction sales have sprung up all over eastern Colorado and western Nebraska and Kansas. There are now as many as four of these in one town. They vary from ten to fifty miles apart. Some of these have grown into substantial handlers for feeder cattle. Scottsbluff, Nebraska, for example, is in a district which formerly secured the majority of its feeder cattle at Denver. Today this large feeding district is largely supplied with cattle through the two auction sales existing there. The cattle for the auction usually come from a district in Wyoming which

Importance
of country
auctions.

Trans.

formerly marketed at Denver. The auction sales at Grand Island, Nebraska, now handle in excess of 100,000 cattle annually. These are becoming material factors in competition with the central market at Denver, but the point is that the dealer can go to these points and buy without any rate or regulation of the Secretary and will do so if additional charges are imposed upon him which make the central market less attractive to him.

When I speak of competition in this situation, I am referring to the competition between the auction sale and the central market and the competition between direct buying and the central market. It is a very different competition from that of which I spoke recently as one which tends to raise the price on the market. The former is a competition between markets, whereas the latter is a competition within the market for a commodity.

Dealer part
of market.

1676 My point is that the dealer is a part of the market demand required in furtherance of the interests of the producer. His functions are included in and paid for by the marketing charge. Any disturbance of this situation is apt to be detrimental to the industry.

Experience
shows no
charge
warranted.

The Government has proposed for several years the making of a charge on livestock re-weighed at markets. For about the first forty years of Denver's existence as a livestock market, there was no packers and stockyards administration, and any rate or charge deemed expedient could have been charged. The stockyards management has ever been awake to ways to increase revenue, and, long ago, would have made a charge had they felt it was in the interest of the yards and its patrons, the producer. A market only attracts business by the prices it obtains for its patrons and the service it is able to render, not by the cheapness or smallness

Trans.

of its charge. When prices at Denver get out of line with other points or with buying at point of origin, its receipts drop. The result, therefore, is a struggle between markets to increase competition on the market and raise prices paid as well as to improve service and facilities. That is why dealers and packers have been induced to come to Denver and become active competitors on the market. We know, from experience, that any charge added to the buyer will result in lowered competition, a less attractive market and lower prices to our patron, the producer. When that happens our business will, of course, be materially curtailed, which, if reasonable income on the property is to be maintained, will mean a higher rate on the traffic that is left. Our situation then, were we to make a re-weigh charge applicable, would be comparable to that between the railroads and the trucks where the rails increase rates because of a loss of traffic to the trucks and then lose more.

**Management
opposes
charges on
trader.**

1678 The fact that such a charge may have successfully been collected at some point east of Denver has, in our opinion, no bearing whatever on whether it can successfully be applied at Denver. Chicago has had such a charge for several years. That market is at the end of the line and may feel they can collect a re-weigh or other charges without losing a great deal of business; however, Chicago has lost a lot of business for some reason. Chicago, for example, collects yardage on a shipment simply feeding en route or trying the market. We know from experience that we cannot make such a charge at Denver and that if we attempted to do so, we would drive far more business away than the revenue from that source would produce. We would like at this time to make a service charge on shipments of hogs moving to California, feeding at Denver. We have built up our business and a fair return on the pro-

**Chicago no
criterion.**

Trans.

Different
conditions at
Denver than
at other
markets.

1679 perty by making it an attractive place for producers to come to, not by providing rates that would decrease prices or otherwise decrease demand. The Interstate Commerce Commission in the Transit Case 198, ICC, page 73, has recognized the different and peculiar conditions existing at Denver compared to markets further east and we feel the Secretary should do likewise, especially as it is such a small matter converted into cents per animal received and sold.

I am speaking now of the general proposition of additional charges other than what the management has found in its experience to be advisable. The fact that Chicago can make certain charges has no bearing on our situation here. Chicago makes a yardage charge regardless of whether the shipment sells or not. We do not do this, and we know if we attempted to do so, it would drive away far more business than any revenue from such source might produce.

1680 I have known shipments which have tried the market at Denver, been dissatisfied, moved on to Omaha or one of the Missouri River markets, been dissatisfied there and ultimately sold at Chicago at a loss to the producer who sold there irrespective of price because it was the end of the road. There is no place to forward livestock to from Chicago. There is no substantial or large market at Jersey City or Buffalo, Cleveland or Cincinnati where western sheep producers or cattle producers might be willing to forward their livestock. There was a large amount of testimony to that effect by producer witnesses and commission men in the so-called Transit Case, 198, ICC, page 73.

Different
conditions at
Denver.

There are certain conditions in Denver which differentiate this market from the Missouri River markets, where such a re-weigh charge has been

Trans.

provided and its collection attempted. We are practically in the heart of the range country and at some distance from the Corn Belt. Missouri River markets are just the opposite. Denver dealers can drive to range-producing territory and fill orders in a very short time. It would require a lot more time and expense for Missouri River dealers to do the same thing. The conditions are entirely different. The demand also is different. Small lot feeders in the Corn Belt usually go to nearby markets to obtain their feeding livestock. 1681 The ones that come to Denver are usually the larger feeders. Small lot feeders cannot afford to go to point of origin for their requirements while large lot feeders, because of their volume, can afford to do so at a small expense per carload or unit.

There has been testimony in this and other cases and it seems to be the feeling of the Department that the cattle dealers' purchases are, in a large percentage, resold on the market in competition with fresh arrivals of the shipper to the market. As the figures show, however, the amount of competition at Denver is small and its effect negligible. Using the year 1934 as representative, according to Government Exhibit 43, traders purchased on the Denver market during the year 204,618 cattle. Of these 15,377, or 7.5%, were resold to other dealers, generally to fill orders placed with the latter dealers; 44,009 head, or 21.5%, were resold to others on the market, which includes sales directly to feeder buyers or to commission firms on orders; 58,296 head, or 28.5%, were shipped to other markets for sale; 68,710 head, or 33.5 %, were purchased on orders placed directly by fatteners with the dealers; 5,525 head, or 2.7%, were purchased by dealers on the Denver market and shipped to their own feed lots; and 12,492 head, or 6.3%, were purchased by dealers acting as agents for packing plants.

Competition
with fresh
arrivals.

Trans.

1682 To begin with, the number bought on order, 33.5%; those shipped to feed lots, 2.7%, and those slaughtered at Denver, or 6.3%, or a total of 42.5% of the total purchases by dealers were immediately taken off the market and did not again enter into competition with other livestock offered that day or on later days. Denver dealers during the year shipped 58,296 cattle, or 28.5% of their purchases to other markets on speculation. These are usually fat cattle, the fat end of droves of cattle they have purchased, or some particular type of feeders such as heavy feeders, or two-way cattle, which find a more ready outlet at Denver to dealers.

When a dealer ships cattle to another market on speculation, he appears in that market as any other shipper and has to pay at that market full yardage. The cattle shipped on to other markets, although figured in Denver receipts, also figure in the receipts of other markets. Under the Secretary's theory, or the Department's theory, the re-weigh charge would not be applicable to any of these shipments. They would pay full yardage at the latter market and they would not pay any additional yardage, half or otherwise, or re-weigh on our market. Yet they are moved out of our market exactly like the cattle bought by any feeder buyer.

1684 As a general rule, when dealers at Denver ship cattle to other markets, the cattle are purchased with that in view, and are moved out immediately. The only exception to this is if during the latter part of the week traders have some cattle on hand which are getting stale, in order to clean up their alleys, they may ship a few to other markets. However, this is the exception rather than the rule. By cattle going stale I mean that after they have been on hand in the yard for several days, they don't look

Trans.

fresh, their hair gets a little off color and buyers on the market get to know them and when they are in that condition they are termed stale.

The Denver feeder market is usually higher than the Missouri River except for the types we have previously mentioned, which are expressly bought for and moved to other markets. These cattle so purchased are bought in the morning and moved out on so-called hot-shot trains at one p. m., and, therefore, do not enter into competition with other arrivals the next day. This, therefore, eliminates an additional 28.5 per cent as coming into competition with fresh arrivals, bringing this total up to 71 per cent. Of the remaining 29 per cent, 7.5 per cent are resold by dealers to other dealers. Dealers do not purchase from other dealers as a general rule except to fill orders which have been placed with them. If the dealers were not at Denver, it does not follow that the orders would be placed with others at Denver for the reason that dealers are active in securing orders, and if they were not located on the market, but are dealing in the country, it is more than likely that they would obtain the same orders and fill them elsewhere. We may, therefore, properly eliminate this 7½ per cent as coming into competition with fresh arrivals, leaving only a net of 21.5 per cent of the cattle purchased by traders which could actually come in competition with fresh arrivals from producers. Of this 21.5 per cent, a substantial part are resold by dealers the same day they make the purchase. For example, on Monday dealers get out early, make their purchases promptly, get them into their divisions, make the required sorting and sell as quickly as possible. There has been a distinct trend towards this the past five years by dealers in order to eliminate the necessity of purchasing hay to carry livestock over until the next day,

Trans.

or until later in the week. It is our experience that up to 75 per cent of dealer purchases are resold the day they make the purchase. To be entirely conservative, we have used a figure of 50 per cent, which would leave approximately 11 per cent of the total dealer purchases actually in competition with fresh arrivals of producers' cattle the next day at the Denver market.

**Actual 1930
experience
with trader
charge.**

1686 The Denver market has already had some experience with such a charge. In September, 1932, in an attempt to comply with the Secretary's Order in Docket 301, during the injunction period, we endeavored to collect the re-weigh charge from dealers with the understanding that if we were successful in the court in opposing the Secretary's Order, the amount would be refunded. The dealers on the market immediately called a strike and ceased buying, which practically paralyzed demand. Some outside fatteners showed up on the market, however, and because of this condition attempted to purchase at prices materially below those prevailing the previous week. While the Stock Yard Company might have held out for an indefinite period and taken the loss, we could not do so and act in the interest of the shipper. The owners who had cattle on the Denver market that week stated that they lost at least \$50,000 due to this action and importuned us to withdraw the charge, which we did the third day. This proposed charge and so-called strike affected our receipts the entire fall and we have reason to believe, because of the expectation of the dealers that it may some time in the future be applied, has caused them to go to the country more, filling orders there instead of on the market. It is our opinion, based on this and other experiences, with full knowledge of conditions in the West, that it would be impossible to collect such a charge and at the same time maintain our pres-

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ent volume and be an attractive market for producers of the West. Certainly after spending the large amount of money we have in building up a livestock market at Denver, it would be most foolish to endanger that investment in any way by disturbing our buying demand, by making it hard for them to be willing and active buyers, or by driving them off the market by making charges which are not effective at outside points. The management of the company believes that such action would be contrary to good business judgment and would bring much criticism from our producer patrons.

**Management
opposed
charge on
Trader.**

Our competition is not alone that of the other central markets the Secretary has regulated. In fact, so far as feeder livestock is concerned on which a re-weigh charge might be applicable, the competition from other central markets is minor. The Secretary is not regulating the competition of direct buying, auction sales and so forth, but on the contrary, he has more or less approved direct buying of fat livestock and, by inference, of feeder livestock. I base that statement on his findings on direct marketing of hogs, Government Exhibit

**Secretary
does not
regulate direct
buying.**

1688 53. We feel there is an implied approval of the direct buying of other kinds of livestock by the findings he made with regard to hogs. It has also been the attitude of co-operative marketing agencies, which are in a manner supported by the Government, that they favored direct buying in some cases, particularly feeder cattle and sheep.

1689 Whereupon Respondent's Exhibits 21, 22 and 23 were offered in evidence and the ruling thereon deferred until after cross-examination.

**Respondent's
Exhibits 21,
22 and 23
offered.**

I have prepared for the information of the Secretary an exhibit showing what effect a 10 per cent and 20 per cent reduction in the rates of The Denver Union Stock Yard Company would have had on

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the earnings of that company during the past five years. These exhibits are now marked Respondent's Exhibit 24 for the year 1930, 25 for the year 1931, 26 for the year 1932, 27 for the year 1933 and 28 for the year 1934. These exhibits were prepared by me or by those directly under my supervision and control and in accordance with my instructions.

On July 28, 1931, as a result of the hearing in Docket 301, the Secretary ordered a 20% reduction in yardage rates and on the profit of feed. He also ordered a charge of substantially one-half yardage on shipments re-weighed on dealer transactions 1690 on the market. The rates in the last column are our present rates reduced 10%. We have added the one-half yardage charges on the actual shipments we might have re-weighed, based on the agreed figures as shown by Government Exhibit 43 and 43-A and Respondent's Exhibit 22. However, Exhibit 22 is based on figures shown in Government Exhibit 43 and 43-A and simply applies to the number of head shown on those exhibits, the rates ordered as a result of the 1930 hearing by the Secretary for re-weighs in 1931. The reduced rates were applied on all of the traffic actually coming to the Denver market for the five-year period 1930 to 1934, as it actually sold and paid yardage and purchased feed.

1691 In arriving at the rate base, the Secretary threw out the railroad tracks and other facilities producing additional income, and the income therefrom was also thrown out. These exhibits show that if the Secretary's rates in 1931 had been in effect for the 5 year period 1930 to 1934, they would have failed to produce the return then found reasonable by the Secretary by \$44,237.00 in 1930; \$71,000.00 in 1931; \$91,000.00 in 1932; \$86,000.00 in 1933; and \$26,000.00 in 1934.

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Summarizing: Had the rates the Secretary found reasonable as a result of the 1930 hearing been effective for the years 1930 to 1934, inclusive, during that five-year period The Denver Union Stock Yard would have been short \$401,000.00, that is, it would have earned \$401,000.00 less than the amount the Secretary stated was a fair and reasonable return. That is an average of \$80,000.00 per year. Had the returns been reduced only 10% instead of 20% during that period, the shortage for the five-year period would have been \$225,000.00, or an average of \$45,000.00 per year. For the purpose of the record I may say here that when I referred to the decision of the Secretary in 1931 I mean that decision which the Secretary made following the hearing of 1930. In this testimony I have given consideration to the throwouts of expenses made by the Secretary in the 1930 hearing. We have thrown out bond interest as an expense, this being about three-fourths of the Secretary's throwouts. No other expenses have been thrown out for the reason that a substantial part of the expense items thrown out by the Secretary included costs of operation of the Stock Show, carrying charges on that property, certain donations to the Community Chest, Chamber of Commerce and others, and the expense incident to the valuation of our property. I did not eliminate those items because the Court upheld these expenses in its decision of our prior case.

All throwouts of the Secretary aside from bond interest just about balanced our revenue from investments and the railroad property. There is also some revenue which would be eliminated, such as Stock Show rent, which we have not given consideration. The total income from railroad earnings during the five-year period was \$52,733.93 and from investments \$50,952.17, or a total of \$103,

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686.10. Accepting the throwouts made by the Secretary, we would have been short over the five-year period, on a basis of the Secretary's rates and the Secretary's value, an amount of \$297,000.00.

1698 That is, accepting the Secretary's finding that \$254,000.00 approximately was a fair return for the property of The Denver Union Stock Yard Company used and useful in the handling of livestock in commerce at the time of the 1930 hearing, and accepting all of his throwouts from expenses, the returns provided by the Secretary would have lacked \$297,000.00, or \$59,000.00 per year over the five-year period of producing what he said and found they should and would produce.

We feel that this conclusion is supported by Government Exhibit 41-A. After elimination of all property the Government does not deem used and useful and its income and expense, the expense including the carrying costs of the Stock Show, vacant lands and other property not producing income, as well as other throwouts of expense, all of which were condemned by the court in the previous case, and a reduction in our annual depreciation of \$15,000 per year, the government only found an average return for the five years of \$256,961.24, or only \$2,444 per year over what the Secretary said was fair and reasonable in 1930, at our present rates which he attempted to reduce. Non-deductions of donations alone would absorb this average. The approximate 20 per cent reduction ordered by the Secretary would have reduced our earnings \$51,000 per year or, over the five-year period, \$255,000.00. Not making the deductions in expense condemned by the court, our figures are \$297,000.00. The difference in depreciation of \$15,000.00 per year over the five-year period totals \$75,000.00. We feel

ths.

9 our estimate of the revenue we would have received under the Secretary's Order is most conservative.

Whereupon Respondent's Exhibits 24 to 28, inclusive, were offered in evidence and the ruling thereon deferred until after cross-examination. Respondent's Exhibits 24-28 offered.

0 The witness then discussed the effect of the NRA in reducing hours of labor and increasing costs and the fact that the company does not intend to return to the 10-hour day. The Secretary now in his final order has made an allowance for increased wages, hence this discussion is now deemed immaterial and is omitted from the abstract.

9 Now with respect to the costs of these rate investigations and hearings, from March 1, 1924, to December 31, 1933, The Denver Union Stock Yard Company had expended a total of \$62,166.93 in work incident to valuing the property, presenting testimony, preparation of exhibits and other work caused by valuation proceedings, this being an average of \$6,216 per year, or \$518 per month. We start with March 1, 1924, because in 1924, or a few months prior thereto, the Packers and Stockyards Administration set down for hearing and investigation the rates and charges of The Denver Union Stock Yard Company. We went ahead and prepared for this hearing, having our property valued in various respects. The hearing was later called off, the case not being heard. However, due to the case being set down for hearing we thought it necessary to go ahead and prepare for it. Cost of rate hearings.

0 Take, for instance, Mr. Eppich's testimony of the valuation of the land which he made in 1925, that was a part of the expenditures occurring in that period on account of that proposed hearing. This \$518.00 per month does not include office help or the cost of preparing statistical data. Inasmuch

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as this will be a continuing expense from now on, the same as commercial litigation by railroads before the Interstate Commerce Commission, which that Commission allows as proper expense, an expense allowance of at least \$500.00 per month should be allowed us to take care of this work in determining the fair and reasonable rates or in testing the reasonableness of our present rates. In the future we plan on keeping information necessary for rate investigations regarding our valuation and rates right up to date at all times, which will require at least one additional man and numerous accounting forms and statements. At the rate of \$500.00 per month it will require probably five years to pay our cost of the present hearing. In the meantime, we may have others,

1710 The witness then discussed in detail the recommendations of Government witness Christensen to
 1713 eliminate from the rate base those portions of the Exchange Building occupied by government offices, including the postoffice, and by the telegraph companies, serum companies, etc. (see abstract pages 17-18). This testimony is omitted here because such recommendations were not embodied by the secretary in his final order.

1714 Now with respect to Government Land Appraiser Zelinski's appraisal of the Yard Company's land. I have been at the stockyards for twenty years and am familiar with that territory, and as Assistant General Manager I have examined the books and records of the Company with regard to the prices paid for portions of the Yard Company's properties. I am making the following statement in order to point out wherein the Government Land Appraiser apparently has not given weight to surrounding the adjoining values of other lands in the stockyards area, and to conditions which affect land values based on his testimony. In this testimony,

Government
land values
deemed
inadequate.

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witness Zelinski stated that land values were affected by proximity to highways and railroads, by freedom from floods, by improvements which had been made in river channels, by availability of fire protection, city water and other advantages that go with being within the City limits of a city such as Denver, by the nearness of the land to the center of industry in the stockyards area and so forth.

1715 I do not pose as a real estate expert in the accepted definition, but I have for many years closely watched and kept track of development in the stockyards district, with the land valuation in that section, and I feel I am competent to testify as to the improvements which have been made in the past 20 years in various ways in the stockyards district, and to compare the lands of The Denver Union Stock Yard Company under discussion with other land in that section which may have been used to determine the value of the land of the Stock Yard Company. I feel that I can also point out values of our land determined in various ways in the past and show wherein the Government Land Appraiser has not apparently given due consideration to those values. I have repeatedly been over the land which will be discussed in this testimony and am familiar with the contracts, sales, developments or other matters which I feel create or affect values.

At this point Respondent's Exhibits 33, 34 and 35 were marked for identification.

(Witness continuing). Exhibit 33 is an airplane photograph of the yard taken in 1933 which has been colored and marked in various ways, as will later be explained.

1716 Exhibit 34 is a map of the Denver Union Stock Yard area showing the location of the old river channel, the location of the present river channel

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and the amount of filling necessary to fill the old channel and low-lying land adjacent to the channel up to the present level.

Exhibit 35 is a statement showing actual cash expenditures and land grants to the City and County of Denver in order to develop highways serving the stockyards and the stockyards district.

Respondent's
Exhibits 33,
34 and 35
described.

Returning to Respondent's Exhibit 33, it is an airplane photograph of the Denver Stockyards taken in January, 1933, looking north, showing that portion of the property of The Denver Union Stock Yard Company north of the Colorado and Southern right-of-way, west of the Burlington right-of-way and east of the Platte River, together with a substantial area of land north of the stockyards. Exhibit 34 is a map showing the location of the old Platte River channel through Zone 4, the present Platte River channel, the average fill of the old river channel to the top of the bank and the average fill of this and adjoining land to the present ground level. Exhibit 35 is a statement showing land granted to the City in various parts of the yard and the cost thereof in order to make our property more accessible and otherwise develop it. All of these exhibits will be referred to and explained in more detail later.

- 1717 The fact that on Respondent's Exhibit 33 I have not colored the Stadium property, that is to say, the horse and mule division on Lafayette Street and Zone 9, is not meant to waive in any manner the claim that it is our property and used and useful. This exhibit has nothing to do with used and useful property. As a matter of fact I have colored certain lands to indicate that they do not belong to the Stock Yard Company. The only purpose of this exhibit is to illustrate my testimony as it
- 1718 develops. Prior to the year 1917 the railroads, in

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using railroad tracks of The Denver Union Stock Yard Company only paid the maintenance thereon and did not pay any return on the investment in the tracks or on the land they occupied. Negotiations were started to correct this situation. A series of conferences with the executive heads of the railroads finally resulted in an agreement whereby the carriers using these railroad tracks agreed to pay 6% interest, maintenance and taxes on their value. At that time 4.26 acres were occupied by railroad tracks allowing for proper clearances. Of this, 2.17 acres were located in Zone 4. During these conferences a composite value of \$8,772.00 per acre was arrived at. There had also been a material amount of filling done on all of the tracks. Railroad engineers, after going over the matter carefully, allowed 22,500 cubic yards of filling at \$1 per yard on the 2.17 acres of land occupied by the tracks in Zone 4, and 7,500 yards at the same price on the 2.09 acres located in other zones. This, therefore, gives us a value on the land occupied by tracks in Zone 4, which extends from the C. & S. right-of-way at the southerly end of our property to the northern end, of \$8,772.00 per acre, plus \$10,369.00 per acre filling, or a total of \$19,141.00 per acre. For the land in other zones, the grading expenses of 7,500 yards at \$1 per yard on 2.09 acres, figures \$3,588.00 for grading, plus \$8,772.00 for value, or a total of \$12,360.00 per acre. The railroad tracks in these other zones extend from Zone 6 on the south through the heart of our yard to Zone 3 on the north. Obviously, in arriving at this value which was a composite, a greater value was allowed in the other zones than in Zone 4, which would probably reverse these figures and give a value in Zone 4 of about \$12,000 per acre, and in the other zones about \$19,000. These values were arrived at under arms-length bargaining and

**Valuations
agreed to by
Railroads are
indicative.**

1719

Trans.

Value fixed by
arms length
bargaining.

with a desire on the part of the carriers to pay nothing at all. The filling expense was arrived at after careful checking by railroad engineers. This contract with the railroads, while subject to cancellation, as most such contracts are by either party, has now been running for 17 years. There is no prospect of its being cancelled, no indication that there is any desire on the part of the railroads to cancel it, nor, apparently, any possibility that it will not be effective for many years to come.

Respondent's Exhibit No. 34 (the map) shows the filling that has taken place in Zone 4. All of the colored area is the property of The Denver Union Stock Yard Company. The tracks on which 22,500 yards of fill was allowed are immediately to the right of this colored area. They may also be seen in the photograph, Exhibit 33, they being the tracks in the center left hand part of the picture. Exhibit No. 34 shows the total area filled, not including filling on account of railroad tracks prior to this development, this area being 9.95 acres; the amount of the fill, which was a total of 127,852 cubic yards; and the fill per acre, or 12,850 cubic yards. The railroads found the cost of filling ground in this zone to be \$1 per cubic yard. Approximately the same cost would obtain today as all of the filling material would have to be moved from some distant point, there being no 1720 filling material in that particular area. The old river channel was filled from three to eight feet in order to bring it level with adjoining river banks, and then all of it was filled seven feet above this in order to bring it level with the stockyards area. The Government Appraiser has found a value for the 18.722 acres in Zone 4 of \$2,500 per acre, or \$46,805. Our appraiser found a value of 16.382 acres of \$12,000 per acre, and on 2.34 acres a value of \$10,000 per acre, or a total of \$129,984. The

Trans.

filling cost alone on this 13 acres of land, with no consideration given to the value of the land itself, the way it is served by railroads and highways, the fact that it adjoins the Armour and Swift plants, and other factors that create value, would be \$150,352, or over three times the value placed upon it by the Government Appraiser. We have previously shown the use of this land and how it has been developed under testimony concerning land used and useful.

On Respondent's Exhibit No. 33 (the photograph) we have tinted in red the area of the C. B. & Q. right-of-way on which the Interstate Commerce Commission recently placed a value of 25 cents per sq. ft., or \$10,890.00 per acre. This is just the raw value of the land, filling and grading being in addition thereto. In 1917 the I.C.C. placed a value on this zone of 70 cents per sq. ft., or \$30,000 per acre. I.C.C. values north of this zone decrease; however, none of these values has been accepted by the C. B. & Q., although the recapture provision in the act has been repealed and there is now not the same necessity to contest I.C.C. values.

The portion of Exhibit 33 tinted in purple is property we sold to Armour & Company last month, May, 1935, under an option made over 10 years ago. This area contains .475 acre of land and 1,555 feet of track. The basis of the original option was the same as our contract with the railroads, that is, \$8,772.00 per acre for land and \$3.17 per foot for the track, and not as outlined on page 275 of Government Exhibit 23, which showed a land value of either \$9,176.00 or \$5,564.00 per acre, depending on the value of the tracks. This option compelled us to sell but did not compel Armour to buy. The option was given when Armour & Company owned one-half interest in the stockyards and could com-

I C C valuation of C B & Q indicates higher values.

Recent Armour Sale indicates higher values.

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pel the stockyards management to option at practically any price. We would have preferred not to sell at this time, but had no choice. Armour & Company certainly thought this land worth this amount, that is, \$8,772.00 per acre, or they would not have exercised their option.

Zone 1
Undervalued.

Zone 1 in the main stockyards area is tinted in orange on Exhibit 33. It will be noted we have at one end of this zone property recently valued by the Interstate Commerce Commission at \$10,890.00 per acre and at the other end a recent compelled sale at \$8,772.00 per acre. We have leased to the railroads lands adjoining this area its full length at from \$12,000 to \$19,000 per acre as previously explained. The Government value on this zone is \$8,500.00, although the Government witness states that it is the center of industry at the stockyards and, therefore, more valuable than the two values or sales we have mentioned. Our appraisers have 1722 found a value of \$17,500.00 per acre on 34.934 acres and \$15,000.00 per acre on 36 acres.

Zone 2.

Zone 2 adjoins Zone 1 on the north, being tinted in pink. It is bounded on the northerly side by Race Court, an improved street, on the east side of the C. B. & Q. right-of-way with track connections if desired, and on the west by Franklin Street and the tracks of the Northwestern Terminal Railway, and by our tracks. At the southwesterly corner it adjoins the land recently sold to Armour & Company for \$8,772.00 per acre. It is served on two sides by highways and by all railroads entering Denver, the same as our other lands. Railroads pay rental on tracks through this area on a basis of \$8,772.00 per acre, plus grading. On this zone containing 23.19 acres, the Government Appraiser found a value of \$5,000 per acre and our appraisers \$15,000 per acre. In 1930 the Government Ap-

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praiser found a value of \$8,000 per acre. This Government Appraiser was a local man of 30 years' experience.

Zone 3 joins Zone 2 on the north, being separated **Zone 3.** from that zone by Race Court. This area containing 19.825 acres is tinted in brown. The Government value at this time is \$3,500 per acre,—our value \$8,000 per acre. The land cost \$3,000 per acre in 1916, at which time it was not served by the railroad facilities, was not connected with the terminal railway of the Stock Yard Company or to any highway except Franklin Street on one corner. It is now served by the joint railroad tracks of the ~~Stock Yard Company~~ running into it, and by Race Court on its longest side. Prior to purchase it was rough, uneven and undeveloped. To-day it is comparatively level and ready for stockyards use with minor grading. The railroads pay on a value of \$8,772.00 per acre for tracks on land in this zone.

1723 Exhibit No. 35 shows the cost of providing Race Court as a highway, these being Items 4, 8 and 9. 1.78 acres of land was granted at \$3,000 per acre, or a total cost of \$5,340. Item 8, the cost of the Race Court subway, is \$4,227, and Item 9, excavating for the Race Court subway, is \$6,887, or a total of \$16,454. The original cost of the 30 acres was \$90,000. Adding \$16,454 to make the zone accessible as it is at present, gives a total of \$106,454. We lost 1.78 acres in the transaction, leaving 28.22 acres, or, in other words, the usable amount of the tract cost us \$3,675 per acre 17 years ago. We do not deny that land values can go down, but we do insist that just the opposite has been the experience of Denver values, and of land values in the stockyards district the past 17 years. Since 1917 the Denver market has materially expanded, additional packing plants have been built, receipts

Cost to
Company of
Race Court.

Trans.

have been materially increased, and the population of the city has increased over 50,000 people. The stockyards proper in 1917 stopped at Franklin Street, or approximately 1,600 feet from the Race Court subway. Today pens have been extended north to this subway.

Q. Now, I want to stop right there, Mr. Pexton, and ask whether or not it isn't a fact that all of the land which impliedly, at least was recommended by Mr. Christensen as used and useful is not now fully occupied by stockyards facilities.

A. Yes, it is, with possibly one or two minor exceptions, very narrow parcels of land adjoining fences or something like that.

Interspersed
parcels. 1724

Q. Well, now, these were all pointed out to Mr. Christensen. He named one that was along the east side of Zone 2. In your opinion, is that of such size as could be used for the expansion of the cattle division?

A. No, sir, it could not. We are saving that particular land there to enlarge our cattle drive-out chute, to permit access with fire wagons to that side of the yard, to build another branding chute or move it down there if and when it is necessary. It would not permit any expansion of cattle pens.

(Witness continuing). Further examples are parcels designated as 161 and 147 on Government Exhibit 8.

1725 Parcel 147 is a very small, long, triangular piece containing about 7,000 square feet and would accord practically no land for expansion. Parcel 161 is removed from the yards and is so located that it would be impossible to build any pens upon it. In reality it is land left over in the development of the yards. We are now using it at this time for

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the parking of patrons' trucks and to some extent parking for Swift & Company. If it had no use whatever it should still be in the rate base because in the development of a stockyards or any other industry, or even in the building of a house, the builder will find certain parts that are not usable and this is one of the parts that we now find not 100% usable in the development of our stockyards. It would have been impossible in the original purchase not to have purchased this particular piece of ground because it is practically in the center of our property.

So, too, Mr. Christensen mentioned another strip of land west of the main center alley or yard and adjoining the stockyards trackage; it is east of hay barn 4 and running north of the shop and 1726 lunch room. That area is now used at this time as a material yard and as a roadway taking manure to the manure dump on Zone 3 and in moving hay to and from the cars. We might at some time be able to build some chutes in that particular parcel, but it would not be feasible as land for expansion to yard cattle in. I would like to add that Mr. Christensen also mentioned a small parcel of ground adjoining the Burlington chutes and east of the cattle area immediately north of the Exchange Building, that being outlined in purple on Government Exhibit 8. That area is not suitable for expansion for the cattle yard proper. The area numbered 157 on Government Exhibit was left there 1727 purposely in the building of the yards so that our employees might have a passageway going to and from the chute house to the Burlington dock and in order that it would not be necessary for them to walk on the Burlington switch track; it was purposely left as a safety feature in order that someone might not be killed by switch engines moving over those tracks. The area is only six to

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eight feet on our property, and while we might have a few pens that narrow in the drive-in division, the area in question certainly would not be ground for expansion in any sense in the cattle yard. By "drive-in pens" I mean those pens used simply to hold one or two head until they are moved to the sales pens.

No expansion
ground
allowed.

To shorten this whole thing, I might say, in my opinion, Mr. Christensen has allowed no room whatever for expansion in any department in any way.

Local Beef
and Mutton
tract.

1728 Returning to Exhibit 33 in the upper part of that exhibit is an area tinted dark green. This is 2.757 acres of land on which is the plant of the Local Beef and Mutton Company. In 1920 this company purchased from the Fairmount Cemetery Association 1.34 acres of this land, and on October 18, 1922, 1.417 acres. The consideration in each case was \$2,500 per acre. At the time of purchase, this land was uneven and not graded. This cemetery association is the same company from which we purchased the 30-acre tract in 1916.

The City limits end at the Franklin Street bridge over the Platte River at the point marked X on this exhibit. This packing plant is in Adams County and does not receive fire protection, sewerage, water, paved streets and other advantages that go with property located within the City limits of the City and County of Denver. The changes in the Platte River channel and the flood protection developments stop at this bridge on Franklin Street. The land of this company, costing \$2,500 per acre, is eight to nine feet lower than the land immediately across the river in Zone 3. In the August, 1933, flood all of the area outlined in green on this exhibit was under water, while the property immediately across the river in Zone 3, as well as all other Stock Yard Company land, remained above

rans.

flood waters and was in no way damaged by this flood, and it was not necessary for us to make any expenditure either for flood protection or for rebuilding after the flood. At the point marked A in Zone 3 the elevation above sea level is 5,143.7 feet. The low water level at the point marked B is 5,133.5 feet, point A being 10.2 feet above low water. The elevation at the point marked C, the entrance to the Local Beef & Mutton plant over the tracks of the Northwestern Terminal Railway, is 5,135.8 feet. The company office is 5,136 feet at the point marked D. The elevation of the land just north of the plant at the point marked E is 5,134.3 feet. The high water mark in the August, 1933, flood was 5,137.1, or, in other words, during this flood all of this property was under water, with material damage, while the land in Zone 3 was still 6.6 feet above the high water mark. In the other area, outlined in green, material damage was done. The railroad tracks shown in the photograph containing several cars, running from point M to N, was washed out, cars turned over on their sides, and has not been rebuilt. The houses both north and south of this railroad, were under one to two feet of water. The Local Beef & Mutton land, costing \$2,500 per acre, is in no way comparable to the Race Court land, either in elevation above the river, freedom from floods, river channel improvements, railroad service, highway service, fire protection, city water service, nearness to the center of industry or in any of the elements that create value. Livestock for this plant must be driven down the open highway across the Franklin Street bridge. With this actual sale and all of these conditions, witness Zelinski has placed a value on Zone 3 of only \$1,000 per acre more than this low lying, subject to flood, land. To make this land comparable to the Race Court land in just one

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phase would require filling to the amount of 8 feet, or 12,833 cubic yards per acre, at a cost of approximately \$12,000 per acre. To make it comparable from a flood-protection standpoint would require rebuilding of the railroad and highway bridges across Franklin Street, and a great deal of grading and changing of the Platte River channel at this point, at an expense we cannot estimate. We submit the Local Beef & Mutton land is in no way comparable to Zone 3, yet the owners of the land were willing to pay for it 71% as much as the Government Appraiser has placed on the Zone 3 land.

- 1731 On the morning of May 31, 1935, five days before this hearing opened, due to a heavy rain at the headwaters of Cherry Creek, a majority of the land of the Local Beef & Mutton plant was again under water. Several pilings were taken out of the Franklin Street bridge by this water and, also, a part of the N. W. Terminal grade north of their bridge. All of the land of the Local Beef & Mutton Company was under water with the exception of the main plant, which is on higher ground. The high water mark on the river bank on Zone 3, just opposite this tract, was 5,132.7 feet above sea level, or five feet below the level of this land. The high water mark west of the Franklin Street bridge was 5,140 feet. No stockyards property was damaged in any way.

Zone 4
undervalued.

This photograph will also serve to emphasize other low values the Government Appraiser has placed, in our opinion. The northerly portion of Zone 4 is tinted in blue on the photograph. Since this picture was taken it has practically all been filled in as a comparison with the photograph, Respondent's Exhibit 1, shows. Its present use and necessity in stockyards operation was described in other testimony. On this land adjoining the Armour plant and directly across from the land we sold

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last month for \$8,772 per acre, the Government Appraiser has placed a value of \$2,500 per acre, or the same as the Local Beef & Mutton paid for their land, in 1920 and 1922, subject to flood and outside of the City limits.

1732 For the information of the Secretary, the Hanks feedlot is visible in the extreme upper left hand part of Respondent's Exhibit 33.

More or less the same conditions are true about the rest of our property, that is, the Government values are, in our opinion, unreasonably low and are apparently based upon some distant and not comparable sale or offer. The land in Zones 6 and 7 cost us \$4,375 per acre in 1888, at a time when Denver's population was only 106,713. At that time 46th Avenue, which now separates the two zones, had not been opened. The Swift Packing plant near these zones did not exist, and certainly the Denver livestock market had not developed to its present state either in outlet, demand or facilities. The present Government value is \$4,000.00 per acre on Zone 6, and \$3,000.00 per acre on Zone 7. We gave to the City in 1907 and 1913, 2.298 acres of land to open 46th Avenue, these being Items 2 and 3 on Exhibit 35. The first cost of this 2.29 acres was \$10,050, and the cost plus carrying charges of six per cent simple interest to the date given is \$22,155. The original tract was 11.43 acres, costing \$50,000 for the land. We gave to the city 2.298 acres, leaving a net acreage of 9.15 acres at a net cost of \$50,050, or \$6,550 per acre. The Government value of \$4,000 per acre is 61 per cent of this amount, and the value of \$3,000 per acre is 46 per cent of our cost.

Respondent's Exhibits 31, 32, 33, 34 and 35 were thereupon offered in evidence and ruling thereon deferred until after cross-examination.

Respondent's Exhibits 31, 32, 33, 34 & 35 offered.

Trans.

1733 At this point the photographs being offered into evidence were qualified by the witness as to their accuracy. It was admitted by the witness that airplane photographs to some extent distort the objects photographed in that they enlarge that portion of the photograph near the camera in comparison with more distant portions. The witness stated that, in his opinion, the photographs taken together gave the person viewing them an accurate view of the layout of the Denver yards, which is all that they were intended to give. Witness stated that it was not intended that measurements should be taken from these airplane photographs.

1734 Mr. Miles then waived the objection that the photographs had not been properly qualified, reserving, however, the objection relative to their general admissibility.

1735 MR. ROSWORTH (Continuing): Now, Mr. Per-ton, Mr. Zelinski also testified in connection with his structural appraisal to the use of company labor and what savings might be made in that manner in reproduction new cost. Have you made an examination of the Stock Yard Company records and have you a statement to make with regard to the rates for labor used by the Government in their Exhibit 31, which I believe is the company labor exhibit, is it not, Mr. Zelinski?

MR. ZELINSKI: 31, that is correct.

Govt. figures 1736
on labor
costs below
current scale.

(Witness continuing). Government Exhibit 37 shows the labor rates used in figuring the reproduction cost of the property of The Denver Union Stock Yard Company using company labor for a portion of the work, as shown by Exhibit No. 31. It shows a 30 cent rate for common labor employed by the Stock Yard Company. At this time we have 106 employees in the yard proper. Only two of these are paid the 30 cents rate; all of the remain-

Trans.

ing employees being paid higher rates. 30 cents per hour is our starting rate for new, inexperienced men on rough work. As soon as they get some experience, their hourly rate is increased. Respondent's Exhibit 29 shows the average hourly cost of expense on account of the NRA to be 45.7 cents per hour. Use of our actual common labor cost on Government Exhibit No. 31 would materially change the reproduction cost as shown by this exhibit, for which reason, in our opinion, those figures should not be used. Government Exhibit 28, based on contract labor, should be used.

In all of our major construction the work, with few exceptions, has been performed under contract, it being our experience that it is more economical to handle in this manner. The employees of these contractors are paid the union scale, these rates being used in ascertaining the reproduction cost shown in Government Exhibit 28. Our employees are not unionized. As a general rule, unionized labor in Denver will not work with non-union men such as we employ. When we wish to do work around or on some construction work we have contracted, we generally must wait until the contract portion is finished and these men are off the job.

1737 Such procedure, in the event of full reconstruction, would, in our opinion, materially delay the construction period, and any savings in labor would be more than offset by the extended construction period. The Government allowed a construction period of one year, figuring 7% interest for half that period, or six months, on \$3,015,000, or \$101,964. An extension of the reconstruction period for only a short time would more than offset the saving of approximately \$40,000 as shown by Government Exhibit No. 32.

Now with respect to amortizing the I.C.C. hearings expense over a ten year period, on page 3 of

10-year
period used
on I. C. C.
expense.

Trans.

Government Exhibit No. 41 the Government Auditor shows we have charged off a total of \$19,684.96 during the past five years on account of rate hearings before the Interstate Commerce Commission. He readjusts this expense on a 10-year basis, charging off \$1,968.50 per year. We do not believe it desirable or good business to carry such expenses in our asset account after the money has been spent, pending charge-offs over a 10-year period, for the reason that we continually have cases before the Commission in order to protect transportation charges to and through our market, all of which is in the interest of the producer and patron. The larger amount of this \$19,684 was on account of a discrimination case brought against us by the Missouri River markets, which, if we lost, meant about \$50 per car less in the price livestock shippers would receive on shipments sold at Denver. The case was successfully defended. It did not, however, definitely approve the so-called transit or sale in transit arrangement of livestock at Denver, but only found it non-discriminatory, and we may be again called upon to defend it under Section I of the Interstate Commerce Act in the future. At this time we have pending before the Interstate Commerce Commission a case involving west-bound meat rates to the Pacific Coast and east-bound livestock rates to the Atlantic Coast, both of which will react to the benefit of our patrons if we are successful. We also expect to have an east-bound meat case some time in the near future. It is not good business to hold these expense items in our account and they should be charged off when they are incurred. That is the opinion of the management and the Board of Directors as far as I know it.

Govt.
"throw out"
schedule.

1739 At this point I should like to comment on Government Exhibit 41 and in particular that part of the Exhibit which contains what might be describ-

Trans.

ed as the Government's throw-out schedule. I have examined the various items of expense thrown out by the Government and I am familiar with all of them.

In Government Exhibit 41 the Government makes certain deductions from income, expense and depreciation on account of property they declare not used and useful. We do not agree with these eliminations in any way or with the average income of \$256,961.24 they arrive at on sheet 1 of Exhibit 41-A. As shown previously, in our opinion all property used in connection with the Stock Show is used and useful and expense eliminations on page 3 of Exhibit 41 are not proper.

1740 Pages 4 to 7, inclusive, of Exhibit 41, cover deductions made from our expense account of dues, donations and subscriptions. We believe that these expenses are entirely proper, being made for the good of the market and the patron on the market. We shall take the year 1934 covering each of the eliminated items, explaining why they were made and how they are necessary for the good of the patron in the operation of the Denver market.

Donations eliminated.

The first item eliminated is a subscription of \$1,000 to the Denver Community Chest, this being the consolidated charity and relief organization for the City and County of Denver. The Denver Community Chest takes care of general charity work throughout the City, but its agencies spend a substantial amount of its income in and around the Stock Yards district. Nurses and others representing organizations of the Chest call on and are of assistance to our employees or ex-employees and generally contribute to their general welfare. Some charity is necessary in every City and lack of it results in a more disorderly and unsafe community. It is our opinion that the donations of the Stock

Community Chest serves Stock Yard district.

Trans.

Yard Company in the Stock Yards district would total much more without the Chest. As is the case in most cities, the poorer districts receive much more from the Chest than they contribute, whereas the better residence districts contribute more than they receive. This is the case with Denver. Our contributions to the Chest result in charity cases being more efficiently investigated and we are assured that our donations reach those in need in a much larger percentage than if we attempted to make them direct in large volume.

Chamber of
Commerce
aids live-
stock in-
dustry.

1741 The next item eliminated is a subscription of \$240.00 to the Denver Chamber of Commerce. This Chamber of Commerce has been of value to us in assisting in freight rate cases, in assisting in the building of the Dotsero Cut-off, in building up the City and County of Denver, thereby increasing the outlet for meat products and in contributing to the general welfare of this locality. They have an agricultural department which has been of assistance in connection with livestock production. They are active in bringing tourists to Colorado, which increases meat consumption throughout the territory. Our subscription to them is quite normal considering the fact that the Stock Yards is the largest industry in Denver. In our opinion, the patron of the market receives a benefit much larger than the amount of our subscription of \$20 per month.

The donation to the U. S. Chamber of Commerce next eliminated was \$50 in 1934. The work of the U. S. Chamber of Commerce is familiar to all concerned, it being active in matters affecting and benefiting the general welfare of all people, including the livestock industry.

The next item eliminated is \$15 to the Junior Chamber of Commerce. More or less the same explanation applies to this as to the Denver Chamber of Commerce.

Trans.

The next item is \$395.50 on account of tickets and boxes to the National Western Stock Show. We give tickets to the Stock Show to all of our employees and their families, this constituting about \$300, or the major portion of this item. The remainder covers tickets purchased for patrons of the Denver market here during Stock Show with their livestock. No tickets are given to exhibitors, but only to regular shippers, and this amount is nominal. It is, in fact, solicitation of business.

1742 In our opinion, this expense is proper for the patron, it being spent for the benefit of our own employees and for the benefit of the patron himself.

The next item is \$832.56 to the American Stock Yards Association, an organization of all stockyards. It was organized in compliance with the provisions of the NRA in order to work out a stockyards code at the direction of the President of the United States through his authorized representatives. Under the requirements of the NRA, stockyards companies were required to organize a group, as individual companies would not be recognized. Had the National Recovery Act not been passed, the Association would not have organized. The mere fact that the Act was declared unconstitutional should not remove from our expense an item forced upon us by the Government. Undoubtedly some similar organization will be necessary in the future. This association is still in existence.

**American
Stockyards
Association.**

The next item eliminated is \$115 donated to various churches around the Stock Yards district attended by our employees. We do not donate to churches outside of this district. We believe the presence of these churches in the Stock Yards district has a beneficial effect upon our employees and, through them, upon our patrons and should, therefore, be allowed.

**Church
donations.**

Trans.

The next item is \$75 donated to the United Health Appeal Hospital, a Jewish organization taking charity subjects of all creeds and kinds. We believe this work is for the general good of our territory and that it may properly be supported. We have numerous Jewish patrons.

- 1743 The next item is \$10 to the Volunteers of America, this being a charity organization similar to the Salvation Army.

The next item is \$5 to the Veteran Volunteer Firemen, an organization interested in fire protection in Denver.

The next item is \$15, which is a donation to the Firemen's Pension Fund and gives a better contact with city firemen, and, for this reason we feel, better fire protection.

Traffic
Clubs.

The next two items are \$18 each to the Denver Traffic Club and the Denver Commercial Traffic Club, the first being a traffic club including railroad men, and the second being a similar club not including railroad men. Membership is held in the former club in order to give better contact with the railroad men, thereby enabling us to improve railroad service into Denver for patrons of the Denver market, and also switching service after arrival at Denver. Contacts are formed at this club which makes it much easier to obtain this improved service for the benefit of our patrons. Membership is held in the Commercial Traffic Club mostly for educational purposes, it being strictly an educational organization in order to become better informed on rate matters and their presentation before the Interstate Commerce Commission, and through contacts formed in the club, to be able to consult and confer with other members who are informed on Commission procedures.

Trans.

1744 The next item eliminated is a \$70 contribution **Brand** to the brand inspectors on the Denver market. We **Inspectors.** frequently call upon these inspectors to sort cattle which have been mixed, this being done by brand. Claims are eliminated or reduced through prompt sorting of shipments we have mixed and prompt movement out of the yards. We call upon them at all times of the day and night. No remuneration is given them for this work except the Christmas present which amounts to \$10 each. We cannot insist upon this work they do without remuneration and we feel the expenditure saves us a great deal more in stockyards operation than the amount involved. We can hire them outright to do this work for us but it will cost more to do so.

The next item eliminated is \$95.53 on account **Denver Live-** of dues of The Denver Livestock Exchange on a **stock Ex-** membership of The Denver Union Stock Yard Com- **change dues.** pany in this organization held in the name of the president and general manager. It is felt that in the interest of the patron and to have a voice in the affairs of this organization, The Denver Union Stock Yard Company should have this membership. By having the membership, we can attend their meetings, make suggestions for the good of the service, start advertising programs, start meat consumption programs and otherwise contribute to the general welfare of our patrons. Without this membership we could not attend these meetings or have any voice in their actions, which we believe would prove detrimental to our patrons and to the property of the company. It is just as important for us to be identified with the Exchange in this way as for the lawyer or doctor to be a member of his respective associations or the railroads to be members of associations for their common good.

**Policemen's
Pension Fund.**

Trans.

1745 The next elimination is \$50 donated to the Policemen's Protective Association, this being the pension organization of policemen. We frequently call on a policeman to assist in various ways around the yards, particularly in the protection of our own or our patron's property. We ask them to watch automobiles parked by patrons if thefts are going on. ~~We do not mean that protection would not be~~ accorded if the donation were not made, but we do know their spirit of co-operation is better than if the donation were not made. In the event of trouble in or around the stockyards it would be essential that we have ample and proper police protection for the good of the market and the patron. We are sure that because of this donation the protection our patron would receive would be in much better spirit than would otherwise obtain.

**Miscellaneous
Charitable
Gifts.**

The next three items eliminated are a \$10 donation to the Old Folks Home, \$1 for Christmas tuberculosis seals and \$5 to the Rescue Mission, all of which we believe react to the benefit of our patrons.

The next item is \$11 to the Church Messenger, which is an advertisement which should be allowed.

The next is \$10 to the Joint Labor Day Committee, this donation being made at the behest of the Labor Day Committee to pay honor to labor in keeping with the spirit which caused our National Government to set aside one day of the year as a legal holiday upon which occasion the nation would pay honor to labor.

**Denver
Tourist
Bureau.**

The next item is \$100 to the Denver Tourist Bureau. The Denver Tourist Bureau generally advertises Colorado, bringing tourists to this section who contribute to the general welfare and materially increase the consumption of meats in our territory, all of which is to the benefit of our patrons.

Trans.

1746 The next item is \$10, for advertising in the annual program of the Gentlemen's Riding and Driving Club, an organization identified with the livestock industry insofar as it has for its purposes largely the promotion of the best interests of the horse business of this community.

The next item is \$100 donated to the ~~Denver~~ Woman's College, this being a Denver school educating girls, and largely dependent upon popular subscription. We have felt it was of advantage to the children of our employees who might not otherwise be able to secure a higher education.

The next item eliminated is \$25 to the International Veterinary Congress. This congress is one of veterinaries from all over the country conferring for the good of the livestock industry and one which is supported by the Bureau of Animal Industry of the U. S. Department of Agriculture. We understand this particular conference was with reference to cleaning up cattle tuberculosis in the West so that States might be accredited and, thereby, find a better outlet into the Corn Belt. We feel the donation was well worth while and that it was in the interest of our patrons.

Veterinary
Congress.

The next item is \$25 for an advertisement in the Police and Sheriff's Association Journal. We felt the advertisement justified and that it would have good results, otherwise it would not have been taken.

1747 The next item eliminated is a \$5 advertisement in the Western Legionaire, which circulates all through the West, including livestock producers.

The next item is a \$5 donation to the Letter Carriers. There is a postoffice in the Exchange Building and people renting space in that build-

Trans.

ing desire good service. We felt this donation would create a better spirit and would be of assistance in providing better service.

The next item is \$11 to the National Federation of Federal Employees, this being for tickets for their annual ball. We feel this helps to promote good relations with the various Government departments represented at the Stockyards, particularly with the Bureau of Animal Industry and the Market News Service, and that it is to the interests of all concerned, including the patrons of our market, to do this.

The next item is a \$5 donation to the American Legion, membership of which includes many livestock producers.

The next is a \$5 ad in the program of the Holy Name Basketball League, which, we believe, is justified.

The next is a \$2.50 donation to the Guldman Community Center, an organization somewhat similar to the Salvation Army.

The next item eliminated is \$18 for tickets to the President's Ball, this being a more or less national movement. We did not feel that we had much choice in this donation. Certainly, had we refused this modest donation, we would have run the risk of offending powerful influences.

Total dues,
donations
subscriptions
3/10 of 1%
of gross
income.

1748 This list includes all of the donations made by the Stock Yard Company in 1934, totaling \$3,823.84. The Government has allowed \$233.25 and eliminated \$3,600.59. The total donations are only three-tenths of one per cent of our gross income. We endeavor to keep it as small as possible, making only donations which, in our opinion, are absolutely necessary to maintain the standing of the company in the community. We have been criticized for

Trans.

being too close in these matters. The Government voices no criticism whatever that the company has been extravagant in this matter. We know it has not. Many industries in Denver donate up to \$5,000 annually to the Community Chest. The Stock Yard Company, although the largest industry in Denver in volume of business handled in money transactions, only donates about one-fifth of this amount. We do not understand that the Interstate Commerce Commission criticizes railroads for reasonable charity donations, or throws them out of the rate base.

749 At this point Respondent's Exhibit 36, being Supplement 29 to U. P. Tariff 101-L, I. C. C. 4090, issued June 13, 1935, effective June 15, 1935, under Item 320, was offered into evidence. This exhibit was stated by the witness to establish the same rate as was effective in Denver at that time for Colorado common points and the markets west of the Missouri River with respect to sorting, consolidation and change of ownership of sheep, commonly called the sale in transit privilege.

750 (Witness continuing). I should like to cover more fully the hazards of the stockyards business and the conditions that confront us. Taking, for example, the Electric Light and Gas Company of Denver, anyone requiring this kind of service must go see this company. For that reason, their demand for service is more or less fixed. They are able to anticipate this for a considerable time in the future. They are able to provide either gas or electricity in the form of a gas supply or generator or dynamos, growing gradually as the community develops. They are not confronted by the same things that the Stock Yard Company must face all the time. In the stockyards business we have the hazard of changed transportation conditions, direct buying, disease in livestock, drouth conditions, the Federal attitude on certain things, fluctuating

Hazards of
business.

Trans.

prices, weather, auction sales, growth of railroad feed yards, growth of other markets, none of which are faced in the same way by a true public utility.

- It might be possible, so far as we are concerned, that a market for livestock be established at Cheyenne, Laramie, Greeley, Pueblo, or at some other point. The establishment of an electric light and power company at any of these points would in no way affect the supply of electricity or the demand thereof at Denver. These auction sales that are
- 1751 springing up take a certain amount of business away from us. In other words, we must be continually on our toes to offset these conditions, to improve service, to make changes which will continue to bring the business to Denver, whereas these other true public utilities only need to make these changes or improvements as they see fit. I think
- 1752 we are in exactly the same condition as any manufacturing or service industry that continually meets hazards, changes in economic conditions and other things which affect their volume of business, and therefore their revenue.

Two or three of the hazards which I have mentioned are, in one sense, tied up together. Suppose an early snow storm comes in our mountains, as it has frequently done, and operates to drive out of the range a large number of range animals. That leads to congestion and it leads to shipments to other markets we might normally get under normal weather conditions. We have had snows as early as September 1st in the mountains which forced out a large volume of livestock and forced a part of this livestock to other markets. With normal weather conditions this livestock would have moved down gradually and it would have fed into the Denver market gradually. We also find that as prices go lower there is a reluctance on the part of the producer to take the prices bid at Denver, there be

Trans.

1753 ing a feeling that any change will be an improvement, and he therefore continues on East, hoping the market will improve during the period he is en route.

All of the recent Government policies like the corn hog program, the Taylor Grazing Bill, permission to import Argentine meats, the Federal Farm Board, the things along that line have been contrary to, you might term it, a maintenance of stable business at Denver. Just what effect they will have on the livestock industry over a long period of years, no one can say, but we do know that they have had an immediate effect to create a greater hazard in the business and to reduce the volume of receipts the coming year or two.

This question of Argentine meats has been the subject of protest recently by practically every livestock organization that I know of. It is my information that meats can be produced profitably in the Argentine for very much less than the cost of production in the United States. Without a doubt if the bars are taken down and Argentine meat is permitted to come into this country, it will have a very adverse effect on the livestock industry in the West and therefore the stockyards serving that industry.

1754 HARRY W. FARR, a witness called by the Respondent, after being sworn, testified as follows:

My name is Harry W. Farr and my residence is Greeley, Colorado, and I am engaged in the livestock business, feeding sheep, cattle in wholesale production and the bean business. I feed about 35,000 lambs and a thousand cattle per year. I am not a producer. I am engaged entirely in the feeding side of the operation.

1755 I am a member of the Colorado and Nebraska Lamb Feeders Association and on the executive

Trans.

committee, and president of the Weld County Lamb Feeders Association and a member of the American Livestock Association; also the National Wool Growers, Salt Lake City.

I ship my lambs and cattle to the Denver market in part and to the other markets also. At times I sell direct but not as a rule. I buy the feeders on the range or on the Denver market and fatten them.

I have been familiar with the Denver market since 1907. I am also familiar with the Livestock Show which is held in Denver and have been so since 1756 1907. I have attended every year except one.

Show benefits
the industry
as a whole.

I also get out through the territory and buy my feeders, sometimes direct from growers. I have had opportunity to observe the effect of the Stock Show on the industry and it is my opinion that the Livestock Show at Denver is a benefit to the industry as a whole. I think any show is one of the greatest advertisements there is for meat and meat products. It is very educational for people to go there and see the different classes of stock and how they have been bred and improved. I think it is, you might say, it is the top degree for agricultural college or high school students, 4-H Club boys and girls, their aspirations to get to go to some show, Denver or Kansas City, and so forth. The stock judging teams that they send all compete at these shows from the various states and counties, and so forth.

Benefits
those who do
not attend.

1757 I feel that the benefit spreads out through the industry and touches those who do not even attend the Show. I have seen in my own community where probably the parents would never go to the Show, yet their children became interested through the 4-H Clubs. The boys and girls exhibited their animals at the Show and came back, and their parents

Trans.

got pepped up and soon started to breed better sheep and cattle and hogs.

In my opinion the Denver Show creates an enlarged outlet for livestock which operates beneficially throughout the year. In my opinion a part of the income at the yards is directly traceable to the Show. If they didn't have the Stock Show their income would be very low in January. That is true on account of the immense amount of livestock that the Show draws, especially the large amount of feeder cattle. In other words, in January our feed lot lambs and feeder cattle out in northern Colorado are not quite ready to start to market. They wouldn't usually start until February; March and April are the biggest months. In January the range run is over and there would be practically no business here if it wasn't for the Show. In other words, January would, in my opinion, be a greatly lower month than December so far as cattle or sheep are concerned.

Income of Respondent directly due to Show.

1758

In my opinion, the feeder auction could not be held at any time other than at the Denver Stock Show period. The shows in the East generally run in November and December, and having the Denver show in January, it is an ideal time. It gives the eastern cattle man an opportunity to come out here and buy feeder cattle for his second feed or buy young stuff to finish roughing out throughout the winter and put on grass in the summer. It also gives the range man an opportunity to hold back his cattle and hay feed them for the Show because he knows there will be a good market at that time. It saves a glut in the fall by holding back most of these cattle that are exhibited at the show.

Feeder auction could not be held except at Show time.

In my opinion the Show could not be held successfully with any less housing than it has. I have attended shows in Kansas City and Chicago and

Housing not excessive.

Trans.

Ogden and I don't see how you could get along with any less space at all.

**Yard trader
necessary.**

The producer, and by that I mean of course the feeder and fattener, is interested in the buying outlet on the market. So, too, in my opinion, is the yard trader or dealer an important buying outlet on the market. I don't think you could get along without them at all. As I see it, the function of the yard trader on the market is as follows: A range man will ship in his cattle when he rounds them up. He has various grades, sizes and ages. It is impossible for him to grade them at the railroad or at the round-up because he would have to take these back several miles, and it is too expensive, and his practice is to load up,—to just ship them. The commission men are not interested in the mixed lot of stuff, and the average feeder is not. The yard trader can buy these mixed droves of cattle and reshape them and sell them according to grades and classes.

**Included in
marketing
charge.**

1760 I don't think the yard trader receives anything free. Everything he gets is included in the marketing charge. I feel that the benefit to the producer of having the yard trader in the yard is such that it is a fair proposition from the standpoint that the use of pens, weighing facilities, etc., by the trader should be included in the marketing charge.

Cross-Examination.

**Traders
function.**

I don't think it possible that the commission man could sort and sell these odd lots of cattle to the same advantage the trader does, for this reason: We will take a commission man today, he might have eight or ten loads of cattle and he would try to sort them up and he might have part of those that he could sell to a packer and he might have a car or two of the same grade but in all probability

Trans.

1761 he would have a part of a car of yearling heifers, and a part of a car of calves, and a part of a car of cows and he might accumulate a carload together and dispose of them the same day and the shipper likes to sell out the day he arrives at the market and get his money and go home. In other words, the commission man would have to have more pens and he would have a package of this and that and he would be accumulating together, whereas the yard trader can buy these various packages from several commission men and accumulate a car or several cars of that variety in the same day.

The functions of the commission man and the trader are entirely different. The commission man can sell the stuff and that is what the producer pays him to do. He doesn't care whether the yard trader buys it or the packer or feeder buys it, just so the commission man sells it for the high dollar. The commission man needs the trader to buy the few odd head that he has to sell. He could not function as well as the trader in disposing of these odd lots. It would take him longer to accumulate them and it would be more expensive.

Functions of commission men and traders different.

1762 My testimony in substance is that when the original shipper ships in here and pays his yardage charges that the trader services and facilities which he receives are included in the original yardage charge. That is, the purchaser pays yardage on his cattle and the trader does not have to pay yardage on his. He does have to buy his hay the same as the producer and the shipper. To that extent they are on terms of equality.

Trader receives no free service.

I am familiar with what services and facilities the trader receives from the stockyards as compared to the services and facilities received by the shipper. The way I see it, the shipper comes in and is entitled to yard room and a place where the

Trans.

stock can be fed, watered and exhibited for sale. The trader has certain pens allotted to him that he has to have to put the stuff in that he buys, so both the shipper and the trader need their yard space, that is, their pen space. I don't think there is any difference between the trader and the shipper as to the facilities they receive.

- 1763 I ship from ten to forty per cent of my sheep to the Denver yards, and from seventy-five to eighty per cent of my cattle. In general, both my sheep and my cattle are finished products ready for the packer, although I have sold feeders, that is, short-fed feeders, in the auction at the Denver Show. I don't remember just how many.

Show benefits whole industry.

In my opinion, the shipper or producer of livestock who does not sell at the Denver stockyards during the Show week, or does not come here during the Show week, should still pay carrying charges on the Stock Show property by reason of the rates he pays. The Stock Show is a benefit the year round to the whole meat industry.

I am a stockholder in The Denver Union Stock Yard Company and a Director thereof.

1764

Re-direct Examination

Compared to my interest in the livestock industry the size of my investment in the Denver yards is very small. I was asked to become a member of the Board of Directors of the Denver yards when the Stockyards was taken over from the packers. I was one of the original Directors and presumably represented the lamb-feeding industry of northern Colorado. I presume the policy of the Yard, I know it has been, is to get the customers of the yards interested in the yards.

Q. As a matter of fact, looking at the personnel of the Board of the Yards, there are

Trans.

those representing the cattle industry, are there not?

A. Yes, sir.

Q. Those representing the packing industry, are there not?

1765 A. Yes, sir.

Q. Those representing the commission men, are there not?

A. Yes, sir, also the producers of lambs and the producers of cattle are represented, as well as feeders of lambs and cattle.

Q. And the bankers that do the underwriting and the taking over of the yards from the packers are represented, are they not?

A. Yes, sir.

Q. And it happens that the attorney for the company is also on the Board, is he not?

A. Yes, sir.

Q. As a matter of fact, do you not know that when Mr. Arthur Bosworth, representing the bankers at the time of the taking over of the yard, spoke to you about membership, Mr. Arthur Bosworth and Mr. Shoemaker, I should say, it was definitely mentioned to you that they wanted you among other things for your representation of the lamb feeding industry?

A. Yes, sir.

(Witness continuing). The business investment which I have in my business, the lamb feeding and cattle feeding end of the game, that is, the annual turnover, varies each year according to the cost of the feed and the cost of the animals,—anywhere from three to five hundred thousand dollars, where-

Trans.

as the size of my investment in the Stockyards is, 1766 I think, 500 shares of common stock.

When I used the word "short-feeder" in my examination and cross-examination, I meant one that is partially matured and requires less feeding than a matured animal. It is one that the feeder can finish out in three or four months but is not good enough for the packer to buy at the time of the purchase. People take these short feeders and feed them on beet by-products, beet tops, and then for various reasons frequently sell them at the Show. I feel that if the Show were not here in Denver the same incentive to buy short feeders would not exist on the part of those people.

1768

Re-cross Examination

I think my wife has some preferred stock; maybe I have ten shares and my mother had twenty, I think. I have no bonds.

I don't know of any stockyards that amounts to anything that does not have stock shows.

~~Witness excused.~~

Mr. L. M. Pexton was recalled to the stand.

I was for years connected with the railroads at the stockyards prior to accepting employment by the Yard Company. Also I was the traffic counsel 1769 in connection with the so-called transit case recently decided by the Interstate Commerce Commission affecting the transit at the Denver yards, and I keep a traffic file, check all supplements, handle these matters affecting transit with the railroads and endeavor to keep right up to date on what everyone on the market can do. That is part of my official duty as Assistant General Manager of the Yards.

Trans.

Q. I am going to ask you to explain fully the transit operation at Denver with regard to the privilege of sorting, consolidating and change of ownership, the preservation of what is known as the freight benefit, and whether or not in your opinion the yard trader is better suited and can frequently preserve the freight where the commission men cannot?

A. The transit arrangement provides that shipments from different owners and from different points of origin may be sorted together, using the D. & R. G. W. as an example, shipments originating at Littleton, Colorado, twelve miles from Denver, may be sorted with any other shipment originating on the D. & R. G. W. arriving for the same day's market even though consigned to different commission firms at Denver. Using the example mentioned, that is, Pagosa Springs, in Mr. Farr's testimony, John Doe may have a shipment into one firm and Richard Roe into another commission firm.

The sale-in-transit arrangement explained.

A trader can buy a package or parcel from each firm, sorting together into carload units, preserving the through rate. The peculiarities of the business practically prohibit a commission firm doing this same thing. That is, each firm would be compelled to find a buyer who would purchase his parcel and who would then go to the other commission firm the same day purchasing the balance of the load from that firm. The trader in his operations knows he can sort together and thus purchase a few head from one firm, a few head from another and still additional cattle from another, sorting together and preserving the through rate, which saves about 25 cents per head or up to \$60 per car. Commission firms have tried to do this but have found that as a practical matter

Trader can render patron better service than commission man in this regard.

Trans.

where they have a good volume of business, time will not permit. Neither do they have the necessary men or contact to local buyers who will purchase here and there.

Q. Mr. Pexton, you have spoken of the saving of \$60 per car, maximum, I presume, is that cattle or sheep?

A. Well, the saving is 25 cents per hundred, and the dollars per car depend upon the weight. If the car happens to weigh 30,000 pounds, the saving would be \$75 per car. We are using averages.

Q. Now, does that result in benefit to the producer in your opinion?

A. Most certainly, because this trader, knowing what he can do, and having purchased other cattle which will sort, can bid up 25 cents per hundred more than someone not in position to preserve the through rate and still lay them down at the Missouri River for the same cost. That happens many times daily during the fall movement. Traders will purchase a package of cattle from one firm and then go to others, making similar purchases, knowing they can sort. The only requirement is that they originate on the same railroad. Off of the D. & R. G. on Monday morning during the fall receipts will run up to 250 to 300 carloads of cattle, which provide a very large volume for a trader to purchase from. I think we have a very peculiar situation with respect to this which does not exist at other markets. Our feeding section is north or east of Denver and practically all shipments fattening in transit do so at the through rate.* There is no movement westbound or back-haul, as there is at the Missouri River. For example, a substantial

Results in
higher price
to shipper.

1771

Trans.

1772

portion of the feeder cattle offered at Omaha are moved back into Nebraska for fattening and the through rates would not apply. At Denver, no such condition exists. All of the feeding district is beyond the market and we have transit arrangements which permit the movement, for example, of D. & R. G. cattle from Denver to Fort Collins, Colorado, north of Denver, and back to Denver en route to the East at the through rate. Similar provisions exist on all the railroads coming into Denver.

Sorting
privilege.

1773

(Witness continuing). We may sort together all shipments originating on the Union Pacific proper between Denver and Ogden. We may sort all shipments originating on the O. S. L. together. The principal holds true on all lines. I have simply used the D. & R. G. W. as representative of the normal situation. But we cannot sort, for example, shipments coming in for the same market session on the D. & R. G. with shipments coming in on the U. P., but we can sort cattle coming in on the D. & R. G. originating in the San Luis Valley, in the Gunnison country, in the Rifle country, and in Utah, all into one lot, preserving the through rate from the highest rated point. The purpose of the sorting, of which I have been speaking, is to make carload units. Different from other markets we have practically no demand at the Denver market for less than carload units. At other points there is some demand for small lots of cattle, ten head, for example. However, no such demand exists at Denver. We have some truck-out business, but that is also usually in lots which will finish in carloads. I know of only one or two feeders of the many hundreds purchasing cattle at Denver that are in the market for other than carload units at the time of purchasing feeder cattle. The common practice in both cattle and sheep is to buy, for example, three

Trans.

cars which will expand into four cars after they are fat when moving out of the feed lot. Expansion into four cars is due to the increase in weight rather than any increase in the number of cattle. In other words, you can put a greater number of 800-pound steers in a car than you can of 1,200-pound steers, and in lambs, for example, a normal feeder will buy three loads or 900 head. That is the smaller feeders. Outbound, after they are fat, he will load four cars, or an average of 225 to the car.

"Package"
defined.

On livestock markets the phrase "package" means a few head or an odd lot and not a carload unit.
1774 A man will buy a package here and a package there, which means he will buy three or four head in one place and possibly seven or eight in another until he has accumulated the trade unit, which is a carload.

1775 At this point the witness pointed out an error on Respondent's Exhibit 6, namely that at the bottom of the page showing the monthly receipts of sheep at the Denver market there appears a typographical error. It was stated by the witness that the phrase "average variation five months" should be corrected to read "average variation five years." The record copy was corrected accordingly.

Cross-examination

Peak season.

The percentage of feeder lambs that are sorted out of fat lambs as they come in depends on the time of year. Our receipts of feeders are very light up to about the first of September. From September the first until the middle of December we receive normally from six to eight hundred thousand head of feeders, which would be from 50 to 75 per cent of our receipts during that part of the year, depending on the moisture conditions in range territory. When there is plenty of moisture the percentage of feeders is less than when there is dry

Trans.

1776 weather. Last year, for example, the greater part of our fall receipts were feeders.

Both feeder and fat lambs take advantage of the transit rate of which I have been speaking, that is, of course, unless the fat lambs are slaughtered at Denver. That slaughter, however, only runs about 20,000 head per month, which amounted to only about 8% of our total receipts last year. The remainder of the fat lambs most of them are forwarded to eastern markets or eastern slaughtering points. We have shipped fat lambs out of here that have gone to Boston, New York, Brooklyn, Chicago, St. Louis, St. Paul, all Missouri River points and the interior of Iowa and other points.

The larger part of our feeder lambs are moved to Colorado and Nebraska feed lots; a smaller part to points east of the Missouri River.

1777 When I made the statement that the Denver market had no monopoly I meant that there is no condition which forces this business to the Denver market or which creates a condition where we can expect the same amount of receipts one year after another unless we keep on our toes, actively solicit the business, maintain buyers on the market and furnish facilities adequate to handle the business as it comes. For instance, I consider that to a more or less extent the electric light company here in Denver has a monopoly, and the same is true of our street car service here, except for the competition they might meet from automobiles, but anyone who wants to ride a street car has to patronize the Denver Tramway Company.

**Respondent
does not have
monopoly.**

Anyone who desires to market livestock in Denver has to patronize The Denver Union Stock Yard Company unless he sells direct to the packers. I would say that he was almost compelled to use our facilities if he is going to sell at Denver. However,

Trans.

1778 about a third of our hog receipts are sold in Denver direct to Denver packers. These hogs come mostly from producers who ship direct. The territory from which the packers here in Denver buy hogs which are shipped in direct includes eastern Colorado, western Nebraska and Kansas, as far east as Grand Island and York, Nebraska.

Some of our Denver packers obtain hogs through concentration points. These points are McCook, Hastings, York, Aurora, Grand Island, North Platte, Sterling, Sidney, Alliance and possibly two or three others.

I would not say that there was a certain zone of livestock producing territory surrounding Denver in which the Denver market practically dominates the livestock production. I would not say that for the reason that we lose more business out of what we term the eastern part of the northern Colorado feed lot area than we do, for example, out of the State of Idaho. That is a greater percentage. Using this spring as an example, from the territory on the Union Pacific between Denver and Cheyenne, including the Greeley district, we received approximately 65 per cent of the fat lambs even though all of this territory is within 75 miles of the Denver market. On the other hand this spring following that movement I feel we received about 80 per cent of lambs shipped out of California in the hands of producers or speculators. It is only by keeping the demand alive and maintaining prices, at least comparable to other points that we receive business even from closely adjacent points. There is, however, some small lot livestock moving in by truck that we might have a right to feel we would receive. A good part of that, however, has recently been selling through auction sales. There is a tendency for livestock truck receipts to increase in the

Trans.

Denver market. The normal tendency where shipments are made by truck is to ship to the nearest market where good prices can be obtained. If this truck shipment increased, it would tend to increase the drawing power which this market has over territory contiguous to Denver in the absence of the transit arrangement. We actively solicit and suggest to shippers that they move by rail for the reason that we know if they use the rails their livestock will sell for approximately 25 cents per hundred better at Denver. We have found dissatisfaction on the part of patrons moving by truck who look at the Denver market quotation and ship in like quality livestock and expect to receive the same price when moving by truck as when moving by rail.

It is true that we feel we have more of a hold on truck shipments than we have on rail shipments. The general history of the livestock movement for the past few years, not only at Denver but at all terminal markets, is to show a very marked increase in truck receipts as compared with rail shipments. However, truck receipts at Denver in relation to the total supply constitute a less per cent than they do at any other market with a possible exception of Chicago, where the highly congested districts mitigate against truck movements. I do not feel that our truck movement will ever reach the volume that it has at the Missouri River markets.

**Truck
receipts.**

Q. Now you list certain states from which Denver drew its supply at page 1502 in the record, I cannot give you the page in your testimony, you make this statement: "Receipts of Colorado cattle at the 4 river markets in 1933 total 74,953 head, or 25 per cent of the Denver receipts." Would that not indicate that as to the Colorado cattle the Denver market really dominates?

Trans.

A. I feel the Denver market dominates on Colorado cattle, yes, sir.

(Witness continuing). I have made no study to determine what percentage of feeders loading out of the territory which is tributary to Denver takes advantage of this 85% Colorado feeder rate. Of course, the majority of this business now moves to the Denver market and when selling there must do so at the hundred per cent rate. In order for me to make a study I would be compelled to know the movement which can only be secured from the railroads and which so far we have not been able to secure within any degree of accuracy, and that would be a big job.

1782 I do not think that this 85% rate has been really a material factor in the movement of feeder livestock out of this area so far, but we do think there is a growing tendency along that line as producers and feeders become more acquainted with it. All of these things more or less follow a trend. These rates were effective in 1932. We can sense on the part of producers a desire to take advantage of them more each year. Witness Collins, for example, moved his cattle from Kit Carson, Colorado, into Ohio at the 85 per cent rate. That was partially due to weather conditions. Just what effect it will have on the future it is impossible to estimate.

Q. But, as a matter of fact, suppose I come out into this territory to buy, say, a half dozen carloads of cattle, the extra savings that I would make on the freight rates could be very easily eaten by the extra expense I would be put to in running around and locating those cattle, and getting them loaded out, would it not?

Trans.

A. Whether that was true or not we would try to convince you that it was, being on the market.

Q. And as a matter of fact that is the ordinary situation unless a feeder is buying a relatively large string of cattle, is it not?

A. That is the general condition unless the man is buying a good sized string and can buy them at point of origin under the Denver market.

1783

Q. And the number of purchasers of these relatively large strings represent a relatively small part of the total feeding of livestock, do they not?

A. Well, not so much in our area. Our people out here are on the average much larger feeders than at points in the East. We have people, there is one feeder, for example, in the North Platte Valley that bought 60 carloads at Gunnison, Colorado, last fall.

Q. But that is an unusual situation, is it not?

A. Well, it is unusual, of course, or our business would be materially less but we have numerous large sized feeders that go to the point of origin and buy good sized strings.

Now with respect to the solicitation done by the Yard Company, at this time we have three solicitors in the field. We have had three for about the last two years. They are not the same men that are employed now and it varies at different times of the year. I would say we have had an average of three for about the last two years. Prior to that time we had two part of the time and three part of the time. The Company has been rather concerned

1784

Trans.

about the establishment of the transit at the Missouri River. We have felt we could cement our relations with the patrons of the market; that we should do everything possible to improve our contacts with them and it has been the feeling of the management that we should increase rather than decrease our solicitation due to the various competitive conditions, such as auction sales and direct buying, establishment of transit at the river and the other things that seem to us to imperil our business to a more or less extent. In a general way I am acquainted with what policy the river markets have had with regard to putting solicitors in the country. Some of the markets have had a rather large corps of solicitors and others have a small number. I know one Missouri river market which has a small number and which has suffered a very severe loss of business. With two of the markets I would say that the tendency within the past two years has been to increase their solicitation, and with two, the contrary. It is true that the supply of livestock which is available for some form of marketing, apart from ordinary production fluctuations, runs right along and the amount that goes to market is neither increased nor decreased by the amount of solicitation. And, for instance, if Sioux City or Omaha comes into our territory and takes livestock into Omaha to the detriment of our market, or we do the same thing to them, the actual number of livestock that goes on to the terminal markets is not changed, but that involves a principle of American intuition.

- 1785 I do not think that we have any more automobile salesmen on the road who would probably increase the need for automobiles and yet the Government does not criticize the additional salesmen. We feel the business is there and we have a right, that the management has a right to endeavor to secure and to

Trans.

decide what number of men they shall use in that endeavor. Since there is only so much livestock available, it goes to some market; the increase in solicitation by the various markets is not going to increase the total supply at all markets. It merely means a shift from one market to the other of the supply that is actually in the country. Of course, we contend that when we shift it to the Denver market we improve the net price the shipper receives much more than his proportion of the cost of that solicitation. The solicitor from Sioux City and Omaha may attempt to prove the same thing.

Livestock
auctions.

With respect to the auction markets, I made a rather extended trip this spring to eastern Colorado and western Kansas and Nebraska investigating these markets, checking their source of supply, ascertaining the rates paid for sale at the markets, and also the disposition of the livestock. In this territory they handle cattle, hogs and horses. It not being a sheep producing country, very few sheep are handled. They also handle other miscellaneous commodities, feed, second hand furniture, second hand machinery and so forth. The disposition of the livestock varies, depending on the point of the auction. At most of the points, California hog buyers are represented and the California type hogs, that is, hogs 200 pounds and under, are purchased by these California buyers; the feeder livestock offered is usually purchased by traders who sell locally, if there is demand, or ship in to other communities. In western Kansas, for example, during the period of this visit, the traders were purchasing the feeder cattle offered and moving into the Corn Belt east of the Missouri River. The fat cattle are usually not purchased by packers unless they are packers in that particular locality, such as at Scottsbluff, Nebraska, and Sterling, Colorado, but are purchased by traders who move to

Trans.

various markets. For example, at Sterling, Colorado, a part of the fat cattle purchased there come to Denver market and a part go to markets farther east, if the trader is able to obtain a carload. That situation, in a measure, changes the condition which would otherwise exist. For example, if a producer at Sterling had six head of fat cattle and no other outlet, he would probably truck them to the Denver market. When selling through the auction, a trader may purchase his six and other cattle sufficient to make a carload and move to Omaha or Chicago, or he might come to Denver. However, 1788 that is the exception. There has always been a great deal of trading in feeder cattle out in this range country, but the country trading on feeder livestock we have had in the past has largely been in large droves or lots. These auction sales do not handle any of the large droves but handle the small lots which formerly were handled by local buyers and sent to some market. In the old days there were local buyers at most every town who would purchase livestock and usually ship to the nearest market. The auction sales, in a measure, replaced these buyers. However, because of their volume, they constitute a menace to the central markets much more than I feel local buyers formerly did.

With respect to the volume that is handled at these auction markets, there are four auction sales at Greeley. The week we checked them, they handled approximately 800 cattle. The day I was at Garden City, Kansas, that auction handled 981 cattle, I 1789 believe it was. The day I was at Dodge City, Kansas, that auction handled approximately 1,200 cattle and had handled up to 1,900. At Scottsbluff, where there are two auctions handling largely feeder cattle, although they do a good volume with fat cattle, their sales run up to, that is, the two of them in the Fall, 5,000 per week; when there is an active demand there

Trans.

for feeder cattle. During the spring there are less sales, of course, on account of no feeders being offered; however, there has been a good volume there the past three or four months which have been purchased, in a large measure, by traders from Omaha market and move to the Pacific Coast, to Omaha or to Chicago. One menace we have in this territory on these auction sales is the Pacific Coast demand. They are in the market for hogs, as I previously stated, and for fat cattle which are not as highly finished as the Missouri River or Chicago market demands. The California demand for fat cattle is for fat cows, fat heifers and fat steers which we term two-way cattle, or about half-fat. The auction markets in our territory are not under supervision. I understand, however, that Scottsbluff has been posted. I can only judge the policy of the Department of Agriculture with respect to the posting of these markets by what I observe.

1790 I know that Scottsbluff is posted and also Grand Island, and possibly York. None of the other markets that I visited were posted, although from our measurements they came within the definition of the Packers and Stockyards Act, that is, they contained over 20,000 square feet of pens, excluding alleys. Most of them have sprung up in the last year or two years. Some of them, Dodge City and Garden City, for example, have been operating about three years and have not been posted.

Now with respect to the direct buying of fat cattle in this territory, I stated on direct that certain Iowa packers have been in this territory. I specifically mentioned Morrell, who was here this spring (1935). Until this year Iowa packers have not been in the habit of purchasing fat cattle in this area. I am aware that there has been a very unusual condition in the fat cattle market both in this country and throughout the feeding country in the

Direct buying.

Trans.

middle West. We are hopeful that as soon as normal supplies are available in the Corn Belt and near their plants, these Iowa packers will not come this far West for fat cattle, although they started out here some years ago on sheep and have been constant and regular buyers since then. It is true, however, that the number of sheep available in the Corn Belt for packing plants is in no way comparable with the number of cattle under usual conditions.

It is my understanding that on the additional trips made by Morrell, apart from that first trip, he bought additional cattle. He left shortly after this first trip to go to Chicago and Washington, but I was advised that he was out here again and purchased 1,200 head the last trip.

- 1792 With respect to the hogs which pass through this market en route to California, these hogs are purchased east of here as a rule. They usually carry their own corn which has been purchased at the point of origin, placed in sacks and tied on the side of the car. We receive \$1.00 per car unloading, \$1.00 per car loading, \$1.00 per car watering and \$1.00 per car for taking this feed that is on the side and spreading it on the car floor, a total of \$4.00. These shipments normally originate about as far East as Grand Island and Lincoln, Nebraska. Recently hogs have been received from Omaha, Shenandoah and other Iowa points. Our company gets a revenue of approximately \$4.00 per car on these shipments of hogs. If our rates were properly related I do not feel that if we did not have this California movement the larger part of this California hog business would move East for this reason. California has a certain demand for pork products which will be filled from some source. The most advantageous source is eastern Colorado and western Nebraska and Kansas. If California demand
- 1793 did not exist, these hogs would move East, as they

Trans.

did prior to ten and fifteen years ago. Now that they are moving West, we feel they will continue to, and that with a properly related rate structure we will be able to get full yardage on them instead of merely a feeding charge. As the movement continues, it will tend to increase the revenues of our company. That is our hope and ambition, that is, if they are slaughtered at Denver, but even if they are not slaughtered we still get some revenue.

With respect to the receipts and revenues of our company during the calendar year 1934,—1934 was an unusual year on account of the drought conditions. As a result of the drought we, of course, received a large amount of Government livestock, which increased our income. We also received some

Government
and drouth
cattle.

livestock forced to market on account of the drought, which under normal conditions would not have moved. The sheep movement was, we feel, somewhat increased on account of the drought due to lack of ability on the part of producers to hold back their normal amount of ewe lambs. There were also some Government receipts of old ewes. The hog movement in our territory was increased due to the drought in eastern Colorado and Western Kansas and Nebraska, due to lack of feed to carry hogs over for production. I think the Government auditors were correct in eliminating insofar as it was possible the revenues and expenses incident to the movement of Government cattle. I do not think that without eliminating the Governments and taking the total business of our company for 1934, we would have a fair picture to use in drawing conclusions of what the future revenue of the Company might be. Based on what the Government itself says with reference to livestock production in this territory, I believe that my estimates of revenue for 1935 present a fair picture from which the Government might make estimates as to what our future revenue will be.

Trans.

Let me add that we are, of course, through solicitation and work, going to endeavor to secure every bit of business we can. Just how successful we will be remains to be seen. The 1935 estimate is based on the reduced production of livestock. In a sense the reduction shown in 1935 is a compliment to the increased receipts that we received in 1934, that is, we no doubt received some 1935 business in 1934 due to the drought.

I don't think that either 1934 or 1935 are indicative of our business for the future. I don't think we will be over the effects of the drought by 1936, and I feel that it will be at least January 1, 1937, before we will be back to normal. In putting in our estimated return for 1935, we also estimated substantially the same return for 1936.

- 1799 In my direct examination I introduced a copy of the Agricultural Outlook for 1935 as Respondent's Exhibit No. 10, and used the data contained in that report and certain opinions expressed therein in connection with making my estimates as to future receipts. One of the statements made in that report is an estimate that 80% of the Government purchases of cattle were female, and I used that percentage in my computation. Since the Government cattle program has been concluded, I have seen no information showing the actual percentages of females that were purchased. I have discussed with Mr. Petrie, in charge of this work, and also with others, and the information I obtained would seem to bear this out. The usual estimate is a little higher than 80%. I mean to say that the estimate of those with whom I have talked indicates that the actual figures were a little above the Government estimate. For example, an actual count was made at San Francisco, to which point we shipped several hundred cars of cattle. As I recall, the actual count there showed 85% females. However,

Trans.

if, before this hearing is concluded, the Government is able to introduce actual figures as to the Government livestock purchases in this territory, any material variation in that percentage would, to that extent, affect the estimates I have made in my tables and our estimated revenues should be revised to that extent.

I am aware that the estimates included in Respondent's Exhibit 10, and especially the estimate of cattle population have been determined to be somewhat too low and January 1st there was a revision of figures as to the cattle population in a number of the States. However, the cattle we receive are from the actual number on hand and not what the Government estimate is, and if the Government were off one million head, for example, in Colorado that would not actually affect the production or our receipts.

1801 Now, with respect to lamb feeding in the Colorado feed lots. I testified that I felt that the volume of feeding in these feed lots might be adversely affected by high prices of feeder lambs this fall. Some years ago when feeder lambs were high, that is from ten to twelve cents a pound, and these feeders were rather prosperous, the level of feeder lamb prices in the Fall did not seem to make any difference. Since 1931 high feeder lamb prices have seemed to affect the volume of feeding in this way; most of the feeders up there are indebted to the bank, a condition that did not exist prior to 1931, and the bank more or less set a maximum price that may be paid by people who owe them money. In one recent year, for example, the bankers got together and established a maximum price of around 6 cents per hundred pounds for feeder lambs. That, as I recall, was in 1932. The going price on feeders early in the fall was above 6 cents, with the result that we had a very light demand for feeder lambs,

Trans.

from the northern Colorado territory, and it appeared feeding would be quite light. Later in the season, however, the market dropped below 6 cents and the feeders then came in in good numbers. Based on visits with bankers and on my experience I would say that the bankers up there this fall would be quite apt to get together and set some maximum price that feeders indebted to them might pay for feed-lot lambs. I am inclined to believe this would be around 7 cents. It is true that there is more profit in feeding lambs with fairly high feeder prices and high prices on fat lambs than when both feeder and fat lambs are cheap. The years of greatest profit to lamb feeders have been on high prices when the weight put on by the lambs or the gain more nearly paid out. That is even during the periods of cheap feed prices, as for example, the last two years or three the gain on lambs has cost up to 10 cents per pound whereas the market price for lambs was only around 7 and $7\frac{1}{2}$ cents per pound; therefore there was a loss on the gain. The profit came from the increase in price and the original weight of the feeder lambs, but as lamb prices go up there is also more chance for losses and a greater speculation, and these figures are not inclined to permit people owing them money to speculate. In my opinion, it is the indication at this time from the general livestock conditions existing all over the country that fat lambs next winter will bring fairly good prices.

Q. Referring to Respondent's Exhibit No. 11, I notice that your estimated traffic expense for 1935 is the same as it was in 1933. I take it the policy of your company is that even though it may have in prospect decreased receipts that it will continue to spend the same amount in connection with traffic.

Trans.

1803

A. Yes, that is our policy. In fact we feel, and when I say "we" I am speaking for the management of the Company, we feel that during the period of curtailed supply our traffic expense should be increased in order not only to maintain a percentage volume but also to increase that, if possible, and thereby avoid operating losses in net revenue.

(Witness continuing). I used the same estimated expense for taxes, real and personal, in 1935 as were shown in our books for 1933.

Q. Has there been any reduction in assessments in Denver since the tax expense of 1933?

MR. BOSWORTH: I object to that as incompetent, irrelevant and immaterial.

THE EXAMINER: Objection overruled.

(Witness continuing). I am unable to answer that definitely without checking the books. I believe that due to depreciation there might be a slight decrease, but I don't believe it amounts to a great deal. I believe I could ascertain at the present time
1804 what our tax bill for 1935 will be. I started to add, our taxes in 1933, that is, real and personal, total \$33,981.00. For 1934 they total \$33,092, a decrease of about \$900.00. I will endeavor to ascertain the 1935 prospective payments. The figure, \$33,981.55,
1805 being taxes shown for the year 1933, are the taxes paid in 1933 to cover the taxes assessed for the previous year, 1932, and the taxes which we would pay in 1935 would be the taxes assessed in the year 1934. That is the figure I will endeavor to obtain.

Now with respect to our Stock Show. I stated Stock Show. that the National Western Stock Show is the third largest and most important livestock show in the United States. The two which rank ahead of it are the Chicago Show, the International, and the

Trans.

- Kansas City Show, the American Royal. Other stockyard companies which have, in connection with their business a show somewhat similar to the show here at Denver besides Chicago and Kansas City, are, Omaha, Fort Worth, Portland, Ogden and Los Angeles. They have some calf shows, I believe, at St. Paul or have had, also at Sioux City and St. Joseph. Due to the nearness of one Missouri River market to another a stock show is not as necessary at St. Joe and Sioux City as might be if there were no shows at Kansas City and Omaha. They have a calf and 4-H Club Show at Oklahoma City which in times past they tried to expand into a show comparable to the one at Denver and Fort Worth. Due, I feel, to lack of co-operation among all concerned
- 1806 on the market, the Oklahoma City show has not developed to the extent the Fort Worth has and I feel the quality of Oklahoma cattle indicates that. I have never attended the Omaha Show but I believe it has been going about five years. They do not have a pavilion for the showing of livestock such as we have. Their show is held at the Aksarben grounds, except the feeder show, which is held in the yard proper. All the pure-bred livestock is shown approximately a mile to a mile and a half from the stockyard proper, and if the stockyard company exercises any control over the show it is my understanding that it is indirect control, although I know the management of the yard takes quite an interest in it.
- 1807 St. Joe, Sioux City, St. Louis, St. Paul, Cincinnati, Indianapolis, Cleveland, Jersey City, Buffalo and Pittsburgh have no large stock show comparable to the one here at Denver. They are good sized markets but their conditions are entirely different than Denver. Omaha happens to have, or has had a race track which paid part of the expense of this, that being the reason the stadium was con-

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1808 structured where it was. None of these markets that you enumerate are in the heart of the range country similar to the location of Denver.

It is only within the last few years that Omaha has given any attention to the development of the livestock show. Of course I think they have been negligent in the past and have not fulfilled their duty to the livestock industry.

In our Denver Show our feeder cattle are lotted in pens in the main part of the yard from the main building down to about the 22nd or 23rd alley. We also usually have fat carloads to show at our Show. At the last show there were about 12 or 13 and they too are lotted in pens in the main area of the yards near the Exchange Building.

Increased
business due
to Show.

1809 The pure-bred bulls that were sold during the show were sold both in carload lots and as individuals. They are sold in the stockyards proper in a triangle south of the Exchange Building and in pens west of the Exchange Building.

Up on the hill we handle the registered bulls and females, Boys' and Girls' Club animals, hogs, sheep, and so forth.

The carload hogs are in the regular hog division. The pure-breds are up on the hill. Carload sheep are exhibited in the sheep barn and the pure-breds on the hill.

The horses are generally pure-bred stallions, mares, etc., which are exhibited on the lower floor of the three-story barn. We also have a chicken and poultry division and they have there a few farm implements placed around at different points. There may be some rabbits and they may have some pigeons up on the third floor of the three-story barn. It is my understanding that these latter classes, through their entry fees, etc., pay their own

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way and they contend, at least, that they much more than pay their way through admission fees of people coming to the show to visit those particular exhibits.

- 1811 These pure-bred livestock that are exhibited up on the hill are exhibited by the so-called professional showmen that make the regular circuit. However, the Club stuff, 4-H Club Boys and Girls, is not professional livestock. The number of sales made by these professional exhibitors are relatively small in the number of head, it is true, but it is rather large in dollars.

Increased
Prices due
to Show.

Our sale of feeder cattle is substantially a carlot matter. In my direct examination I testified that last year the normal selling price was around \$1.00 to \$1.50 above the price of market stuff that sold a month previously, that is, for comparable livestock. I am not taking into consideration the loads entered in the Show that won premiums that probably sold, oh, probably \$6, \$7 to \$10 a hundred more.

- I know that the prices in our feeder market at 1812 this past show were from \$1.50 to \$3.00 a hundred higher than even a week before the show and were higher than that compared to early December or late November. I will also endeavor to secure similar prices at the Kansas City and Omaha markets. Depending on the season of the year the normal run of feeder livestock ends at the Denver market from the last week in November to the second week in December. The feeder livestock that is here during the January show is livestock that in some cases is held back by the producer for the purpose of bringing to the show, and in some cases they are warmed-up cattle, that is, cattle that have been purchased by northern Colorado feeders in the fall for the express purpose of holding on beet tops or other feed until the show and fre-

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quently they are cattle from territory outside of what we call Denver cattle territory. The cattle purchased by northern Colorado operators, if the 1813 show did not exist, would probably sell to move into the Corn Belt to a point where they would not come back to Denver. These latter cattle of which I have spoken that have been on a so-called short feed come in in somewhat higher flesh than normal range cattle; they will gain something between the time they are purchased and the time they are sold during the Show.

Naturally a producer expecting to exhibit at the Show will save his best cattle for that purpose. However, we have large numbers of cattle during the fall, marketed during the regular marketing season, which are very comparable in quality to the heavier run during the Show, but it is true that normally a man does not save out cattle that he does not deem the best that he has. However, we receive many cattle for the regular market during the Show week which are not entered in the Show. The number of carloads actually entered at the Show to compete for prizes total on the average from 100 to 125 cars. Our receipts of feeder cattle for Show week will run from 20,000 to 30,000, which would be from 500 to 700 carloads.

1814 Relative to our average run during the height of the season, I would say that this 500 to 700 carloads run a little higher in quality, that is the average, you might say, a weighted average of all the 500 or 700 carloads we receive during Show week runs a little higher than a weighted average of 500 to 700 carloads we might receive some Monday during the fall. However, we get very good cattle during the fall.

These cattle that are held out for the Show are generally only hay-fed cattle. The custom of the

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Show is that cattle entered there, that is feeder cattle will not have had grain. They are probably given all the hay they will consume. However, in mountain country, being covered all of the cattle are given all of the hay they will consume, because it is a surplus area for hay. Except in northern Colorado on warmed-up cattle, I wouldn't say that any of the cattle in the Show, except, of course, with minor exceptions, have had alfalfa.

They are selected so that they are fairly uniform by carload and indicate the breed, characteristics, and so on. That is, they are blocky Hereford cattle 1815 and white-faced cattle.

The barn up on the hill was not in the last Show. It usually is, and I would say that since it was built about 1918 or 1919, I believe it has been used for show purposes all but one or two years. Last fall, in an effort to co-operate with the Government, we leased this barn to Swift & Company for the storage of Government hides from drought cattle, there being no other facilities near the yards or in Denver where hides could be stored. We would have preferred not to have done this, but Swift & Company were somewhat insistent on it, and seemed to feel that we should co-operate with the movement to that extent. The barn was full of hides during Show week, for which reason everyone had to crowd up and be satisfied with the other facilities that were available.

The barn was built by the Stock Show Association. The Stock Show Association is a non-profit corporation. There are no shares of stock. Memberships in it were originally subscribed for by various people. It pays no dividends, of course; was not organized for that purpose. Memberships 1816 were sold originally as a clever way, you might say, of getting money for the Show and thereby

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relieving the Yard Company of that expense. For operating convenience, and as I explained in my direct testimony, to secure more interest in the Show, to increase revenue and reduce expense, ostensibly they have a lease. However, the management of the stockyards company practically dictates their policies and their actions and their expenditures.

- 1817 Besides the pavilion on the hill, the lease covers the other buildings on the hill as well during Show week. The pavilion was built under the direction of the Association. I believe the Association, because they are such an association and for that reason were in a position to do so, went downtown and secured donations from various people for the building of this barn, or sales pavilion rather, which the Stockyard Company would have found it impossible to do. Now, just as in the case of the tile barn, following a year of unusual returns due to the war, the Show Association had a little revenue left after paying their rent; they took this revenue and built the tile barn. Two or three years later they had a deficit of some \$23,000, which the Stock Yard Company had to pay. We then took title to the barn. Because of rent they have not paid in the past we feel that the sales pavilion is ours, and we feel the same way about the tile barn. The deficit that we have been forced to absorb, or the rent we have not collected, amounts to a great deal more than the value of both of these structures.

The only contribution our company makes toward the premium list is in the form of ads. Of course, we stand behind the Show, and if, at the end of the season they are short, the Stock Yard Company is forced to absorb the deficit. Now, the premium list and other matters of that kind go into the general pot, that is the revenue from them and the

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expense they caused.

1818 I think that the yardage revenue on the individual animals sold on the hill during the Show week is permitted to accrue to the Show Association. I believe we could secure information from which we could tell the number of head of animals which are entered in the Show which are sold on the hill property during Show week. We will endeavor to furnish that information for the past three or four years. Of course, the rent we receive for this property during the Show week amounts to a great deal more than this yardage. For that reason we felt it only fair to permit such revenue to accrue to the Show inasmuch as it directly or indirectly comes through the stockyards company anyway. We would find it difficult to secure the co-operation we do from the Show Association if we endeavored to hog, so to speak, all of the revenue up there and still insist on rent. When we turn the premises over to them, as we do in this lease but not actually do, we let them keep the revenue with the understanding that they will pay us what they do pay us if there are profits.

**Respondent's
Exhibit 13
excludes sales
on Hill.**

The figures which I have included in Respondent's Exhibit 13 represent all revenue that we receive during January, and of course includes livestock sold in the main yard. It does not include 1819 any sales made up on the hill. The revenue from sales on the hill is shown on Respondent's Exhibit 14, it being included in the Show rent, that is, if we did not permit the Show Association to keep this yardage the rent would not be high.

We were not able to collect our rent during the years 1930, 1931, 1932 and 1933. When the Show runs behind we do not always pay whatever their deficit is directly to them but encourage them to borrow money or otherwise make arrangements

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to take care of the deficit. This is done for the reason that if the Show Association gets a surplus on hand they might not be inclined to be as economical as we desire them to be. In past years, I believe it was about 1924, or along in there, when we had some exceptionally bad weather during the Show week, there was a deficit of approximately \$23,000 one year which was paid by the Stock Yard Company. I do not believe we have made any payments

1820 the Show there is considerable extra labor on the hill which the Stock Yard Company has to furnish, but the Show always pays us for it if they are able to, and they usually do. In other words, we make our force available to them and bill them for whatever labor they obtain. Our force is familiar with the property, know just what is to be done and are in position to do it with materially less cost than if they hired outside people, and for that reason we clean up the ground for them prior to the Show and after the Show is over. Now, the regular labor incident to the operation of the Show during the Stock Show week is on the Show payroll and is paid for by them. The work which we have to do down in the yards in preparing for the feeder auction and putting up temporary facilities, and so forth, is just charged to regular operating expense, that is to the labor account for the month of January, or expense account.

1821 In my opening statement I did state that I felt that when conditions became normal there was no reason to believe that the Denver market would not continue to grow.

No additions to our physical structure have been made since 1930 which required land that was not previously used in connection with the stockyards structures.

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**Growth of
Yard.**

During the period from 1925 to 1930, we constructed an addition to the cattle yard,—in 1925. We also constructed another addition in 1928. A change was made in 1932 at the north end of the cattle yard through the building of some loading chutes for drive-out livestock. We constructed a new sheep barn in 1929. The site of the new sheep barn had previously had pens upon it and one or two frame barns, so it is true that that land was in use for stockyards purposes prior to that time, or at least the first floor or ground level was in use, so that construction of the sheep barn did not add anything to the area of land which we had in use. It did, of course, furnish considerable more area for yarding and trading, but it did not require any additional land.

The pens constructed in 1925 covered an area of approximately 500 feet long and 90 feet wide. The 1928 construction covered an area of approximately 1823 500 feet wide, 540 feet long, $7\frac{1}{4}$ acres.

For the period from 1920 up to but not including 1925, we did not construct pens over any additional land.

In my direct testimony I did make some criticism of the use of two or three deck structures, and it is true that the sheep barn is a two or three deck structure. However, my criticism was directed toward using a two or three deck structure for cattle or hogs. I have no such criticism on its use for sheep. I am aware that at a number of markets two-story buildings are used for hogs, usually where they are short of room, such as Kansas City, which has a four deck barn; Sioux City has a two deck barn. The reason was lack of room, in my opinion and not because it was more advisable to handle the traffic that way or more economical.

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I have made an investigation from an engineering standpoint to determine whether a two-story hog barn is more expensive than a one-story hog barn. I talked to and consulted with our engineers and found that a two-story concrete barn with roof would cost approximately \$100,000 an acre; that a two-story concrete structure without a roof would cost approximately \$55,000 per acre; this structure simply being concrete uprights to the second floor and then a flat roof with nothing above that roof except the construction of the pens. Building a frame hog barn of the same size as a concrete hog barn which would cost approximately \$300,000 would, according to the information I obtained, cost approximately \$100,000, or about one-third. Of course, a wooden structure is subject to much heavier depreciation than a concrete structure. There has been a tendency in some places to construct these buildings either of concrete or brick and steel. We have tried to follow that more or less. I am not just positive that it is more economical for the reason that you get a great deal more in your rate base to start with. The interest on \$100,000 or \$200,000 additional during the life of the structure can eat up a lot of difference in depreciation. It is true that the fire risk is much less and the fire risk is a hazard of the stockyard business. I believe that the premium rates are higher on wooden structures than on concrete. Just how much I have not ascertained. In the construction of a concrete building it has to have a roof. If you build one story you have all your foundation and your footings, etc., and merely put the roof on, and when you add the second story you merely have to raise the roof and insert the second story. Of course, when you build a frame structure you do not find it necessary to go to the expense of deep footings and things like that, and while a frame structure is not as permanent and

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not as satisfactory as a concrete structure, it may be far more economical due to the difference in original cost and the interest and taxes thereon. It is purely a matter of business judgment at the time of the construction and how long you feel you may need the structure in the locality you are constructing it in. After you build a concrete building, it is there from then on, while a wood building can be moved to a new location rather easily.

Zone 3.

Now as to this 30-acre tract in the northerly end of the yards, which is Zone 3 and a part of Zone 2, I stated that prior to our purchase there was an option taken on 10 acres. It is my understanding that it was in that area in the lower left hand part, substantially a square out of that area. That option was at \$4,000 per acre. In my opinion, that 10 acres at the present time, being near the center of the industry, etc., would probably carry a higher value than the remainder.

At the time of the purchase I feel that the entire area was worth substantially the same to the Stock Yard Company, that is, \$3,000 per acre. To someone else who wanted to be close in and didn't need the same area, the 10 acres was undoubtedly worth \$4,000 an acre to them. The reason that it was worth more to our company is that it was contiguous to other property which we had and we had a specific use for it, and in fact have used most of it for that specific use.

1827 It is true that when that option was in existence the Blayney-Murphy Company contemplated purchasing that tract, and had we not exercised that option, of course there would have been no demand on the part of Blayney-Murphy for the tract that they later purchased. Had they purchased it and erected the plant that they did erect at their present

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site, we would have found it impossible to purchase that site and erect a structure so that we could use it.

1829 We have in this area covered by the 10-acre option approximately one and three-quarters acres of pens. We also have on this 10 acres our hay barn, manure dump and the Race Court Road; in fact, all of it except approximately one and one-third acres is now occupied by structures, pens, railroads or roadways except one and one-third acres north of Race Court, which is used for the dumping of manure.

If that option had been exercised there would still have been approximately 20 acres left which are in the purchase which we actually made, although the ten acres would have separated our property from this remaining 20 acres to a more or less extent, leaving only an opening approximately 400 feet wide east of the 10 acres. It would, however, have been possible to gain access to the 20 acres through that 400 feet. Just how it would have worked out I do not know because we needed Race Court in order to be able to close the Franklin Street area which was vacated by the City, this amounting to a little over 2 acres. Whether, if our company had purchased the 20 acres without also purchasing the ten we would still have been in the same position to close Franklin Street, is problematical because the road would have had to swing around the 10 acres. However, I would say that we would still have been able to close Franklin Street. In our opinion, unless we could close Franklin Street, it would not have been practical to have

1830 extended our yard north of Franklin Street without constructing a viaduct. I cited the situation at Omaha where they have a viaduct running from L Street over to the Exchange Building and then to Q Street. However, my judgment relative to the

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Denver yard is not based on the Omaha situation but rather from a practical stockyard operating standpoint.

Expansion
land.

Q. Now, on page 1610 of the record, Mr. Pexton, you discussed the question of the management of the company in making purchases of land for expansion. You do not understand, do you, that the Government takes the position that it is not proper for the management to make such purchase of land as it may see fit?

A. I do not understand that the Government criticizes us for anything we may do. They simply say "If you do certain things or purchase certain lands you do so with your own money and not with the producers' money, and at your peril." Now, we cannot agree that that is a proper position to take. The Denver Union Stock Yard Company, for example, after due consideration and careful thought purchased the 30 acres of land we have been discussing. They arrived at their decision to purchase after giving consideration to all factors, including the need of the land and the producers' interest. They immediately used a very substantial part of the land and today are in stockyards operation in one way and another using all of it. The same principle applies to the Stock Show. These things were done for the good of the producer and we feel when the Department attempts to eliminate any part of them, they are in effect, saying they are not for the good of the producer, which we deny, and are taking unto themselves matters that we feel come under management.

1835 (Witness continuing). When this 30-acre tract was purchased the purchase price was \$3,000 per acre but when it is brought into the rate base in a rate hearing it is brought in at some value at the

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time the hearing is held, not necessarily the cost price. Of course, in the case of 30 acres, we feel its present use conclusively shows it is now used and useful in stockyards operation and therefore should be in the rate base and I find it difficult to discuss this particular tract from that particular angle because it is already used and useful. Now, some other tract of land that is being used for expansion purposes, such as Zone 5, I think the management could be criticized if they had an unnecessary or unusual amount of land held for expansion. I do not feel that under regulation we should be permitted to own, for example, a 100 acres north of the—or west of the Platte River for expansion purposes. I do feel that it is good business and proper management to purchase some land when it is available in order to avoid double decking, in order to be able to close streets, or in order to avoid being held up when we find the land is necessary, in order to avoid the wrecking of buildings and that when we so do that we are acting 100% in the producer's interest and not against him.

On this particular land, if the Government should accept the appraisal of our land experts and our contention that it is used and useful, it would be included in the rate base at from \$10,000 to \$12,000 an acre. It cost our company \$3,000 an acre. If that land had been carried in the rate base over a period of years, even though it had not been used, the patron would have been paying the carrying cost of it. Of course, he might find it much to his advantage, as I explained in my direct testimony, for us to carry in the rate base rather than to make an expenditure of a large sum of money through double decking or some reason like that which would be necessary had we not purchased the land when it was open and thereby had it available for expansion, when the expansion was necessary. If the

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Secretary accepts the contention of our real estate men as to value, it will be included in the rate base at approximately four times its cost to the company.

1837

Q. And if the patron has been paying the carrying cost on this land during that period he will not only have to carry the cost but also now pay on the unearned increment, will he not?

A. Well, he will not be paying the carrying cost necessarily on \$12,000 per acre at the time he purchased it. You must assume there that we have made an unreasonable return.

Q. No, I think if he has been paying the carrying cost on the cost he will have carried the land for the company.

A. Prior to this time our rates would have been the same whether we owned this property or not, as you cannot properly allege that he has been carrying the carrying cost on this land. Now, for the future, if you fix a rate which includes this land at the value we feel it is worth, obviously he will pay interest on that value the same as he does on all other parts of the yard which are used and useful in stock-yards operation.

Q. And if at some later time there is another rate hearing and the value of that land has gone up, it will then be included in the rate base, if our law is not changed, on the basis of its present value, will it?

A. When you adopt the reproduction method of finding cost that necessarily follows. Your reproduction method this time arrives at a value substantially a half of a million dollars under what you found in 1930. Now, that is

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the case where the company stands to lose a half a million dollars because you picked a time of low production cost compared to 1929.

The matter works both ways.

- 1838 (Witness continuing). I am not in a position to state how the reproduction cost compares with the original cost of all the structures. I could with respect to certain particular structures. I do not have the original cost of all the structures available other than as it is incorporated in one of Mr. Zelinski's exhibits. I could compare the original cost of the sheep barn with the cost of reproduction new. As long as the matter was brought up, I would like to add there, Mr. Zelinski having mentioned it, that that contract happened to be made by a Denver contractor at the time prices were going up. The deal practically broke him because it was under contract. We secured the barn for a very large amount of money under what it actually cost him to produce it or what it would cost had we elected to build the barn ourselves. The same thing is true with the new Exchange Building.

- 1839 —It is true that the trucking business is increasing in Denver, and as a result thereof, we find that we have to make certain modifications of our pens and in our docks and do a certain amount of reconstruction work, and that to a certain extent livestock which originally came in by rail, and used the rail docks, no longer utilizes them, although we have not felt it at this point as much as they have at other points or to the extent that we feel we can
- 1840 give up any of our present railroad facilities.

Trucking
Increase.

The probability that the truck-in business will increase will result in certain depreciation by reason of obsolescence in certain parts of our property. We are endeavoring to avoid that as far as possible by proper management. That is, as I explained in my direct, we plan on using the present hog barns

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as additional sheep area and rebuilding a hog barn near the Exchange Building. Now the obsolescence we will experience there will of course be the loss of the pens, cattle pens, around and south of the Exchange Building. We will move the entire hog division from its present location to the proposed location, using the present hog facilities for sheep. I feel that prior to this time we should have provided additional parking facilities for trucks. The roadway into the present drive-in division has been very congested the past two years.

With respect to the land north of Race Court, 1841 taking 1934 for an example, ~~due to the dryness of~~ the season, while we dumped a substantial amount of manure on that area, I would not say that all of the vacant land outside of the feed lot was used; this being principally due to the fact that truck gardeners purchasing manure, due to the dryness of the season, removed it rather rapidly. We have been going through a dry cycle. We must expect there will be wet cycles, and for that reason the prospective use in the future will be the same as existed four or five years ago when we found the vacant land in that particular area inadequate to take care of all of our manure that needed dumping. I cannot state offhand how much we put up. I believe I could ascertain for you the number of loads during the season. It might take a week or so. I know that we did not use the manure dock for manure last fall because, as I stated in my direct, we were saying that for or in the event of wet and stormy weather when we could not get onto the land north of Race Court and the wet or stormy weather did not occur.

In 1933 we used it practically to the same extent we did in 1934. 1933 was also a dry year. In 1932 we used it to a larger extent than we did in 1933 or 1934.

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1842 I have estimated that under normal conditions we would need ten acres in that area for manure dumping. We do not attempt to pile this manure, but drive in a dump truck, and that occupies a certain area. The next load is dumped as close to that as possible, but not on top of it. We have found it more economical to handle in that fashion than attempting to pile. The area actually covered in any one of these three years depends on the rate at which the manure is moved by the people purchasing it. I would estimate over a five-year period, which includes both wet and dry years, an average of ten acres so used. In 1934 and 1933, due to the rapidity with which it was moved, which was on account of the dry weather, I would estimate we used from five to seven acres.

We are able to sell all that we have available, provided we properly handle it, so that the customers can remove it from the property. We do not lack and have not lacked for the past four or five years an outlet for such manure as we have available. The sale, however, depends on proper handling, so that it will be available to prospective purchasers when they are in a position to take it. We feel that we should have at least ten acres above Race Court available for this reason, and that if we did not have it, it would be necessary for us to purchase it elsewhere for such disposal.

Manure Sales.

1843 The use we made of Pen 4212 during the past year is not a normal use during the entire year. That pen was used for the dumping of manure after the cattle season was over for the convenience of one of our larger patrons and with the understanding that he would remove it promptly. Had we needed the pen for livestock at that time, we, of course, would not have used it for manure. The pen was expressly built for large shipments of

Trans.

cattle or sheep during the heavy season. Our heavy season is over around the first of December. We used it for livestock up until about that time and then dumped manure in it for some time afterwards when there was no prospective use of it for livestock. By so doing, we lowered our operating cost, as it made a shorter haul to this pen than to the area north of Race Court. This, however, does not change our necessity of the land north of Race Court in any particular during the time when our manure production is largest.

MR. BOSWORTH: Mr. Examiner, may I ask Government counsel if they are attempting to impeach the testimony of their own witness, Mr. Christensen, who changed his report to indicate that this pen 4212 was not a manure dumping facility?

1844 MR. COOPER: I think his testimony was that it had been filled with manure and the manure had been cleaned out.

MR. BOSWORTH: Oh, no. Mr. Christensen is here. He can correct me if I am wrong, but as I remember his testimony, he came in with a *change in his original report as made to show that that was not a manure dumping facility and was included in his used and useful land.*

MR. COOPER: The Government is making no contention that pen 4212 is not used and useful.

MR. BOSWORTH: He excluded all the other manure dumping ground, Mr. Cooper, except that around the manure dock in Zone 2 as not used and useful and it was our understanding that that was one of the purposes of his changes in his report, Mr. Examiner.

(Witness continuing). At the time pen 4212 was constructed we had a substantial movement

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of livestock from the south to the north during the spring. It was then used for these large shipments feeding at Denver. This movement has decreased to a certain extent. We now use it for some large shipments during the spring and for numerous large shipments during the fall of both sheep and cattle. We have a substantial movement of through sheep, part of which are yarded in the triangle south of the Exchange Building, and when that is filled up in the north end of the yard, we endeavor to keep all through sheep out of the regular sheep division. We used the pen last fall to yard Government cattle ~~is off of the scale~~. It is used during the fall for a period of from 2½ to 3½ months, and in the spring it was used for a period of around two months.

- 1845 The disadvantage of using it for manure is that we create the larger part of our manure when we clean the pen. We endeavor at this yard to keep our pens cleaned up and in good shape at all times, and I believe have a reputation of having the cleanest stockyard in the country. Now, all pens are usually cleaned at least once per week during the fall season. That means we have got to have a place to dump the manure. At the same time we are using pen 4212. If we use pen 4212 during the fall season for manure dumping, which we cannot, it would not be near large enough for that purpose without the use of a clam shell.

Including Government cattle, we had one of the heaviest movements of cattle in 1934 that we have had in recent years, although the Government cattle did not create much manure.

It is our contention that that part of the area **Feed lots.** which is now occupied by feed lots should be included as used and useful. Though we exercise no direct management control over those feed lots

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we say how they shall be used and who they shall be used by and under what conditions. They are under lease with certain specified understandings. I have not read the lease into the record.

1846 I would like to add this, however, that there is a very definite understanding with the party having this lease and operating the yard that he will not ~~sell cattle down there unless he collects yardage~~ fees, but that those cattle shall be sent to the stockyard proper. Now occasionally he has sold some cattle down there and he has paid us yardage thereon. I checked up for the month of January and February, I believe it was, and he paid us \$84.00 yardage which goes into our general account, and of course it is not distinguished by an audit, for cattle sold in his feed lot.

The operator of the feed lot feeds cattle on contract, namely, he agrees to provide feed at so much per ton. I do not understand that he operates under a gain basis, that is, that the owner will pay him so much per pound for the cattle. He furnishes the feed and furnishes the labor and fattens the cattle, and then they are sold for the account of the owner.

The cattle fed on the feed lots north of the stockyards with whom this feeder competes and which yards compete with the Denver yards, are not forced to either market their cattle through the Denver yards or to pay yardage provided they are sold in
1847 their own yards. We feel that it is simply good business on our part to give these fellows some competition and it is simply a protection of our business.

To the extent that the cattle consume feed and get fat it is true that the fattening of cattle on ~~these~~ feed lots is comparable to the fattening of cattle on other feed lots or feed lots that the farmer

Trans.

might have, but the yard feed lot is not comparable to these other feed lots insofar as the regulations of the feed yard and their connection with the Stock Yard Company is concerned. By that I mean that the cattle sold on the yard feed lot move back into the Denver yards for selling, or if they are sold in that feed lot they pay us the same yardage as if they sold in the stockyard proper.

I cannot tell definitely whether the income which our company receives from the use of these feed lots equals the carrying cost of the property at the value which your appraisers have put on the land and which Mr. Zelinski has put on the structures, for the reason that in the past when cattle were driven in at that end of the yard, we have not kept a check as to whether they come from this feed lot or from other feed lots. We know, however, that the yard
 1848 has been full of cattle, that there is rather a rapid turnover, and have reason to believe that if we could allocate the revenue received in the stockyards proper due to this feed yard, that it would carry the cost of the property or substantially carry it.

If the cattle from the feed lot come down into the regular yard for sale, the Stock Yard Company at that time furnishes to them the same services and facilities that it furnishes to other cattle. The only point is that at the other yards competing with this yard and with the Denver stockyards, they are not required to move back through the yard, and frequently do not. I wouldn't say that our operating expense is increased in any way by the handling of these additional cattle that come from our own feed yards. We haven't found it necessary to increase scale facilities or labor costs and so forth on account of these particular cattle. For that reason if they were compared to handling at some other feed yard, loading up and.

Trans.

moving to other markets, whatever revenue we receive from that source is practically net.

1850 MR. BOSWORTH: Let the record show, please, that through the courtesy of Government Counsel and because of the fact that the next witness must leave town in the very near future, we have been permitted to interrupt the cross examination of Mr. Pexton, and will put Mr. Julius Wolf on the stand.

JULIUS WOLF, a witness for the Respondent, after being sworn, testified as follows:

Direct Examination.

My name is Julius Wolf and my home is in Denver, Colorado. I am in the livestock business; buy and sell and grow and fatten cattle. Our firm name is Wolf Brothers. Our offices are at The Denver Union Stock Yard and I have been in the livestock business about thirty years.

Large scale
operations.

1851 In 1934 and 1935 we handled approximately 26,000 cattle through the Denver Stockyards. In 1933 it run a little larger, probably 29,000 cattle. During the past five years I would say that we have handled a yearly average of about 30,000 cattle through the Denver yard. We feed between 4,000 and 5,000 head annually on our feed lots and farms near Albion, Nebraska, in Boone County. We grow our cattle on our ranch 40 miles northwest of Albion in Wheeler County, Nebraska. We grow about 1,500 cattle annually at that ranch. We
1852 have no other ranch. In addition to the cattle handled at the Denver office, fed at Albion and grown on our ranch in Wheeler County, we buy from 10,000 to 15,000 cattle annually direct in the country from the ranchers. Summing up our dealings in cattle for a year, it would be about as follows:

TRANS.

An average of about 30,000 head through the Denver office; around 10,000 in the country direct and we feed 4,000 to 5,000 and grow around 1,500. Of course it varies at times, some years we handle more, sometimes less, but I judge that would be about the average amount of business we do.

Q. Now, as to your buying operations at the Denver Yards, will you describe your business in detail, for example describe your operations on a typical day; what do you do and how do you conduct your business generally?

Trader.
Operations of
Wolf Bros.

(Witness continuing). Well, take, for instance, on a Monday in the fall of the year when we have a run of 12,000 or 15,000 or 20,000 cattle in Denver, we get out in the morning and buy cattle with the expectation of re-selling some of them right there in the yards and otherwise we have a clientele, we have a lot of friends and customers who depend on us for their cattle and we know just about what class of cattle these people want and we try to buy that class of cattle. After we get them bought, a certain amount of them, say 1,500 or 2,000, or whatever we may buy, we step to the telephone and call up our fellows that we think will need the class of cattle that we bought that morning, and try to sell them to them and ship them out the same day if possible.

A good many people come in from the country and buy from us.

We buy carloads and we buy odd lots. The carload lots we try to keep intact and a great deal of these cattle we buy we do keep intact, that is, as to weight, and when we sell these cattle we sell them on the original weights, on the weights we bought them at, that is called the original scale ticket. No reweigh in many instances.

1001

Trans.

Odd lots
reweighed.

The odd lots we take down to our alley, even them up, sort them up into carload lots and sell them that way. If we haven't got anybody to buy these cattle, as a rule we send them out; we will call somebody up and tell them we have a load of 1854 odd cattle, evened up, flat, if the cattle are flat; that means they have no freight, no freight benefit, and then we ship them out. In other words, we do our best to get rid of them as quick as we can. These cattle, these odd cattle, have to be weighed because we get them in odd lots and we sort them up and we cannot preserve the original weight because we change them around and sort them up, take the good ones out and put the poor ones together and the good ones together and make loads that way and that is the reason we have to reweigh these cattle.

Chiefly
stockers &
feeders
bought by
trader.

We buy principally stockers and feeders but we buy all kinds of cattle, practically all kinds. We buy some that have flesh on them and some that have not. We buy cattle that is partially fat and in some instances we buy fat cattle also. An animal that is partially fat is called a two-way animal, that is an animal that will do for further feed and also probably fat enough that some of the packers would buy them, but they need further feed to make them thoroughly matured animals, that is, prime 1855 beef. When we buy fat cattle we are competing with the packers. We buy fat cattle quite frequently. In other words, if we think that packers are trying to buy these cattle too cheap and we think we can make a profit on them by buying them and preserving the freight and shipping them on, why we buy them. We are not always successful; sometimes we get left.

Competition
with Packers
on fat stuff.

Knows needs
of clients.

We don't buy on order. We have no orders in our pockets. When we go out in the yards we buy these cattle on our own judgment, and if our judg-

Trans.

ment is bad, we lose money. If it is good, why, we make a profit but we have an advantage, having a larger acquaintance than lots of people that depend on us for their cattle, and knowing what class of cattle these people want, we are in a position to buy intelligently enough so we can sell them at a small profit most of the time. Of course, there are times when we ship these fellows cattle after we tell them what they are, and they have taken our word for it and occasionally we get a kick telling us the cattle were not as good as we told them we would send, and, of course, then we would either have to, if they refused to take the cattle, make a concession or move the cattle some place else and try to get rid of them. If we have to do that and if they are West of our place, we send them to Albion, or if they are East of there we find another customer or put them on the open market or take our medicine. If we put them on the open market we use either Omaha, Kansas City or St. Joe, whichever is the closest.

We take title to everything we buy; the commission man looks to us for the money. Sometimes we buy more than our outlet is. Then we try to find customers. I, at times, in the fall of the year sit up until one or two o'clock in the morning selling cattle, especially if we have bought more than we could use, trying to sell them, trying to find customers and trying to find places for them and a good many times we succeed and sometimes we don't.

Trader
profits.

With respect to profit, we generally try to get 10 cents a hundred profit on the cattle we buy and sell. That would be a dollar on a thousand-pound steer, but we don't get but few thousand-pound steers nowadays. We buy chiefly stocker and feeder stuff, which is lighter, so our average profit is considerably less than a dollar an animal.

Trans.

80% of trader
purchases
moved out
in 24 hrs.

- 1858 I think the most cattle we ever bought in a single day on the Denver market is 3,500 head. Our average would be considerably less than that. Our books this year show that for the year 1934-35 20% sets on the Denver market more than 24 hours. The other 80% move out promptly because it is every trader's aim in the yards to get rid of the cattle just as fast as they possibly can, and as 99 per cent of the people that buy cattle want the original weights, why, it is to the advantage of everybody to get them out of the yards as fast as possible. Even where we have an excess amount we still try to get them out promptly. That
- 1859 is why I said previously that if we do not get rid of them during the day on Monday I would be busy all night finding places for these cattle and trying to get them out as early as possible on Tuesday.

17% Re-
weighed.

- Our books show that 17% of the cattle that we have handled in the year 1934-35 were sold and re-weighed out of our alley. However, the bulk of the cattle, I would say 80% of our cattle, are not weighed at all. They go out and are sold on the original weights. That part which moves out on the original weights is sold largely to people who are, you might say, our established clientele. The 17% of re-weighs are sold to the new purchasers,—those who are not at the instant our steady clientele, who pick up odd lots that have to be re-weighed. The other 3% are also sold out of our alley to people who casually come in, but move out within the
- 1860 twenty-four hour period. That is, out of the 20% that is not sold to our established clientele, there is probably 3 or 4 per cent of that that will be sold without re-weigh; the other 17% will be weighed.

The hot-shot train starts loading about 1:30 or 2 in the afternoon. Frequently we are weighing on a Monday, if it's busy, until rather late. Sometimes we buy cattle in the morning and do not get

Trans.

them until evening; consequently we can't get them out until the next day on the hot-shot. That frequently happens with the ordinary feeder buyer. Lots of the ordinary feeder buyers, the farmers that come in, keep their cattle there three or four days before they move them out, because lots of them want them branded, dehorned and dipped, and lots of times they have to get them inspected in order to get a loan on the cattle and it takes sometimes three or four days before they can get their cattle out.

1861 I don't think that we get any better service than the farmer, in fact, I think the farmer gets the better service. For instance, when our cattle are weighed, we have our own men at the scales that have to drive these cattle to our pens, where, if a farmer buyer comes in, he gets—the Stock Yard Company receives his cattle at the scales and yards them for him, takes them down wherever he wants them, locks them up, takes them to the branding chute for him; in fact, I always said that they always get better treatment than the yard traders,—people that are there every day. The farmer can leave his cattle in the yards as long as he deems necessary without any additional charge as long as he pays the feed bill or as long as he pays the hay bill. He can keep them there two weeks, I don't believe the Stock Yard Company would care. If we keep our cattle there we have to pay the feed bill and furnish our own men to feed our cattle, whereas the stockyards furnishes the men to feed the farmer's cattle.

Trader receives less service than farmer.

When I said a moment ago that "our men drive them to our pens" I mean by that the pens that have been allotted to us by the Stock Yard Company. We have no lease on those pens and they can take them away from us and do take them away from us when they need them and make us yard our

Allocation of pens to traders.

Trans.

cattle some place else, in a good many instances, especially where there ~~is~~ a large run. This 17% of the cattle which are re-weighed include cattle that come in in odd lots, that is, truck-in cattle, and just what we call a plain, common set of cattle mostly.

The truck-ins do not have any freight benefit so they can be sorted backwards and forwards in any way or any way they want without any loss of freight benefit.

Trader pre-
serves freight
benefit.

In a great many instances the yard trader, such as I am, is able to preserve the freight benefit when the commission man either doesn't or is not equipped to do so, for instance, take a feeder buyer who comes in, we will say, to the Denver Livestock Commission Company; the Denver Livestock Commission Company has got two loads of cattle, we will say, for instance, from Pagosa Springs, and he would say to the salesman of the Denver Livestock Commission Company, "Now I want to buy these two loads of cattle." The salesman will tell him, "All right, I will sell them to you." "But," he says, "you have got four cattle in each pen that I cannot use, that I don't want." Well, the salesman is up against it. He either, if he takes these four cattle out of each pen, he kills the freight. The freight is no good. This man would have to buy these cattle on the flat basis, while on the other hand, if we traders, we go in and buy these two loads of cattle from the Denver Livestock Commission Company, we go down to John Clay & Company, another commission firm, who probably have two or three loads of cattle from the same point of origin, Pagosa Springs, also, that we can buy, and we may go up to Drinkard & Emmert and they may have two more loads. Well, there will be seven loads of cattle, that is, seven loads of cattle from

Trans.

Pagosa Springs, we can sort and mix any way we want to, as long as we ship the same cattle out. Now, this man comes down to our alley, we can sell him these two loads of cattle he wanted to buy from the Denver Livestock Commission Company, and take eight cattle out of the total purchases from the same point, just as good cattle as the ones he wanted, two loads he bought from the Denver Livestock Commission Company, and that way make him satisfied. He gets just exactly what he wants and the man that shipped these cattle in got the benefit of that, for the reason that we could pay 20 to 25 cents a hundred more for these cattle because we have the freight benefit, but if the farmer would have bought these cattle and the Denver Livestock Commission Company would have taken out these eight cattle, then he would have killed the freight and the buyer would have had to buy these cattle flat. That occurs very frequently.

Trader can
pay higher
prices.

1865 There may be a load of off cattle, what we call off cattle, in the seven or eight loads that would give us seven loads of good cattle and one load of cheap cattle, and there are always customers for cheap cattle, people that want to buy nothing but plain and cheap cattle, and then we have customers, people that come in and that absolutely won't buy an off steer; they just want good cattle and we sort these cattle up that way, and we still have the benefit of the freight on that one off load because they all originated from the same point. The result is that we are given an incentive to buy many loads in order to try to get a load of off cattle to preserve the freight.

The situation that I have just described is typical of the traders on the Denver market. However, it is just the larger traders that do that kind of business. 1007

Trans.

1866 The little fellow is just as necessary in the yards in Denver or any other yards as the bigger traders, because on a busy day they just don't get time to get around and buy these small packages of cattle. By a package, I mean four or five, or six or eight.

Small trader
equally es-
sential.

Our aim is to buy the carloads first, and then if we get around to the little, to the small lots, we try and buy them, but the little fellow makes a specialty of those small odd lots. They haven't got the capital to handle the large lots and they confine themselves to the smaller. The little fellow is just as anxious after he gets them bought to sell them as anybody else, but of course buying in small lots, it takes a longer time, and it takes them longer to get carloads together, although there is quite a few people that come in nowadays that buy just a truckload of cattle and that is their principal trade, and once in a while they get a carload and ship them out and sell them out.

Handles
small
shipments.

1867 In other words it is the little fellow on the market who very largely takes care of the truck-outs. They are specialists in the cattle trading end of it. We have traders who do not buy anything but cows and those who do not buy anything but stock calves and some that buy nothing but butcher stuff. Butcher stuff is cattle with flesh on them. They are not actually as high grade as the fattened cattle, not quite prime beef.

And there are sheep traders in the Denver yards. I am not familiar with the people who are. I don't get over there very much but I know there are sheep traders there.

I really do not know whether there are any exclusive hog traders or not. They have on other markets but I don't know whether they have them in Denver or not.

Trans.

1868 The various yard traders compete with other traders and with other buyers as well. Everybody is competition out there. Everybody is trying to do as much business as they possibly can. They are all out for cattle and that is what makes the market. Naturally competition tends to raise the price and stabilizes the market. There is absolutely no agreement, expressed or implied, or any understanding of any sort between the traders that if one trader bids on livestock other traders will not bid on it. It is just dog eat dog out there, everybody for himself.

Active Competition.
Raise price.

Cross Examination.

Yes, I have been in business for thirty years. I wouldn't say that I have been a trader on the yard for thirty years, though in a sense I have. I have been coming to Denver over twenty-five years, buying cattle on the Denver market and have been registered as a yard trader under the Packers and Stockyards Administration, I think, for four years.

I own and operate my own ranch in Nebraska. I did not get the ranch as a result of the profits from my trading operations.

1869 - At this point Mr. Bosworth objected to the question that elicited the information in the last sentence as incompetent, irrelevant, immaterial and unfair and asked that the witness' answer be stricken from the record. Motion to strike was denied.

1870 (Witness continuing). Until four years ago I was not registered as a yard trader nor was I a member of a firm that was registered more than four years ago, but I had a friend in the yards that we let have the money to incorporate his firm.

My own firm, called Wolf Bros. is now doing business as a yard trader. Sometimes in the fall

Trans.

we employ six or seven people, and when the season gets dull, we have one or two. Of those people three buy cattle.

1871 Yes, on the average I buy about 30,000 cattle at the Denver yards in a year. We sell those cattle to different parties in the Corn Belt and in the yards. We don't get out into the country and get orders, we don't go any place, we do the bulk of our business over the telephone. A certain per cent are sold over the 'phone and a certain per cent in the yards. We do not turn them over to a commission firm to sell; we sell them ourselves.

We sell about 80% on ticket, as it is called. When we sell on ticket we intend to make a profit of about 10 cents a hundred.

1872 The average weight is around 700 lbs. If we sell on ticket the same day we purchase the cattle we do not feed the cattle, but we always keep hay in the pens and put the cattle in them. However, if they are not sold on ticket the first day, we feed them and then sell them on the ticket. Where we have to feed them we still make only 10 cents a hundred, so the feed charge comes out of the so-called profit of 10 cents.

80% are sold on ticket, and according to our 1873 books last year 17% were sold on actual weight. We feed that 17% and give them a fill. We do not always make a profit on that fill as well as on the weight. In fact we do not more frequently than we do. We fill because the cattle have to eat and on eating they naturally fill. If anybody eats they fill. We feed them just as light as we possibly can.

I spend practically all of my time in the fall of the year at the yards. I don't go up to the ranch.

1010 I have a brother who attends to that. He sells 1874 from the ranch. Yes, I stated in my judgment the

Trans.

farmer gets as good if not better treatment than the trader; in some instances better. The farmer does pay a yardage charge and so does the trader. If we ship cattle to Denver we pay a yardage charge, but of course we are then shipping in as producers. However, if I buy some cattle on the Denver Union Stockyards this morning and keep them in the pen until tomorrow morning, I do not pay any yardage charge.

When we get hay from the stockyards the stockyards employees do not break up the bales and feed it out to the cattle. They simply put it on the fence and we break it up and feed it. When the grower ships to the yards the commission house that he ships to has the hay loaded on the fence and the employees of the commission house break it up and feed the cattle. I don't know whether there is any different rate for hay that is put on the fence and hay that is put in the pen and broken up.

1877 If I, as a trader, buy livestock today and keep them in the pen for two or three days, I don't pay any yardage.

Q. Now, there is, I believe, some mention in the record about a so-called strike out here among the traders, were you on the yards at the time the so-called traders struck?

This question was objected to as improper cross-examination, and the objection being sustained, the Government thereupon made the witness its own.

(Witness continuing). I was not in Denver the day the strike started. As far as I know, there wasn't any strike.

Q. Did the traders lay off from their yard operations for a few days?

A. Yes, I think they did. The fact of the matter is, if I recollect, at that time when this

Trans.

1879 question came up as I understood that they were to charge yardage to the trader and not on cattle that was bought on order, they were not to be charged any yardage. Well, I didn't have orders myself and I don't know about the balance of them, so I couldn't buy any cattle; as I didn't have any orders I couldn't buy any cattle.

MR. MILES (continuing). Now, did the stock yard officials try to discourage the trader from this strike?

A. I don't know.

Q. Never heard of it, did you, of their trying to discourage anybody?

A. No.

I cannot offhand state the profit I made per head on the approximately 30,000 head of cattle, of which 80% were sold at the Denver yards. The profit was very small; in fact, there has not been any profit in the past two or three years. Notwithstanding that fact I am still doing business as a trader at the Denver yards. I don't know any thing else to do. I still have my ranch.

Cross-examination by Mr. Bosworth.

If I remember correctly the Yard Company did notify the trader that as of a certain date there would be a yardage charge imposed against the traders in their purchases. The Yard Company did not, to the best of my knowledge, ever tell me or any other trader that we should not pay this extra yardage charge.

1881

Re-direct by Mr. Miles.

The Stock Yard officials never told me that their feelings would not be hurt if we went on a strike, nor did they ever say anything like that. I think

Trans.

it was just the opposite, if anything. The fact of the matter is that I do not remember the circumstances very much any more, but as near as I can remember, and as far as I knew, the Stock Yard Company never made any suggestion or anything like that to us. The Stock Yard officials never
 1883 said anything to me in any way indicative of their attitude that there should or should not be a strike or a laying off in the trading, nor did they say anything of that nature to any other trader out there to the best of my knowledge.

1884 *Cross-examination of Mr. Pexton resumed
 by Mr. Cooper.*

I find that I was in error with regard to our taxes and their method of payment. We make monthly reserves each year for our taxes that same year. We usually know approximately the amount of our taxes for the current year by the end of that year and then make adjustments at the end of the year so that the amount in the reserve will equal the amount of taxes for that year which we will
 pay the following year as they are due. Our 1934 taxes totaled \$33,082.19 and were reserved for in 1934, although being paid in 1935. We are not yet informed what our taxes will be for 1935, however, we have reason to believe they will be substantially the same as in 1934, or around \$33,000.

With reference to the question of yardage on ~~livestock~~ sold on the Stock Show property during Stock Show week and the feeding of livestock fed during Stock Show on that property, our gross profit on grain, hay and bedding furnished to livestock on the Show property during Stock Show week in January, 1935, was \$1,266.51. This money was paid to the Stock Yard Company and went into the revenue of that Company, being turned over to the Show Association in no way.

Profits from
 Feed at
 show included
 in income.

Trans.

Stall rents are charged for livestock exhibited on the hill. This totaled \$2,289 in the January, 1935, Show. It was collected by the Stock Yard Company but allowed as a credit to the Show Association and used to pay the labor and material bill of the Stock Yard Company against the Show, which usually totals about \$3,000 per year.

Income from
Fat livestock
and bulls sold
at show
is included.

The fat livestock exhibited on the hill, this being mostly single entry livestock, is sold in the fat auction in the stockyards proper, yardage being paid directly to the Stock Yard Company and going into the general Stock Yard Company revenues. Yardage of bulls sold on the hill is collected by the Stock Yard Company direct from the seller and goes into general yard revenues. There is a ring charge for livestock sold in the sales pavilion on the Stock Show ground, which revenue goes to the Show Association.

Bedding sales
due to show.

During the month of January, 1935, the Stock Yard Company sold a total of 6,688 bales of straw in the stockyards proper and on the Show grounds. Of this, 1,870 bales was sold on the Show grounds. 4,812 bales were sold in the stockyards proper, and the profit on this straw of 45 cents per bale, or \$2,168.10 was collected directly by the Stock Yard Company and went into their general revenues.

There was also a profit on grain in the stockyards proper during the past Show week of \$321.62, which was collected by the Stock Yard Company and went into their general revenues.

This stall rent of \$2,289.00 did not arise entirely out of the rental for the use of stalls which have been included in the property conceded by the Government to be used and useful. The Stadium contains a large number of horse stalls which are used during the Show week and the revenue from which is included in this \$2,289.00. I do not have

Trans.

any way of segregating the figures at this time. I would not care to say how much it would be; I believe I had better ascertain the break-down of the \$2,289.00. All of the show horses are kept in the Stadium during the Show week and that is usually fairly full during Show week and our higher rents apply there. Since you want that information I will endeavor to secure it.

The yardage on the livestock which was sold up on the hill, that is, the pure-bred sales, were carried into the other yardage, and we have not kept our records in such a way that we can tell whether the yardage from the pure-bred bull of \$1.00 a head is derived from sales in the yard proper or up on the hill.

1887 I have that information you asked for regarding prices. I have the Bureau of Agricultural Economics, Market News Service Market Reports for November 12, 19 and December 3rd of 1934, and January 7, 14 and 15 of 1935, which carries the Denver, Omaha and Kansas City livestock markets for those days. The report of November 12th shows the receipt of 13,600 commercial cattle at Denver. The Denver market for that day reads "most of the good stocker and feeder steers went at \$4 to \$5, with several loads at \$5.10 to \$5.15. Top yearlings reached \$5.65, and two-year olds and other yearlings made \$5.50." The report for Omaha the same day reads: "stockers and feeders slow, steady, medium to choice steers, \$2.75 to \$5; choice stock fat calves \$5.50." The report for Kansas City the same day reads, "stockers and feeders opened slow, steady to easier, bulk, early \$2.75 to \$4.50; choice 527-pound steer calves \$2.35." The latter is what we would call top yearlings at Denver.

Comparative
prices before
and during
Show from
government
records.

1888 The report for November 19th shows 10,200 commercial cattle at Denver, and reads as follows:

1015

Trans.

"Two loads of around 1,175-pound feeder steers reached \$5.75, while lighter weights, including yearlings, were taken at \$4.75 and \$5.50. Other steers brought \$4.50 down." The Omaha market for the same day reads as follows: "Stockers and feeders, steady. Medium to good steers \$2.75 to \$4.50. Choice yearlings held above \$5.00." The Kansas City market for the same day reads as follows: "Stockers and feeders slow, steady to weak. Bulk \$2.75 to \$4.50. High quality 336-pound steer calves \$5.75."

The report for December 3rd, 1934, reads as follows: "Denver receipts, 4,600 commercial cattle. Several loads of good medium stocker and feeder steers went at \$3.35 to \$4.50, with some yearlings held around \$5.00 unsold late. There were two cars of fleshy 1,210-pound feeder steers at \$5.50 straight." The Omaha market for the same day reads as follows: "Stockers and feeders scarce, steady. Medium to good steers \$2.75 to \$4.00. Yearlings \$4.75. The Kansas City market for the same day reads as follows: "Better grade stockers and feeders fully steady, others slow. Few loads choice stockers up to \$5.00."

The Denver market for January 7, 1935, reads as follows: "Receipts, 1,800 commercial cattle. Stockers and feeders went generally at \$3.50 to \$4.75." The Omaha market for the same day reads as follows: "Stockers and feeders scarce, active, strong. Bulk \$4.00 to \$5.50, few loads to \$6.10. The Kansas City market for the same day reads 1889 as follows: "Stockers and feeders mostly steady, supply liberal. Bulk \$3.75 to \$5.50. Choice yearlings \$5.90."

Increased
Prices due
to Show.

The report for Monday, January 14, 1935, this being the first day of the Denver Stock Show, reads as follows: "Stockers and feeders enjoyed one of

Trans.

the sharpest single advances on record. One load of steers around 1,050 pounds went out at \$9.00. There were others with bids of \$8.00 to \$8.50. Three cars of two-year-olds made \$7.90, and others sold at \$7.75. There were any number of loads at \$7.15 to \$7.25 with numerous loads at \$6.50 to \$7.00." The Omaha market for the same day reads as follows: "Stockers and feeders active, strong, to around 25 cents higher. Bulk \$5.00 to \$7.00. Fleshy feeders \$7.35." The Kansas City market for the same day reads as follows: "Stockers and feeders in liberal supply, steady to 25 cents higher. Bulk \$4.25 to \$6.25. Choice steer calves \$6.35."

We do not wish to leave the impression that the \$8.50 and \$9.00 cattle sold on January 14th were comparable to those sold on January 7th at from \$3.50 to \$4.75. The latter cattle would be more comparable to those which sold at from \$6.50 to \$7.25 on January 14th.

The Denver market report for January 15, 1935, reads as follows: "Stockers and feeder steers were in moderate supply and sold readily at steady to strong prices, following the unusually sharp gain of Monday. One load of feeder steers around 750 pounds made \$8.25. Other loads were taken at \$6.60 to \$8.00." On the same day the Omaha market reads as follows: "Stockers and feeders active, strong. Medium to choice steers \$5.00 to \$6.50. Fleshy feeders \$7.25 and \$7.45. The Kansas City market for the same day reads as follows: "Stockers and feeders steady to strong. Choice stockers and light feeders up to \$7.00."

With respect to Respondent's Exhibit 19, which was the detailed blue-print showing the proposed cattle pens which are to be an extension of the yard north of Race Court, we do not, at this time, have any definite date in mind as to when actual con-

Expansion of facilities.

Trans.

struction of these pens may be expected to start. That depends entirely on the general recovery from the depression and on the recovery in our locality from the drought, as well as other conditions mentioned in my direct testimony. A favorable decision in the West Bound Meat case would, we feel, immediately increase our hog receipts and necessitate the moving of the hog facilities to the proposed location. It would not necessarily follow that we would immediately extend across Race Court in the event of that change, as the building of these new pens would depend on our cattle business and the necessity for additional pens. We would first cut up the three large pens at the north end of the yard. It has never been the policy of the management of the company to build additional pens or expand until a well founded need for them occurs.

**New Hog
Facilities.**

1891 With respect to the proposed new hog house, we feel the construction of a new hog house is more imminent than construction of additional cattle pens, for the reason that our sheep and hog receipts have been increasing while our cattle receipts have not increased the same way, although they have not decreased to the extent the total receipts indicate, either the number of sales or space required. We have felt some new construction should be made in the hog division for the past two or three years, but it has been delayed on account of the depression, on account of the corn hog program, on account of the drought and awaiting to see the results of the West Bound Meat case. I do not wish to name a specific date for any of these improvements because that is a question of management and for decision by the president of the Company and the board of directors, who will take all matters and conditions into consideration when making their decision.

Trans.

The new hog house hasn't reached the blue-print stage yet. However, we know substantially the kind of barn we wish to build.

1892 I believe I do recognize the copy which you are handing me of Respondent's Exhibit 38 introduced at the hearing held in 1930. The plans of that exhibit are somewhat similar to the plans which are shown in Respondent's Exhibit 19, being proposed cattle pens in each instance, and cattle pens not varying in size to any extent. The construction indicated on that exhibit has not materialized, largely due to the depression and the feeling on our part to wait and see what was going to happen rather than go ahead and spend a hundred thousand dollars or so and find ourselves in bad condition financially. I would like to state that when we introduced this exhibit in 1930 we actually felt, the way our cattle business had been expanding, that these cattle pens would be built in the near future and I still feel they would have been had it not been for the economic depression.

1893 Whereupon Government Exhibit 54 was offered and received in evidence.

Government Exhibit 54 admitted.

With reference to Zone 6. It contains a roadway extending from 46th Avenue to the south of Zone 4. The balance of the zone is now being filled with dump material from the city, and everything that is not inflammable is dumped in this locality. The material which is being used to fill that zone is costing the stockyards nothing.

Zone 6 in part being filled.

1894 With reference to the subway on 46th Avenue under the Burlington, railroad men have been out to see us about this. We understand the proposal has been recommended to the Federal Government under the PWA, I believe it is, or at least one of the developments and uses of the three or four billion dollars the President is going to use for grade

Trans.

crossing elimination and other work. It has been selected as one of the most important, as the location of one of the most important needs for a subway in Denver. If that subway is constructed along the lines that we have suggested it will give access to the stockyard property. We do not feel that the present access is sufficient for the needs of that location. I do not feel that the access to the upper end of our property or to the Exchange Building is near all that could be desired. We are forced to use the C. & S. Railroad right-of-way south of the Stadium property and the C. B. & Q. right-of-way from the C. & S. right-of-way to the Exchange Building. The railroads comment and complain of this at times and do not wish a condition to be created whereby use will create ownership. I believe we are faced with the proposition that either of these roads might be closed at any time.

As to a line of trucks standing on streets and the necessity for parking space, I do know the attitude of our local people here and I do know that from an operating standpoint, we could not permit a long line of trucks to stand from our unloading chutes up to 46th Avenue without interfering with other traffic and other yard operations, including movements from Swift & Company and I am sure the city authorities would object to a line of trucks standing on 46th Avenue and would expect the Stock Yard Company to provide some point where these trucks could stand awaiting their turn.

Zone 5.

With respect to Zone 5, I testified that the Yard Company is contemplating the establishment of facilities to provide for the shearing and feeding of sheep on this tract. I believe the development will depend to a certain extent upon the outcome in this case and upon the result of the establishment of transit at the Missouri River. We do not doubt in our minds at this time with the improved price

Trans.

of wool, that it would be a good thing for us to do. We do know, however, that unless we can allocate
 1897 a certain part of the yardage in the stockyards proper, that is the revenue from that yardage to that facility if and when built, that it will not be self-carrying for this reason. These lambs may shear at any eastern feed yards. Feeding costs at those points on account of their being in the Corn Belt, are less than they are at Denver, because when fed at Denver the corn must be hauled from the Corn Belt to Denver. In meeting the competition from these other yards, we will be compelled to sell our feed substantially at cost and there will be no margin of profit to carry the property. We expect to be able to sell the lambs after they are shorn on the Denver market, receiving 8 cents per head yardage and our profit on the investment and a part of carrying cost will necessarily come from that source. Now if we are prohibited by the Secretary of Agriculture from having any facility in our rate base which contributes to the general prosperity of the yard our judgment may be changed for that reason. That is, it would not be good judgment on our part to have outside facilities which contribute to the general prosperity but which are operated at a loss if we cannot allocate a portion of the yard revenue to that facility.

At this point the Government produced a blue-print which was introduced in the 1930 hearing and identified as Respondent's Exhibit 37.

(Witness continuing). I have seen that document before. It covers those plans which were presumed to develop on Zone 5. None of these improvements have been made since the date of the 1930 hearing.

1898 Whereupon the blue-print designated as Government Exhibit 55 was offered and received in evidence.

Gov't. Ex.
 55 Admitted.
 1021

Trans.

Hay Storage.

1899 Due to the policy of our company in purchasing large quantities of hay in the fall, the northerly end of Zone 4 is used for hay storage purposes. We have the hay barn, which is indicated on Government Exhibit 8 as Y-1 on that tract. During the fall of 1934 in that particular zone we stacked approximately 900 tons of hay and straw outside. The hay is just stacked up and covered with a tarpaulin. We had one long stack covering the area designated Parcel 81 south of the roadway. The stack completely filled that particular area. We also had a stack of straw just west of hay barn Y-1.

1900 The docks at the westerly end of the sheep barn are on Zone 1 but contiguous to Zone 4. They are used for the loading and unloading of sheep and hogs mostly. They are used both for consignments of sheep and hogs which are being consigned to the market for sale and for through shipment. Most of the sheep unload on that dock and are consigned to the market for sale. We also unload some hogs there consigned direct to the packers and through hogs which are watered in the chute pens. We endeavor to unload through sheep on the U. P. dock or the Burlington dock for the reason that they are yarded in either end of the cattle yard, that is, during the busy season. At this time of the year if we had a car of through sheep, it would probably be yarded in the barn.

River Easements.

The easements on Zone 4 follow along the channel of the river and cover a width of about 50 feet, although about half of that width is from the slope at the top of the bank to the bottom of the river. The Yard Company at the present time is using it for roadway purposes and for sewer outlets. That part of the easement which is now being used as a roadway passing through Zone 4 would extend

Trans.

from a point along the river about opposite hay barn Y-5, at which point the roadway would be entirely on the easement, south to a point about 1901 opposite the Swift & Co. line. From there on south the road swings back adjacent to the railroad tracks. There might be one point in there where the road is off of the easement, all or part of it.

We feel that all of our railroad tracks, including those in Zone 4, and the land they occupy, is a facility used and useful in the handling of livestock in commerce, and therefore should be included in the rate base. They were built primarily to handle livestock. We will endeavor to get all we can from the various railroads handling.

**Railroad
Trackage.**

It is true we feel that the 50-foot right-of-way owned by the U. P., which is at the westerly side of the pen area in the cattle division and divides the cattle division from the sheep and hog barn which goes through the heart of our yard, is unfortunate from our standpoint and increases our operating expenses. As the yard has been built and as it is now laid out it is doubtful whether any changes would be made at this time even if we 1902 owned that right-of-way instead of the U. P. However, if we had retained ownership to the right-of-way originally and had not sold it to other people, I do not believe there would be any tracks or roadway through this particular section, but that the layout of the yards would be entirely different. Because of this condition, we have a long narrow yard, which makes operating expenses higher, whereas if the right-of-way was not down through there, we would have a wider and more compact yard. When our land witnesses testified relative to this fact they were considering the land as it is with all the improvements stripped off and with the other service. Now, if we had a square yard instead of a long narrow yard, we would undoubtedly

Trans.

ly have railroad access to it, which would be just as good and desirable as this particular right-of-way of the U. P. At this date we could not make what I would term material changes in our yard by securing ownership of that property, but if we had owned it originally, we would have a very much wider yard and probably would not have the Swift and Armour plants in their present locations.

1903 It is true that the company originally operating the yards owned most if not all of the land now occupied by Swift and Armour. The grant to the U. P. was made in order to get that railroad company to build into our property. Now obviously any railroad would be glad to build into our stock-yards under its present size, but fifty years ago, when the yard was just starting, is an entirely different proposition. We had not developed much business and it was entirely different getting some railroad to expend considerable money to serve us.

1904 As a result of the Stock Yard Company's leasing its tracks to the carriers, the carriers are enabled to deliver the livestock direct to the docks of the Stock Yard Company. That is, by virtue of the leases they have access to the docks and that was, of course, their purpose of making the lease.

1905 I wouldn't say that it was the major consideration because prior to that time they had been reaching the same docks over tracks for which they had been paying nothing, and it wasn't a case of reaching any new facility. I happened to be with the railroads at that time and I discussed the matter from a railroad standpoint with various executive officers of the railroads. Now, they had been using the tracks practically free for many years, and they felt that such use in the past created a more or less right to use in the future, and they were very, very reluctant to make the lease.

Trans.

However, the Stock Yard Company was in a position if it so desired to deny them the use of those tracks unless they paid for them and the railroads were under the duty to deliver the livestock which was consigned and in getting the lease they did get access to our docks and chute pens and were thus able to make delivery.

The Stock Yard Company has an understanding but no written agreement with the carrier to perform the actual loading and unloading services for which the carrier pays to the Stock Yard Company a fee. That charge at this time is \$1.00 per car. I would like to add that while this is paid to us directly by the railroads, because of our particular condition here and our transit arrangement, in effect from 60 to 65 per cent of the money is actually paid by the producer himself and not from the freight charge of the railroad for performing the service. That is the decision of the Interstate Commerce Commission providing that where transit is granted, the railroad need not absorb the unloading or loading expense. Now, some other stockyards have raised their charges. For example, on a double deck from a dollar to a dollar and a half. About 92 per cent of our sheep are transited here. If we raise that rate at Denver from a dollar to a dollar and a half for every movement, or from two or three dollars for the through movement, it means raising the out-of-pocket cost for loading and unloading on transited livestock of the producer a dollar a car or fifty per cent. Our chute facilities, unloading facilities, are, in a major sense, purely producer facilities which are paid for by the purchaser as a separate charge and not in the local or through freight rate. That is due to the transit arrangement. Livestock which is consigned to Denver and sold at Denver and not re-shipped on through billing, on such livestock the carrier absorbs

Bulk of loading charges paid by shipper.

Loading and unloading facilities are producer facilities at Denver.

Trans.

the loading and unloading charge. That amounts to about 20% of our railroad receipts. As I read the decisions and the Interstate Commerce Act on shipments consigned locally to or moved locally from public markets, the carriers are required to load or unload from the chute pens.

MR. BOSWORTH: Now, just a minute. I want to object, Mr. Examiner. This raises largely a question of law. I believe the proper construction of the law is that the cost of unloading shipments coming locally, consigned locally, and that takes it apart from this transit situation which Mr. Pexton has previously testified to, is included in the rate charged by the carrier, but there is nothing in the Transportation Act or in any decision which requires the carrier to unload. It is simply a question of who pays the cost, and that is all there is. Now, I think that it is an improper type of question to ask a witness who is not a lawyer for his understanding of the law. It calls for a legal conclusion.

MR. COOPER: Well, this witness has at various times expressed legal conclusions, and in addition
1908 to that he has testified, as a part of his qualifications, that he was admitted to practice before the Interstate Commerce Commission.

MR. BOSWORTH: I had forgotten the last and in view of that fact I will withdraw the objection from the standpoint of the legal construction of it.

(Witness continuing). The carrier is required to absorb the expense incident to the loading or unloading on strictly local traffic; as I read it there is nothing in the law which compels the carrier itself to do that. Our strictly local traffic amounts to about 20 per cent of our total receipts, so that in our unloading and loading we are working for the carrier about 20 per cent of the time and for

Trans.

the producer in the handling of livestock in commerce about 80 per cent of the time. I would like to add here, the same law which covers this also carries the exception that loading and unloading charges need not be absorbed where transit is granted or where shipments are unloaded at the request of producers.

Loading and unloading charges not absorbed if transit granted.

1909 In handling livestock, which is a perishable commodity the carrier, having taken custody of the livestock, as a practical matter has to, in order to comply with the 28-36-hour law and also the Interstate Commerce Act, provide facilities for loading and unloading in some way either by furnishing them itself or by making arrangements with some other person, and where required to stand the cost, standing it in order that the livestock may be unloaded. However, if sales inspection, dipping, etc., takes place at the feeding point, the application may be changed even though the feeding point may be at a point where the 36-hour law has not taken effect.

1910 When I previously stated that the carriers paid taxes in the City and County of Denver on a basis of one-half of the value of the land, that was not on the theory that the land in Denver is assessed at one-half its actual value; it was simply an agreement arrived at at the time of the original lease.

Though the Blayney-Murphy plant is not as well located as the Armour and Swift plants for the reason that it is served by the C. B. & Q., it is true that the switching charge on shipments from the Blayney-Murphy plant is absorbed by the carriers if the shipments are moving to competitive points.

I made the following statement on direct examination: "Having railroad tracks with our own unloading chutes has enabled us to more rapidly

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unload shipments of livestock coming into the market, thereby getting them on feed more promptly and the patrons receiving a heavier fill."

Loading and
unloading
facilities
described.

1911 The Burlington dock contains 28 unloading chutes and serves that line; also business switched by that line for the D. & R. G. and C. B. I. & P.; the Union Pacific dock contains 24 unloading chutes and serves that line, the C. & S. and the Santa Fe. The so-called quarantine or C. & S. chutes belonging to the Stock Yard Company contains 13 chutes and serves all lines. The river dock contains 12 chutes and serves all lines. The reason for the statement I made on direct is that we will frequently have shipments in off the Burlington or D. & R. G. which if all handled on the Burlington dock would congest that dock and result in slow unloading. Because of the two stockyards docks served by stockyards tracks being available, we could and often do unload train loads of livestock coming in on the D. & R. G., switched by the C. B. & Q. on their own dock and our two docks at the same time. Now, if the quarantine and river docks are only limited to one line, it would mean that these trains could not be split up but would have to await their turn on the Burlington dock.

I have made no computations with respect to the percentage of our shipments which are unloaded at docks contiguous to the tracks owned by the carriers and it would be impossible to estimate that without checking a year's business. We have checked the efficiency of each dock and found that per chute the quarantine chute handles more cars than any other dock. Next ranks the U. P. dock, next the river dock and next the Burlington unloading dock. All lines, of course, use the quarantine dock, including the Burlington for D. & R. G. business, Union Pacific and C. & S. and D. & S. L. We cannot take the yearbook and, because

Trans.

the Union Pacific brought in 10,000 cars, for example, or loaded out 14,000, estimate that they were all handled on the U. P. dock because they are not. When the U. P. is loading out for their hot shot, for example, they will use their own dock, the quarantine dock, and the river dock all at the same time and without an actual check. As a rough estimate and more or less of a guess, I would say that approximately 40% of our traffic is handled on the two stockyards docks and the other 60% on the U. P. and Burlington docks.

If we did not have our docks and had, for example, a train of from 70 to 80 cars off of the D. & R. G. switched by the Burlington in the fall, as we often do, and found it necessary to unload all on the Burlington dock, the unloading would not be near as rapid. Because of the arrangement we have, practically all of the unloading is quite rapid.

Our company does not control the switching of cars into the docks irrespective of what road they happen to come in on. We could not order Burlington livestock unloaded on the U. P. dock or U. P. livestock unloaded on the Burlington dock. We do, in a measure, direct which dock shall be used if it is possible to use other docks and specify where certain species of livestock will be handled. For example, we instruct railroads that we will only handle hogs on our own docks to avoid driving these hogs either through subways or over viaducts. If a train carries a majority of sheep we will instruct that they be unloaded near the sheep barn rather than, for example, on the Burlington dock, which would cause a rather long drive.

Can't control
switching at
B. E. Co.
docks.

1914 I stated, in my direct in connection with the railroad lease that the fill had been allowed for 30,000 cubic yards at the rate of \$1.00 per cubic yard. It

Trans.

was estimated by the engineers that it would cost that amount to obtain the fill at some distance from the property and to haul it to the desired location, there being no filling material immediately available.

I do not know how the cost of grading was set up in our investment account. I couldn't say whether our accounts are so kept that it could be determined.

Club Building.

Referring to Zone 9 and the Club building located thereon. The lower floor of the Club building is leased at this time to anyone we may find in the market for space in that territory, such as restaurants, stores and so forth. The second floor is used by the manager of the stock show before, during and after the stock show for a period of about six weeks, it being necessary to have an office for the manager and his clerical staff in that locality.

**Zone 10
Necessary.**

Referring to Zone 10. We having had no need for gravel for the past two or three months to amount to anything, I do not believe any is being removed right at this time. It is our expectation that we will take gravel from that area this fall during icy weather when it is needed and no longer remove gravel from Zone 3, as recent levels on Zone 3 indicate we will need all of the present gravel or dirt in that zone for filling of the zone when it is needed for stockyard purposes. The management has instructed our superintendent to discontinue taking gravel from Zone 3 and I understand he is no longer taking gravel from that source. Those instructions were given about ten days or two weeks ago. I understand that our force made an error and did take some from there possibly two or three weeks ago but I do not think it will occur again in the future.

**Gravel for
Zone 3
discontinued.**

Trans.

Correcting page 1,681 of the record, the cattle and calves purchased at Denver during 1934 is 205,962 of which 17,107 head, or 8.3 per cent were sold to other dealers. There were 43,474, or 21.1 per cent of cattle and calves resold on the market. I stated 58,296 head, or 28½ per cent, were shipped to other markets for sale. This should read 58,445 head, or 28½ per cent. The figure 68,710 head, or 33½ per cent, purchased on orders is the same. Also the number shipped unsold from Denver of 5,525 head to feed lots, and the number purchased for slaughter at Denver, or 12,492 head.

**Trader Sales
Analyzed.**

1919 The reason for these corrections is due to the agreement reached with the Government on the amount of livestock purchased and resold by traders.

Referring to Government Exhibit 43 and the side heading entitled "Bought on order," when I use that term I am referring both to the case where cattle to which traders take title and resell which they ship out of the market because they have a client with whom they get in touch and to the case which, under the Packers and Stockyards Act is technically referred to as "Purchases on order," that is, where the cattle are purchased and the producer pays a commission and receives the original package direct. There would be included in these figures cattle such as were referred to by Mr. Wolf this morning when he spoke of sending out cattle on orders but which he himself had actually purchased and on which he had attempted to obtain

1920 a 10 cents per hundred profit, but it would not include any cattle which were re-weighed at the market. The only cattle re-weighed were those shown under heading II, this being the amount resold to dealers, 16,526 cattle and 581 calves, and those resold to others 40,591 cattle and 2,883 calves.

Referring to the case where the dealer goes out into the country and fills orders and gets an ad-


 Trans.

vantage thereby by reason of the 85% transit rate: where dealers make purchases of that kind it may be that the purchaser in the east who buys the feeders gets the advantage of it or it may be that the dealer himself is enabled to take the advantage and thereby increase his profits. It would depend on whether the dealer was purchasing ~~on~~ straight speculation or on an order. If he was purchasing on speculation, he would endeavor to sell the cattle as high as possible. If he was purchasing on order, he would probably charge the customer 50 cents or a dollar a head for making the purchase, this being the going commission rate for country deals in our territory.

Dealers
Strike
in 1930.

1921

Q. Now, you referred to this so-called dealers' strike after the date, effective date of the Secretary's order. Do you know whether the traders knew that the Stock Yard Company was averse to the imposition of a trader charge?

A. Well, they may have known our attitude at the original hearing. However, after the order came out, we had some conferences with them, told them that the matter had been taken to the court, that we would endeavor if possible to avoid the collection of the charge, but that while the matter was in court it would be necessary for us to make the collection, and we hoped that they would accept it in an orderly way and depend upon the decision of the court to be fair to them. We promised them that as we were impounding the revenue above the Secretary's rates from the original shipper, we would also impound the revenue that we would collect from them and refund to them promptly in the event we were successful. We also stated to them that we felt their interest lay in the development

Trans.

of the Denver market, that they would make a mistake by doing anything to oppose this charge, that any adverse action on their part would militate against the market, would probably react against receipts coming to Denver and would cause damage to them as well as the Stock Yard Company, and in other ways endeavored to prevail upon them to accept the charge in an orderly way and comply with the rules of the Secretary in the same way that we were. And it is our understanding from these conferences that they would do that.

1922 Mr. Shoemaker, the president and general manager of the company, happened to be called East the weekend before the new rules were effective. Sometime over the week they apparently decided, and as far as I could find out, they had no meetings or collusions, and I don't know just how this came about, but anyway, at any rate on Monday they did not appear on the market to buy. I talked to various traders, telling them I thought they were making a serious error, that while there apparently was no collusion on their part, yet anyone investigating the matter would be bound to feel there had been collusion, that the condition of the market was bound to affect our receipts the entire fall, and endeavored to persuade and prevail upon them to go ahead on the market and operate. Securing no results, I called Mr. Shoemaker at Chicago on the telephone, advising him of the condition. He replied that he thought if I would take the matter up with them properly, expressing the viewpoint of the company, calling attention to the damage to the market and the damage to producers their action was causing, that I could prevail upon them to go ahead and accept the charge, paying the re-weight or half yardage charge and letting it be impounded. I went back and talked to various traders and oth-

Trans.

ers on the market that day, pleading with them that they take action on the market. Their usual reply was that they were in no sense boycotting the market, that they simply felt the addition of this charge would put them out of business and that if it was necessary for them to go out of business, they had better find it out immediately and either get into other business or handle their dealings
1923 elsewhere. The matter ran along this way with practically no action on the market until the next day when I called Mr. Shoemaker, and it is my recollection that he stated to hold the matter in abeyance until he returned home. He returned as promptly as possible, and after giving due consideration to all of the factors, decided that it would be in the producers' interest to waive the charge until we knew definitely from the court whether it should be collected, and this was done entirely in the interest of the patron of the market. We felt the effects of this action the entire fall; that is, our competitors would sympathetically talk to producers, stating that it was too bad about the situation in Denver, and so forth, and in a way leave the impression that our operations and outlet on the market were still curtailed.

That tells substantially all of what was done by the Yard Company in its effort to break up the strike. I know that we were most emphatically opposed to any such action as this and did everything we could in our power to prevent the action in the first place and to break it up after it started, knowing that results would be more or less what they were, that is, that our receipts would be affected the entire fall.

Referring now to the NRA and the number of men which were added to our payroll as a result of the NRA wage schedules: I can check that up for

Trans.

1924 any given date before and after the NRA. It is my recollection that right at this time we have about 35 more men than we had for a like amount of business prior to the NRA.

1926 Referring now to Respondent's Exhibits 15 and 35: I do not feel that the expenditures for roads set out in Exhibit 35 are of the same general character as the expenditures set out in Exhibit 15. The expenditures on account of roads set out in Exhibit 35 are to create better accessibility, to better serve our property, while the expenditures on Exhibit 15 are for the betterment of and to create buying demand on the property. The opening of a road into the property would not necessarily create additional buying demand on the market, at least not back from 1886 to 1915.

In my opinion the expenditures for roads indicated on Respondent's Exhibit 35 should be taken into consideration in value of the land.

Referring now to Respondent's Exhibit 15, the first item, or the first two items, I stated that a Mr. Gebhard was president and manager of the Colorado Packing Co. To my knowledge I don't think he was ever connected with the Stock Yard Company.

Q. An audit made by our Department shows that at the time The Denver Union Stock Yard Company was organized in 1886 one of its directors was a Henry Gebhard. Would you be in a position to state whether they were one and the same person?

A. Well, I had no knowledge that Henry Gebhard was ever connected with The Denver Stock Yard Company. I knew that he was not during the period after I came to Denver, which was after 1915, and I have never heard or

Trans.

1928

understood that he had been connected with the Company. However, I would not feel that if he did have that would have any particular bearing on this because the grant to Mr. Gebhard in the establishment of the Colorado Packing Company was not nearly as large as a later grant made to the Western Packing Company. It is my understanding that Swift & Company was not interested in the Western Packing Company as early as 1902, that after the National Packing Company was organized the old Western plant and the Colorado plant were purchased by the National Packing Company about 1906 retaining ownership until the National Packing Company was dissolved about 1912 and that in the split-up of the assets of that company, Swift & Company took their present Denver plant and Armour & Company the plant of the Colorado, or their present Denver plant.

(Witness continuing). It is my understanding that the National Packing Company was owned by the Swift, Armour, Sulzburger, Morris and so forth. However, the organization of that company was sometime after the grant to the Western Packing Company and the building of the Western Packing Company's plant at Denver. My information is that the National Packing Company first acquired an interest in the Colorado Packing plant about 1906 and Armour & Company about 1912 or 1913. As I understand it the National Packing Company acquired their interest in The Denver Union Stock Yard along in 1906 and in the dissolution of that Company Armour and Swift divided The Denver Union Stock Yard in 1912 or 1913.

Q. Do you know whether either Armour or Swift had any indirect interest in The Denver Union Stock Yards prior to 1906?

Trans.

MR. BOSWORTH: Now, Mr. Examiner, I would like to ask the purpose of those questions because on the face of them they seem to me to be entirely immaterial and irrelevant.

MR. COOPER: I think the purpose of them is perfectly clear. There was a period clearly from 1906 on when the Armour and Swift interests controlled both the Stockyards Company and the packing plants, a part of which plants secured property on these grants that are indicated in Respondent's Exhibit 15 and, of course, when the same parties own two pieces of property it is very easy to transfer one to the other without having any actual consideration involved.

THE EXAMINER: The witness may answer.

1929 A. It is my understanding after all the checking that I have been able to do that they did not, that is, Armour and Swift had no interest in the Denver market in any way until that property was purchased by the National Packing Company. I would call attention to the fact that our grants since 1906 or since the entry of the National Packing Company into the Denver market had been very much less than they were prior to that time and that it is apparent the grants made by the company prior to 1906 did result in the building of a good sized packing industry in Denver which attracted these people.

1930. In estimating the value of the land in these grants indicated in Respondent's Exhibit 15, we used as a basis the value obtained by analysis of the so-called Pitkin sale.

I was not acquainted with Robert Knox Pitkin, although I understood that he was a resident of Denver owning that property. I do not

Trans.

know when he acquired it nor how long he had it, nor do I know what was located on the property when he acquired it. From the information I have been able to obtain at the time he sold the property there was located thereon substantially the same property as was on it at the time I came to Denver in 1915, that is, some sheds, pens, etc.

I do not know that there was any other consideration for that sale in addition to the actual physical property.

1931

Q. Did you make any analysis, Mr. Pexton, of the cost of land in the stockyards area which was acquired at various times by The Denver Union Stock Yard Company?

MR. BOSWORTH: Objected to as incompetent, irrelevant and immaterial.

MR. COOPER: Mr. Examiner, I think counsel for the respondent has mistaken the purpose of this question. In the preparation of Respondent's Exhibit 15, the witness has used as a basis for his comparison the value of the land in the Pitkin sale in 1888 as representative of the value of the land which was transferred by these grants; at the same time the respondent company had made other purchases, and in attempting to determine what was a reasonable value as of the date of those grants, I am simply asking whether the witness gave consideration to the prices actually paid by the respondent company for certain lands, part of which I think were included in these grants.

THE EXAMINER: Objection overruled.

THE WITNESS: I endeavored to do so, yes, sir.

1932

(Witness continuing). The unit value per acre of the land in the Pitkin sale used in Respondent's

Trans.

Exhibit 15 I felt to be \$4,375.00 per acre, that is \$2,500.00 for the improvements and \$50,000.00 for the land.

I did not give any consideration to the purchase made in 1886 of the Clough Stockyards Company, which included 53 acres of land with certain buildings for a total purchase price of \$50,000.00, for the reason that that purchase represented a transfer from an individual to a corporation of which that individual was an officer and I felt for that reason it was not truly representative. I did not give any consideration to the purchase of 11.45 acres from James F. Wolf in 1888 at an average price of \$1,441.00 per acre, because the majority of that was low-lying land along the river, not filled, and I did not feel it was comparable to the stockyard
1933 area or the land that was given to the Western Packing Company or even to Henry Gebhard. Even if it developed that a part of this Wolf land is included in the Gebhard land I would not change my answer because if that were true that part would be the higher ground of the Wolf purchase.

I did not give any consideration to the purchase made from Frederick A. Keener of 14.34 acres at the rate of approximately \$1,500.00 per acre, which is now a part of Zone 2, because I did not feel that it was comparable to the Pitkin tract for the reason that it was across Franklin Street and at a considerable distance from the stockyards proper and the center of industry at that time.

I did not give any consideration to the purchase made from St. Vincents Land Company in 1900 of 5 acres lying just south of the Pitkin tract and bordering it, because that land is now in the heart of the river bed and at the time of purchase was low-lying land adjoining the river, and I did not
1039

Trans.

feel that it was at all comparable to the stockyard area or the land given to the Western Packing Company or the Colorado Packing Company.

I did not give any consideration to the purchase made from Sheedy and Berger of 20 acres at the rate of \$1,000.00 per acre, which land is now part of Zone 1 and part of Zone 5 and a portion of it lies in the river, for the reason that I did not feel it was in any way comparable to the stockyard proper or to the land given to Swift & Company because the part of that tract now on this side of the river was at that time in the river bed and was very low-lying land, and the part across the river was separated from the stockyard proper and carried a lower value for the same reason that it does at this time.

1934 I did not give any consideration to a tract of land purchased from Charles F. Morse in 1888 known as the Jennie Rubble tract of 10 acres at the rate of \$1,700.00 per acre, which land is now mostly owned by Armour & Company. That particular tract of land was almost entirely in the tract of land donated to the Colorado Packing Company and now a part of the Armour tract. Mr. Morse was an officer of the company and I did not feel that that particular sale should be used.

I did take into consideration the purchase made by the Riverside Cemetery Association of 29.92 acres at the rate of \$3,000 per acre, which land was purchased in 1916 and is located in Zones 2 and 3. If you will note item 14 on Exhibit 15 I used the value of \$3,000.00 per acre for the land granted to the C. B. & Q. of 2.5 acres, this being the price the land cost us. That grant was made in 1917. I note that this exhibit shows that the grant was made in 1919. That is the date that the deed was re-

Trans.

corded. The actual land was given to the Burlington, in 1917 and they extended their tracks thereon in that year.

Referring back a moment to the 10 acre tract that was purchased from Charles F. Morse. Mr. Morse deeded the property, as I recall, to the Stock Yard Company in 1898. I do not know what he paid for it and whether, because of being an officer in the company, he made any profit thereby. As a result
1936 of these various grants and the situation as it developed, at the present date there are now located at Denver three of the so-called big packers. We feel that their presence is of great value to the Stock Yard Company and to the market as a whole and to our parton, the producer, because of the outlet they create at Denver, not only for local slaughter but for shipment to other points for slaughter.

It is substantially true that it has been the universal history of the stockyards business that no large terminal market has been developed without the presence of one or more of these large packers. Their presence, because of the volume of business they handle, is necessary for a market to be successful in a large way. Any expenditures made to reach that result is to the benefit of the producer.

Q. Now, if you can imagine such a thing, Mr. Pexton, what would be the effect on your market if over night the presence of these three packers could be wiped off and tomorrow morning you would go out there without any big packers?

1937 Whereupon counsel for respondent objected that, the question was incompetent, irrelevant and immaterial. Objection was overruled.

(Witness continuing). It would be extremely difficult for me to imagine such a thing. If such 1041

Trans.

an occurrence did happen without a question of doubt it would affect our outlet very materially. We would then, of course, be compelled to get together and decide what could be done, and it would be a case, possibly, of building the market over again at this or some other point.

MR. COOPER: (Continuing). If such a thing were to happen, Mr. Pexton, do you feel that your stockyard property as it now is would be worth its cost of reproduction new less depreciation plus the appraised value of the land?

Counsel for respondent thereupon objected on the grounds that the question was improper. The objection was sustained.

1941

A. Obviously if we did not have the outlet that now exists the Stock Yard Company would not own facilities that it now owns. Therefore, such a property as this would not be available for purchase. I recently looked over various sites for a stockyards in a Western city, with a view of building a stockyard at that point. That particular place now has a livestock market which is not properly located either for outlet, switching facilities, prompt handling, nearness to the city, and so forth. When one goes to look for a stockyards location, all of these things must be taken into consideration as well as damage suits that might result from the so-called nuisance that a stockyards is supposed to have.

1942

It is a good deal like the value which Mr. Zelinski placed on a right-of-way of the Pere Marquette in Bay City, Michigan, of \$112,000 on land on which Pere Marquette had an easement granted by the City, but which they did not own. Mr. Zelinski assumed that because of this easement the Pere Marquette had prescriptive easement against the

Trans.

abutting property owners, and the right to damage by smoke, noise and vibration without being responsible, and that if they had not had those rights, it would have cost \$112,000 to acquire them. This land of The Denver Union Stock Yard Company does have this right, is particularly well located both from a railroad and highway transportation standpoint, from having railroads out of Denver, from having prospective stockyards sites and having a large amount of livestock available.

1943 If I was in the market for a stockyards and there existed no packers at Denver, but this site of land with all of the other outlets, facilities and supplies that I have enumerated, such as a year around supply of lambs, a good supply of hogs for local requirements, a location at the eastern edge of the producing area, and the western edge of the fattening area, a location closely adjacent to the feed lots of northern Colorado, I am inclined to believe I would be willing, if I had the money, to pay a very substantial price for this land with a view of erecting the necessary stockyards facilities upon it, and with the expectation that I would be required to expend considerable money in developing an outlet, and possibly attracting the larger packers to the Denver market.

1944 Referring to the so-called schedule of throwouts and specifically to the item of \$832.56 which was contributed to the American Stock Yard Association. I would not say that that association is continuing to function 100% in the way it was functioning at the time it was organized and the time thereafter when the Code was under consideration. The Association has closed its Washington office. It is, however, still in existence and will undoubtedly continue to function in some manner as long as is necessary.

Trans.

I believe it is true that the maintenance of the Washington office constituted a larger part of the expense of that association.

I believe there is some difference of opinion among the officers of the association as to whether they will continue to function. However, I know it is the feeling of our company that an association of stockyards for the mutual good of both stockyards and producers is something desirable and that it should be continued. Naturally if the Wash-
1945 ington office with a paid secretary there is discontinued, the after expenses will be less than they have been in the past.

Now with respect to the Veteran Volunteer Firemen. It is an organization of men who were volunteer firemen in the early days, the organization being continued. They have an annual dinner for which the charge is \$5.00, that being the amount of our donation.

The Gentlemen's Riding and Driving Club is an old organization, one of those that sponsored the horse show division of the stock show and the breeding of horses in the early days. They were of material assistance during the early part of the show in that portion of the show which provided the revenue. The organization still continues and supports the show.

When I stated that the International Veterinarians Congress was supported by the Bureau of Animal Industry I meant that it has the sanction of that Bureau and as I understand it, the endorsement of Dr. Mohler. Their annual meeting is a conference of veterinarians all over the country to decide what is the best for the livestock industry.

The Holy Name Basket Ball League is a league
1946 of various Catholic Churches in Denver, the members of which have an annual basket ball contest

Trans.

and tournament. Part of our employees and part of our patrons belong to these churches and we felt that this contribution or ad in their program was justified.

In discussing the hazards with which the stock-
yards business is faced, I mentioned the possibility
of the importation of meat from the Argentine. It is
my understanding that at the present time, due to
an embargo on meat on account of the hoof and
mouth disease, no meat can be imported from the
Argentine unless it is canned. I am aware that
at the present time, and for many years past, the
hoof and mouth disease has been prevalent in the
Argentine. It is my feeling that there is very little
possibility that this disease will ever be eradicated
in that country, but there seems to be some pres-
sure brought on the President or others to take
down the bars in this respect. We know Dr. Moh-
ler's attitude about it and that if his opinion pre-
vails, this embargo will not be lifted but we are
fearful, however, along with many producers of the
West that there is some possibility along that line.
We know that from time to time pressure has
been brought upon the Department to have this
embargo lifted. The past two or three years under
the New Deal numerous changes have been made,
for example, the tariff has been reduced on sugar
which we believe is to the detriment of the beet
sugar producers of the West. We are fearful that
the same attitude might exist with regard to meat.

Thereupon a number of issues of the Record
Stockman beginning January 2, 1935, and conclud-
ing January 26, 1935, were offered and received
in evidence and designated as follows:

Issue January 2, 1935.	Government Exhibit 56
" January 5, 1935.	" " 56a
" January 7, 1935.	" " 56b

Government
Exhibits 56
to 56q ad-
mitted

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"	January 8, 1935 -	"	"	56c
"	January 10, 1935 -	"	"	56d
"	January 11, 1935 -	"	"	56e
"	January 12, 1935 -	"	"	56f
"	January 14, 1935 -	"	"	56g
"	January 15, 1935 -	"	"	56h
"	January 17, 1935 -	"	"	56i
"	January 18, 1935 -	"	"	56j
"	January 19, 1935 -	"	"	56k
"	January 21, 1935 -	"	"	56l
"	January 22, 1935 -	"	"	56m
"	January 23, 1935 -	"	"	56n
"	January 24, 1935 -	"	"	56o
"	January 25, 1935 -	"	"	56p
"	January 26, 1935 -	"	"	56q

Respondent's Exhibits 5 to 36 admitted, objections being interposed and overruled in several cases.

1949 **MR. BOSWORTH:** Well, now, Mr. Examiner, we would like to have your ruling upon the exhibits which we have offered, which ruling was deferred until after cross-examination. That applies to Respondent's Exhibits 5 to 36, I believe.

Counsel for the Government thereupon consented to receiving into evidence Exhibits 5 to 10, inclusive, which were thereupon received.

Exhibit 11 was objected to on the grounds that it was incompetent and speculative. The objection was overruled and Respondent's Exhibit 11 was thereupon received in evidence.

1950 Respondent's Exhibits 12, 13 and 14 were received in evidence without objection.

Respondent's Exhibit 15 objected to on the ground that it is a use of a method entirely unknown to the law and absolutely immaterial. The objection was overruled and the exhibit was received in evidence.

Trans.

Respondent's Exhibits 17 and 18 were received in evidence without objection. (Respondent's Exhibit 16 had already been received in evidence.)

Respondent's Exhibit 19 was objected to as being speculative and immaterial. Objection was overruled and the exhibit was received in evidence.

Respondent's Exhibits 20, 21, 22 and 23 received in evidence without objection.

1951 Respondent's Exhibits 24, 25, 26, 27 and 28 objected to as irrelevant; objection overruled and the exhibits received in evidence.

Respondent's Exhibits 29, 30, 31 and 32 objected to as speculative, incompetent and immaterial. The objection was overruled and the exhibits were received in evidence.

Respondent's Exhibits 33 and 34 were admitted in evidence without objection.

1952 Respondent's Exhibit 35 was objected to as immaterial and speculative. Objection overruled and the exhibit was received in evidence.

Respondent's Exhibit 36 was received in evidence without objection.

Re-direct Examination

The Denver Union Stock Yards do not operate in any manner under a franchise from anyone whatsoever. We have never been advised by anyone, **No Monopoly.** including the Department of Agriculture, that anything in the nature of a certificate of convenience and necessity is necessary in the establishment of a new stockyards, and in fact such a certificate is not necessary. Anyone can build a stockyards at any point they see fit without permission from any Government agency excepting possibly local authorities under a zoning ordinance or something of that nature.

Trans.

1953 As a matter of fact two auction sales have been commenced in Denver and it is my understanding that the zoning board, because these auction sales are not within the Class "B" Industrial District, has closed out one and is in the process of closing out the other.

The competition experienced by the Denver stockyards, because of other markets and direct buying, and with auction sales, is very real. We meet it every day and it seems to be growing. We find greater work, more advertising, more solicitation necessary at all times in order to maintain our position against these various forms of competition.

Denver
Market
competitive
with others.

I recall the testimony of Dr. Dozier in the 1935 hearing that Denver, in his opinion, was the most competitive market, with the possible exception of St. Joe, due to St. Joe's location between Sioux City and Kansas City, and I believe he was right at that time and that the same conditions would obtain today as shown by his exhibit, showing the movement of livestock from our territory to the various markets.

1955 On page 1972 of the transcript the Government counsel and I were discussing the California movement in hogs. I there itemized the total revenue from loading and unloading, watering and spreading corn in the cars of \$4.00 and stated that if the rates were properly related, a different situation would obtain. By that I meant the relationship between the rate on packing house products with the rate on livestock from our territory to the Pacific Coast. I meant by packing house products, all the products of animals, both packing house products under the railroad definition and fresh meats. I meant that if the rates were properly related there would be an increased slaughter here in Denver. Double deck California type hogs will

Trans.

load about 140 to the car. Our yardage charge is 1956 12 cents per head on rail hogs. On a double deck car of hogs of this number selling at Denver our yardage charge would be \$16.80, plus \$1.00 unloading, plus the profit on the corn they might consume, or a gross revenue of probably \$20.00 per car. Of course, we would require additional facilities over and above those that are necessary when the shipments simply water here in Denver, but counting the unloading and marketing charge and other revenue, the comparison is between \$4.00 for hogs that simply water here in Denver and \$20.00 if they were sold on this market.

In my opinion were it not for the Denver Stock Show the bulls sold at that Show and the fat cattle in carloads and the feeder carloads sold during that Show, would not come to Denver. There would be nothing to attract them here. Unless there was a stock show to attract the buyers there would be no one to sell them to, and therefore no reason for the movement of this livestock to Denver. Increased business due to Show.

With reference to why carload shipments either of bulls or fat cattle or feeders are not shown upon the hill property, Zone 9, the answer is that that area would not begin to handle the several hundred cars of livestock that are entered in the Show. 1957

For example, the approximate 100 to 125 cars of feeding cattle entered in the Show which pay an entry fee to the stock show, must be exhibited in the stockyard proper because there is no room in the horse and mule division for their exhibition. The same is true with regard to fat cattle, bulls, carload bulls and so forth. Much of yard proper used for Show livestock.

In addition to the cattle that are actually entered in the Show, there also come to Denver during Stock Show week to take advantage of the prices Increased business due to Show.

Trans.

during that period, several hundred cars that are not entered in the Show.

Show attracts buyers.

January earnings due to Show.

1958

Lots of buyers come here who are interested in cattle that is not the proper show type. In fact, the larger volume of our sales is to people who are not interested in pure-bred livestock. This is particularly true of the feeder auction. We find no difficulty, however, in allocating the revenue from this livestock to the Show or on account of the Show. We know absolutely that the month of January would be our lowest month of the year and would have a substantial deficit were it not for the Stock Show. The Stock Show is held during January largely because it is a light month and we then have the facilities available to handle the increased business. There have been suggestions from time to time that it be held in October or November in a circuit with other shows. At that time of the year our facilities are crowded, and we would find it impossible to provide the proper facilities and equipment to handle the show. The show is particularly held during January in order to fill up what would otherwise be a light month and a deficit period. In our exhibits comparing December with February, we have not taken this into consideration but have only compared January actual earnings with December and February actual earnings, although it must be obvious to anyone familiar with livestock conditions in the West that January would not be as favorable a month as either December or February if it were not for the Show.

When I told Mr. Cooper that the pure-bred livestock shown at the Show were shown by professional showmen who traveled the rounds of the show, I meant, and I am sure that he meant, what is a common phrase in the trade, that is, men who are termed professional showmen who are simply breed-

Trans.

1959 ers, whose major operation is the production of pure-bred livestock. They are not professional showmen in the sense that that term is used in most industries. There must be someone who produces good bulls in order for the ordinary run of producers to produce good cattle. They fill that need and then send their livestock to the point where the outlet exists. When I speak of a professional showman I didn't mean a man who has a trick horse or anything of that sort, and I am sure that the Government counsel did not mean that.

1960 The sales pavilion and the stadium are entirely different things. We have a so-called sales pavilion which contains seats and a small ring where prospective purchasers may observe and bid on the pure-bred livestock being offered. The stadium, or pavilion, as it was termed, is the place where the horse shows and rodeos are held in the evening and the pure-bred livestock, the 4-H Club livestock, single entries, and so forth, are judged during the daytime. The stadium is the common meeting place for the large number of producers who attend the show during the daytime. It is simply a combination building for these two purposes and is essential for both of the purposes. Stadium and sales pavilion distinguished.

The stadium was built by the Stock Yard Company. The sales pavilion is an addition to brick barn No. 7 on the east side of Lafayette Street, that is, it adjoins that barn. It was originally built by the Stock Show Association. The Stock Show Association is a non-profit organization. The 1961 Stock Yard Company stands their deficits. It is generally understood by all concerned that the Stock Yard Company is back of the Show and will make good any of their bills. We have been called upon during periods of severely cold weather to make good deficits as high as \$23,000 in one year.

Trans.

If all revenue
of Show
included,
property
would carry
itself.

Any income or rental which is derived under the lease arrangement with the National Western Stock Show Association goes into the general fund of the company and to the extent of that addition to the general fund it assists in carrying this property. I would like to add that the Stock Show Association so-called, for example, last year, because there was such an association, was able to secure donations totaling \$13,500. It is very doubtful if the Yard Company, in the absence of such an association, would have been able to secure any such donation, if any. We expect to receive on account of the 1935 Show a total of \$7,000 rent which will go into our general revenues and assist in carrying the property devoted to Stock Show purposes. In our opinion, all of the revenue received during the month of January alone is a great deal more than the total carrying cost of this property.

1962 When the Stock Yard Company was operating the Stock Show on its own and attempted to secure these donations or any other support in a financial way for the Show even in the purchase of tickets, the person being solicited felt that here was a large and prosperous company well able to take care of their own affairs, soliciting a smaller individual for support and for that reason were not only reluctant in giving any kind of support but more or less ridiculed the idea of such a large institution to solicit donations or being so tight, as they expressed it, that they would not give away large blocks of tickets. Having an association corrects this condition and results in just the opposite condition. Members of the Board of Directors go to various individuals and institutions and make requests and their standing in the community places an entirely different aspect upon the solicitation and makes it more or less impossible for those solicited to fail to take their proper place to make

Trans.

the proper donation. So far as tickets are concerned, when the Stock Yard Company handled the Show, there was a continued stream of requests with an expectation on the part of those making the requests that the donations would be made. I know this is true because at that time I was on the other side of the fence, and made such requests upon the Yard Company and more or less expected that the tickets be given away. With a Show Association the conditions are entirely changed.

1963 These donations which we thus obtain in the support of the Show and the saving in the free ticket situation, most assuredly help the producer. It is, in effect, what makes the Show possible. Last year, that is for the 1935 Show, the revenue from general admission, seats and tickets totaled \$37,491.13, advertising \$1,640, and as I stated, donations \$13,175. All of this money operated to pay the cost of the Show, to reduce the expense the Stock Yard Company would otherwise have had and all of that was expended for the good of the livestock producer. To have a separate show association makes the Show a great community interest, supported by all concerned, instead of a Show simply sponsored by one company. I do not question in my mind but that the interest in the Show and its beneficial results are materially increased because of having the Stock Show Association, and I think the management of the company was extremely wise in bringing about this condition. By so doing, they enlarged interest, secured greater results from the work and reduced expense to the Stock Yard Company very materially.

Income received lessens cost to producer.

Now with reference to the operation of Zone 2 north of Franklin Street and my testimony in connection with the closing of Franklin Street: the

Trans.

reason why subways could not have been put under Franklin Street, leaving the street open, is that it would have undoubtedly congested the situation. Subways would have resulted in more expensive operations and would have separated the yard so that it would not be as efficient from an operating standpoint or a sales standpoint. Also the water level in that locality is very near the surface.

At the northern end of Franklin Street, extending back a substantial part of the distance to the Burlington main line, it is only 2 to 4 feet to water and any work in that locality must be done by cribbing and with pumps to pump this water out if necessary. In our opinion, construction of subways in this particular area, based on experience, would be more expensive, much more so, than in a location where the same water conditions did not exist.

I believe that the water level in this area of the stockyards is much nearer the surface than the Country Club District, for instance, although I am not entirely familiar with the depth to water in the Country Club District.

1965 It is the water level that may be observed by looking at the excavating which has been done in the Grant Smelter tract purchased by the City and also in the famed Denargo tract where the water, after the ground had been excavated for gravel, stands about 3 feet under the level of the adjoining ground. All of this district is underlaid by water within a short distance of the surface. That is true, for example, even with the Exchange Building. When our Exchange Building was built the construction of the basement and placing the cement there and piers and so forth was very expensive.

Manure
production.

In dry weather in the peak season the output of manure runs from 200 or 300 loads per day. By

Trans.

loads I mean our truck loads, which hold about three cubic yards in weight since we have found it necessary to employ as many as 10 to 15 outside trucks in addition to our own trucks and wagons, which number about 25, and during such periods those trucks will haul from 12 to 15 loads per day each, depending on the length of the haul.

1966 The difference between the dry and the wet weather in this situation is due to the absorption of moisture by the manure, and the bedding, and whatever it is in the pens that acts more or less as a sponge. As a result the wet weather cuts down the cubic content of the load because when the manure is extremely wet we cannot overload the truck or wagon. We have weighed such loads and find that during wet weather the load in one of our trucks or wagons would run up to 9,000 pounds to the load, which is an overload for either the truck or the wagon. In other words, there is always much more manure to haul off from the pens during wet weather than in dry weather, for the reason that we must haul out the snow, slop and one thing and another along with the manure. I most emphatically state that our present manure dock and manure area is not sufficient for our needs during the peak season of its production. During every year I watch this carefully, observing what is going on; I am down there myself almost daily, and I know the facilities and the land area Mr. Christensen recommended as sufficient would not be sufficient, and that if we did not handle it as we do, we could not make the manure sales that we do make.

Manure dock and dump insufficient.

As I stated in my direct, the customers we have for manure will not haul it during wet weather, neither will they haul it while it is in an extremely wet state. If you piled this into one large pile, it would take a long period for it to dry out. By

1955

Trans.

handling as we do, that is, dumping more or less thinly over vacant land, and by "thinly" I mean two or three feet deep, it dries out rapidly and therefore is attractive to our potential purchasers. It is the experience of the Yard Company that this is more economical than any other method of handling manure. The way we handle, a truck with a load of manure goes on to the vacant area north of Race Court, finds a location not previously used, pulls the pin on the dump body and has emptied his load in 10 or 15 seconds. He can then immediately leave, returning to the stockyards for another load. By handling as we do, the efficiency of these trucks is very much more than as if we endeavored to pile in one location where it could be reached only by a clam shell. We tried that one year with the manure company who had contracted for our output and found that our truck efficiency was greatly reduced because of the delay incident to backing the truck and getting it in position where the clam shell could handle it. Based on this experience, repeated tests and accurate figures showing the performance of trucks, and so forth, I am satisfied that the number of trucks we would require, as well as our manure disposal expense, would be very materially increased if we did not handle as we do now. I am convinced that this saving alone would carry the carrying costs of ten acres north of Race Court.

Referring to Government exhibit 55, which is the old blue-print of the proposed hog division west of the river on what is now Zone 5: that proposed improvement was not carried out for the same reason that the improvements north of Race Court were not carried out, as I explained on cross-examination, namely, economic conditions and a feeling on the part of the management and board of directors that we should wait until the depression

Trans.

was over and conditions readjusted themselves rather than go ahead increasing our capital outlay and dissipating our operating profit.

1969 Both of these improvements have been the subject of discussion by the executives of the board of directors of The Denver Union Stock Yard Company and among the various foremen of the Company as well. There are some who feel that the work should be done immediately and there are other more conservative members who feel we should await a change in conditions both economic and weather before undertaking these developments. By "weather" I mean the drouth which then existed and also the corn hog program and the settlement of this West-bound meat case, etc. The controversy over this matter has been a very live discussion for the past three years.

1970 "Selling flat" on the market is a term used to cover livestock which is sold without benefit of freight or which the selling agency does not guarantee there is a freight benefit on. The average balance of the through rate on cattle and sheep from Denver to the Missouri River is 22 cents. This is the average from a large number of points of origin. The local rate on the same livestock from Denver to the Missouri River is 46 cents. The difference is 24 cents, this being the benefit, so-called. That is, when a man comes in and has his livestock sold with benefit of freight, he guarantees that it will not cost the buyer more than the balance of the through rate, which averages 22 cents for the movement from Denver to the Missouri River. The same conditions apply to Chicago, New York and other eastern destinations, the balance of the through rate being more than 22 cents, of course, in such cases. When livestock is sold in this way it is called "memo." By selling on "memo" is meant a sale on a memo basis. It is in effect a

Selling "flat"
defined.

Sale on
"Memo."

Trans.

guarantee by the selling agent that they have so handled the shipment that the buyer may use the inbound freight and secure the lower rate. If a sale is on memo and in some manner the freight benefit were killed, the selling agency would have to stand the cost. For example; as spoken of in Mr. Wolf's testimony, if the Denver Livestock had a car of cattle containing four odd head and they sold those out to some other buyer and then sold the remainder of the load to another buyer on memo or guaranteeing of freight and the buyer was not able to use the freight on account of the four head being sold out, the Denver Livestock Commission Company would be penalized the difference, or on the average of 24 cents per hundred.

Freight paid
to River.

Loading and
unloading
charges not
absorbed in
transit
cases.

Producer pays
loading and
unloading in
80% of cases.

There are also other shipments which are sold freight paid to the Missouri River, these largely being lambs from northern Colorado feed lots which are freight paid to the Missouri River when moved into the fattening lot in order to secure the fattening in transit arrangement. The Interstate Commerce Act, as well as the decisions of the Interstate Commerce Commission, provide that when shipments are consigned locally or slaughtered at a central market, the railroad company must absorb the unloading expense, but if they moved on, no such requirement is made. Because of this, at Denver when shipments are sold memo or freight paid, the unloading charge is added to the freight bill and collected from the producer and the reloading charge is added to the freight bill at the other end in the form of an advance only waybill issued by the railroad freight office at the stockyards and collected from the consignee. This, in effect, makes collection of both items from either the producer or consignee at destination. About 20 per cent of our rail traffic at Denver is slaughtered locally, the other 80 per cent moving on to other destina-

Trans.

tions for either slaughter or further finishing, with the result that actually the carriers pay about 20 per cent of our loading and unloading charges and the producer or consignee the other 80 per cent.

On cross-examination I stated that as to shipments to competitive points the Blayney-Murphy, now the Cudahy, plant is able to have its switching charges on the Burlington absorbed, but that was not true as to shipments to non-competitive points. The majority of their shipments are to non-competitive points. For example, if they were shipping a car of meat to Rock Springs, Wyoming, a non-competitive point on the Union Pacific, they would be required to pay the C. B. & Q. switch themselves, whereas on a like shipment from the Swift 1973 plant switched by the stockyards tracks, there would be no such switching charge.

The same is true as to shipments from Blayney-Murphy, that is, Cudahy, to New Mexico and Arizona, where they have quite a business. To Albuquerque, where they run branch cars, there is a Burlington switch on Cudahy business, whereas on business from Swift & Company reached by the Santa Fe through their joint agreement with the C. & S. over stockyards rails, there is no such switch, and the same is true with regard to Armour & Co. shipments as compared to Cudahy shipments.

If the stockyard company didn't have its own tracks and a load of hogs came in on the Burlington, those hogs would have to be driven across the yards to the Burlington chutes or else a switching charge paid by the consignee.

If the Burlington only had their own dock, the stockyards company not having any docks, and we wanted the hogs unloaded, for example, on the U. P. dock, it would be necessary for the Burlington to turn that car over to the Union Pacific, who

Yard Company
ownership of
docks saves
expense to
producer.

Trans.

would charge a switch. In that event, I would assume the consignee would expect the stockyard company to pay the switch charge, at least I would if I was the consignee, inasmuch as the Burlington had unloading chutes of their own and the switching to the chute nearer the hog division was simply for the convenience of the stockyard company.

1974 In the practical operation of a stockyards it would not be practical to drive hogs across the yard from the Burlington docks to the hog division. I think it would be damaging to the hogs and create greater shrinkage, which would mean less return to the producer, and during hot weather would result in some death loss.

Mr. Charles F. Morse, who was mentioned on cross-examination, was the first president of the stock yard company here. He was a resident of Kansas City. At that period of this yard's existence, the Kansas City yard really owned or dominated this yard.

Attempts to acquire Union Pacific & Burlington docks have failed.

For a number of years the Stock Yard Company has discussed the possibility of purchasing both the U. P. right-of-way through the yards and the C. B. & Q. right-of-way through the yards with the executives of both lines. I know, for example, that Mr. Shoemaker, the president of the company, discussed it with an executive of the Union Pacific and Burlington as far back as 1918 because those executives discussed it with me at that time as to the feasibility of selling and what they would be giving up. Since that time I know that it has been mentioned and I personally have talked to, for example, General Manager Williams of the Union Pacific Railroad as to whether they would be willing to sell this land to the Stock Yard Company so that we could make all of our docks and tracks common and thereby avoid delays to the produc-

Trans.

er's livestock and secure greater efficiency from all of our unloading docks. So far we have had no success whatsoever. The Union Pacific, for example, feel that they have a right-of-way of their own into the largest industry in Denver, an unloading dock that they can use at any time they see fit without having it congested by other lines, that they can bring a setting of cars down there in the morning, leaving them setting on the loading dock and having them loaded as orders appear, which they do not feel would be possible if they did not own the docks themselves, we forbidding the railroads to let empty cars set on our unloading docks. They think that because of having this dock and track of their own, they can give better and more prompt service and thereby secure additional business, and for that reason will not consider making any sales to us, although we have intimated we will pay them a very attractive price for the land. Reference to NRA provisions in leases with Governmental agencies and Respondent's Exhibit 37 relating thereto are omitted.

1980 We do not have any trouble with the subway under the U. P. tracks being filled with water so that the packers cannot bring their livestock through it. However, there was water underneath the ground where the subway is located and while it was being built extensive cribbing was necessary. The walls and floor are all thick concrete and keep out the water, so as a practical matter, the subway is perfectly usable. When, in referring to the U. P. right-of-way and docks I stated "The U. P. has a dock of its own" I was referring to the docks which are actually owned by the Stock Yard Company but which are adjacent to the U. P. right-of-way. The U. P. owns up to the edge of the dock and therefore no other line except the C. & S. can use that dock.

1061

(Witness excused).

Trans.

1982 MR. K. LEE HYDER, a witness called by the Respondent, after being sworn, testified as follows:

Qualifications.

My name is Lee K. Hyder. I live in Milwaukee, Wisconsin. I am an appraiser, in which capacity I am associated with the American Appraisal Company, with headquarters in Milwaukee. I am also an engineer and architect. I had a three-year engineering course at Colorado College, one year of architectural engineering at the University of Pennsylvania, and three years of architectural design. I am vice-president of the American Appraisal Company with direct responsibility for the activities we include under the designation of the engineering division. This covers the investigation and valuation of public utility properties, lands and land development, economic surveys and reports, appraisals of special purpose properties and intangible assets, such as patents, trademarks, lease holds, mining properties and other natural resources, industrial plant surveys, condition and rehabilitation estimates, and so forth. I have held my present position about six years. I have spent approximately 16 years with the American Appraisal Company and for the past 11 years have been in charge of the execution and direction of various phases of our engineering work.

My experience covers about 23 years of general building construction and valuation work. From 1911 to 1913 I was a practicing architect in Cincinnati, Ohio; from 1913 to 1918, practicing architect in Detroit, Michigan; and from 1918 to the present time I have been with the American Appraisal Company. In these 16 years about 50 per cent of my time has been devoted to valuation work in the field. I have served as manager of our architectural department and later directed all of the valuation work, both architectural and mechanical. For the past 12 years the land valuation work and other special work has been under my super-

Trans.

vision. I am a registered architect in the State of Michigan, a registered civil engineer in the State of Wisconsin; I am past president of the Detroit Architectural Club, member of the Michigan Society of Architects, the Architectural Society of the University of Pennsylvania, the Society of Industrial Engineers, Milwaukee Real Estate Board, the Association of Appraisal Executives and a member of the American Institute of Real Estate Appraisers. I am, at the present time, chairman of the Education and Research Committee of the American Institute of Real Estate Appraisers and am also serving as editor-in-chief of the Journal, the regular publication of that organization. I am a member of the valuation committee of the American Society of Civil Engineers and am chairman of the National Committee on Terminology, now making a study of engineering and appraisal terminology, upon which committee are included representatives from various technical societies. I have written many articles which have been published in various general and technical magazines, and covered subjects relating directly or indirectly with valuation matters. These magazines include Public Utilities Fortnightly, the National Real Estate Journal, Engineering News, Wall Street Journal and many other banking, construction, accounting and other publications.

1985 My personal practice covered residential and commercial property, including the design and superintendence of construction of garages, apartment houses, store and loft buildings, and some factory construction. Incidental to my own practice, I have been connected with the following firms:

Willison and Fallis, architects, Denver, Colorado, during which time I was engaged in the design and superintendence of the Vail Hotel, Pueblo, Colorado; the West Court Hotel, Denver, Colorado, and the interior reconstruction and arrangement of

Trans.

the Denver Auditorium, and Garber and Woodward, architects, Cincinnati, Ohio. I was a draftsman in the firm's office during a part of the period of construction of the Union Central Life Building of Cincinnati, and also engaged in various drafting and engineering practice with this firm, primarily on school house design and construction.

Elzner and Anderson, architects, Cincinnati, Ohio: I spent some months in the office of this firm in charge of the design and completing of plans and specifications for a large general unit of the Cincinnati Hospital.

The Allyn Company, architects and engineers: I was with this firm as a manager of the group of architects in the Hamilton County Court House competition. I was associated in the design of the Miami Hotel at Dayton, Ohio, and the Bucknell Hotel at Springfield, Ohio.

1986 The Ferro Concrete Construction Company, Cincinnati, Ohio: with this firm I spent some months in the engineering office, working upon and developing studies of reinforced concrete design. During the same period, I developed the plans and specifications for major additions to the Eastman Kodak plant in Rochester, N. Y.

1987 During my 17 years with the American Appraisal Company, I have personally established the valuation of a large number of nationally known concerns, among which included the Kelly-Springfield Tire Company of Cumberland, Maryland; the Trumble Steel Company at Warren, Ohio; the Schlitz Brewing Company at Milwaukee, Wisconsin; Warren Webster & Company, Camden, N. J., a large number of investment properties, including many hotels such as the Bowman group of hotels at New York City and many other locations; the Radio Keith Orpheum Corporation, whom I have repre-

Trans.

sented for many years, first for the valuation of the theaters forming the Orpheum Circuit, and later carrying through to the B. F. Keith Circuit, and later for intangible property, and having as a joint client the Attorney General of the United States; the Mayo Brothers hospitals and hotels at Rochester, Minnesota; the American Rolling Mill Company at Middletown, Ohio, whom I have represented for a number of years; a number of the packing plants of Armour & Company and Swift & Company, which I have personally appraised or directed the appraisal, our company having made complete valuations of all the properties of these companies; the Northwestern Mutual Life Insurance Company, whom I have represented for the past two years in reporting upon a number of properties for which they hold major loans, one of which was located in Denver, Colorado, and known as the Cooper Building; the National Surety Company, for whom I appraised a number of properties in the past two years, one of which was a large land holding in the vicinity of Denver; the American Oak Leather Company of Cincinnati, Ohio, and many other industrial properties. I have just completed an appraisal of the Stevens Hotel at Chicago, Illinois, and have for a number of years represented the Eppley Hotels Company in the valuation of most of their hotel buildings. I have personally handled a considerable amount of condemnation work representing private interests in the cities of Cleveland, Chicago, St. Louis, Buffalo, Cincinnati, New York, Milwaukee, Camden, New Jersey, and Detroit, Michigan, these having to do with programs of street widening or the acquisition of lands necessary for civic centers or other municipal developments. I have also represented the United States War Department in preparing valuations and engineering studies in connection with a portion of the Missis-

Trans.

issippi Flood Control Project, having to do with the acquisition of lands for the location of the new levee.

1989 I have also represented the City of St. Louis in condemnation work.

The valuation of public utilities has been under my direction, insofar as it has been handled by our organization, for a number of years. I have personally engaged in or directed the valuation of a number of large public utilities, including the Niagara Falls Power Company at Niagara Falls, New York; the Pullman Company, Chicago, Illinois, which included the manufacturing properties and a complete study of going value for carrier operations, which was later presented before the Interstate Commerce Commission. I am now engaged and have been for some years in valuations for the Wisconsin Telephone Company and the Milwaukee Gas Light Company. I have made studies and appraisals for the Lone Star Gas Company, the Indiana Gas Company, the Florida Power & Light Company, and a number of toll bridges, including the St. Louis and St. Charles bridge, the Covington and Cincinnati bridge, the Wheeling bridge and the Harrisburgh bridge. I have served as a representative in arbitration and valuation matters for the Baltimore & Ohio Railroad Company, the Chicago, Milwaukee, St. Paul, and Pacific Railway, the Big Four Railway, the Chicago Junction Railway, the Peoria & Pekin Union Railway, the St. Paul Terminal Railroad, the Fort Worth Belt Line Railroad and the South Omaha Terminal Railway, and others.

1990 I have appeared as an expert witness before the Interstate Commerce Commission in various cases, also before the Secretary of Agriculture through the Packers and Stockyards Division in

Trans.

several hearings, and many times before State public service commissions, courts and other bodies in matters involving valuation.

During the past fifteen years I have prepared appraisals covering the stockyards properties at Chicago, Omaha, St. Paul, St. Joseph, Sioux City, Cincinnati, Indianapolis, Cleveland, Peoria, Fort Worth, Wichita, Ogden, Pittsburgh and several minor yards. **Stockyard Experience.**

Also I have made several appraisals at different times for the Denver stockyard. In addition I have made an inspection and condensed valuation of the yards at Kansas City, St. Louis, Oklahoma City, New Orleans, Louisville and Jersey City.

1991 The American Appraisal Company with whom, as I have stated, I have been connected for some seventeen years or more, and of which I am vice-president, is a corporation incorporated under the laws of the State of Wisconsin in 1896. The company has been and is now engaged exclusively in valuation work covering properties of all types and characters and generally throughout the United States and many foreign countries.

The company functions as a group of specialists of an association under executive control for the use of whom the company maintains a large accumulation of valuation data and statistics. It maintains a price analysis department, devoting its entire time and personnel to the assembling, analyzing and recording of prices of material, labor and equipment, studies of plant construction, layouts, design and other matters relating thereto. The company maintains connections with organizations from which it receives quotations and discount sheets, through which we are constantly enabled to keep in touch with the price situation and the factors affecting the value of properties. 1067

Trans.

We have about twenty-four district offices at the present time, which are largely sales offices, but which direct to some extent the activities of our representatives when engaged in the particular territory. During the period of its existence I would say that the company has made in excess of 50,000 appraisals.

**Knowledge of
Respondent's
properties.**

1992 I have been familiar with the stockyards property at Denver ever since I was a boy. Denver was my home and I can recall spending many days from time to time at almost every opportunity at the stockyards. Specifically I have, as far as my direct studies of the properties are concerned, I have been closely familiar through observation with the stockyards property since 1920, a period of about fifteen years.

In 1920 I came to Denver and made a general inspection and condensed valuation of the physical properties as a part of a general nation-wide survey carried forward during that year. About 1922 or 1923 I supervised a detailed appraisal of the properties. A year or two later in 1924 or 1925 I personally directed a detailed appraisal of the property. Later in about 1927 I met with the engineers of the Packers and Stockyards Administration, as it was at that time, and made a reconciliation of the property inventory as between the inventory which I had prepared and that which the engineers of the Government had prepared.

1993 In 1929 I personally directed a re-appraisal of the properties and subsequently appeared and testified at the hearing held before the Secretary of Agriculture in Denver about February, 1930. In 1934 I came to Denver about August and laid out and directed up until January, 1935, a re-appraisal of the property, during which month the field investigation was completed. During this entire period

**Spent 5
months in
present
appraisal.**

Trans.

I visited Denver a number of times and on every trip I have, for some purpose or another, looked at the property and made some tentative or general inspection.

1994 We started work on the present appraisal in August, 1934. At that appraisal in 1934 I had the benefit of my past knowledge and experience with regard to this property. I had completed studies prior to that and the records had been maintained. However, I did not rely entirely on my past studies. I made a complete re-inspection of the properties. In so far as possible I utilized, of course, the working papers and studies that had been made before, but these were all checked in every instance against the property as it then existed.

I have been in attendance practically throughout this entire hearing and have heard Mr. Zelinski's testimony covering the appraisal of the structural properties on behalf of the Government. I believe that Mr. Zelinski's inventory is substantially correct. I was present when counsel for the Respondent indicated of record that Respondent would accept the Government's figures for reproduction new of the structural properties. I believe the cost of reproduction new as of the date of this valuation as determined by Mr. Zelinski is substantially correct in detail. I have made no investigation of the land myself, that is, as to its value, but I have very carefully reviewed Mr. Zelinski's report.

In my opinion Mr. Zelinski has apparently confined his report and his testimony to the value of the physical properties only, that is, the land and the structural improvements and construction overheads. He has apparently neither inventoried nor valued any of the intangible property elements. Intangible property elements may be defined as those property elements defined.

Trans.

elements of property that may be possessed by the Stock Yard Company as reflected in the established business organization and other factors over and above the actual investment elements represented in the physical properties themselves, that is the land and structural improvements thereon.

1996

Q. Well, now, just so we may be clear as to our terminology here, the term "intangible property values" as used by the engineers, is that something different or is it the same as, we will say, construction overheads such as engineering, superintendence, interest during construction and things of that sort?

"Construction Overheads" and "Intangible property values" distinguished.

A. It is distinctly different in the valuation of public utility properties, inasmuch as the construction overheads relate strictly to those costs that are normally incurred during the period of construction of the physical properties. In other words, the construction overheads are the incidental expenses that cannot be directly assigned to any item of physical property and therefore are usually independently inventoried and valued and added to the structural items. They are, however, subject to the same treatment and are physical property, or a part of physical property just the same as the materials and labor. Intangible property is distinctly different and relates to those elements having to do with the established business and organization and similar elements not forming any part of the physical property or reproduction new of the physical properties themselves.

(Witness continuing). In the view of the engineer the so-called construction overheads are really tangible additions to property value. However, they cannot be definitely assigned, or if they

1997

1070

Trans.

were to be assigned to the individual item it would have to be on the basis of some allocation.

I note in Mr. Zelinski's statement that, in his opinion, the construction period for the reconstruction of the properties of Respondent would be one year. In my opinion, a period of one year for the reconstruction of The Denver Union Stock Yard property would be entirely too low and impossible of accomplishment except at unit costs substantially above normal. However, in examining and reviewing his estimates of cost where the construction period would obviously be a factor in the determination, I believe these estimates to be adequate.

Mr. Zelinski takes 80.5 as a condition per cent on the structural depreciable property of the Respondent. It is my opinion that the condition per cent as established by Mr. Zelinski is entirely too low and does not properly reflect the condition of the property as it existed on December 31, 1934.

As I understand it, Mr. Zelinski's figure of 80.5 is a composite figure. He took the separate elements and reached a condition per cent figure as to the separate elements by weighting all of the elements on the basis of relative costs of reproduction new.

Q. Have you made a study of the condition and accrued depreciation of the physical property as of December 31, 1934?

A. I have.

Q. Is such a study what is meant by the more general phrase of condition per cent?

A. That is used by many engineers and termed "condition per cent." In my own practice I normally take somewhat the opposite view and establish the accrued depreciation which deducted from the cost of reproduction

Trans.

new, results in a figure equivalent to the condition per cent at the time of inspection.

Q. Will you explain how you made your study or various studies you took and the results of your study?

A. As previously stated I have been personally familiar with the property for many years through repeated inspection. To explain my approach properly I shall have to discuss the principles involved to some extent in establishing an accrued depreciation. As a concept depreciation is loss in value from any cause. The causes of depreciation include structural depreciation, structural obsolescence and so-called economic obsolescence. This is as resulting from influences developing from factors not directly relating to or from the use of the property itself. Age is also a factor in depreciation, although it is usually and properly treated as an underlying reason why other basic factors occur. The purpose of an appraisal is, in my opinion, important, in considering the elements of accrued depreciation. For example, the age or, more properly, remaining expectancy of life of a property item as compared to a similar expectancy of a new item is a definite factor in establishing the value of the property for sale. It is not, however, of material weight in the valuation for rate making purposes. For such purposes the actual condition of the property is controlling. Observed depreciation is all that should be given consideration, which would include such obsolescence as is existing and deductions should be made accordingly. It is my personal conviction that the only elements of depreciation to be properly deducted in setting up value as a

Hyder's
method
of deter-
mining condi-
tion per cent.

1999

1072

Trans,

part of the rate base is that actual depreciation that affects the capability of the property to render service as compared with new. Strictly speaking, however, observed depreciation has been given a somewhat broader interpretation by some authorities whereby it has been claimed that not only the depreciation that could be observed should be recognized but also allowances made for depreciation in certain portions of the property which could not be actually seen or inspected. This condition is particularly true in a complex property such as the stockyards, especially underground sewer and water lines, structural parts of the building, and so forth. To some degree the condition of the concealed portions can be estimated by the appearance and condition of what can be seen, also by the knowledge gained by long experience by observing the particular property where major structural changes may have afforded such an opportunity. I have adopted in establishing the accrued depreciation for the property of The Denver Union Stock Yard the broad interpretation that observed depreciation must embrace reasonable allowance for unseen property. In this respect, however, I have been fortunate in having had opportunity to actually see a considerable amount of ordinarily concealed construction by being actually on the scene during the period of expansion and changes in the yards. Such as, for example, the construction of the 1923, 1925 and 1928 extensions of the cattle yards and the new sheep house unit in 1929.

**Witness has
actually seen
concealed
construction.**

2001. Based upon my continued inspection of most of the large stockyards properties in the United States; I believe the Denver yards to be close to the best in the actual physical condition of the property.

**Condition of
Respondent's
Yard close to
best in U. S.**

Trans.

The climate is a very large factor in this regard, inasmuch as the determination of above-ground construction does not proceed nearly as rapidly as it does in the properties constructed along the Missouri River and other Middle West and Eastern locations. I personally examined, in each of the years in which I have previously stated an inspection was made, the detailed items which comprised the property at that time. In the present instance, I personally examined every item and detail of construction that could be observed, such inspection being carried forward, starting with the month of August, 1934, and being finally completed and again checked during the month of January, 1935.

Detailed
Inspection.Capability to
render
service
disregarded.

In the case of the cattle pens, for example, I inspected each block or group of pens, first the rails and then the gates and fence posts, mangers, water troughs, and minor construction, paving, and similar items. Each group was then depreciated in detail and thereafter weighted in accordance with the appraised investment. The resulting cost of reproduction new less depreciation expressed as a condition per cent does not reflect my personal opinion of the relative capability to render service as compared with the new. Excepting for a comparatively minor amount of work necessary to repair fence rails, gates, depressions in the pavement here and there, the cattle block construction as a whole is, I believe, equally as capable for rendering service as would be true of brand-new facilities. However, in arriving at the intrinsic value of the facilities, there is no doubt perhaps that posts here and there may be in some stage of decay below the surface. The pavement is, of course, deteriorating and must at some time be subject to more extensive repairs and replacement; therefore, regardless of my personal opinion of the method which should be used for rate making purposes, I have

Trans.

established the accrued depreciation and condition per cent by taking all of these factors into consideration. That is, I have arrived at the figure which we may term condition per cent by using the observed depreciation which in turn recognized a reasonable allowance for unseen construction. In other words, the term condition per cent does not reflect simply the capability of the structures of rendering service. It also takes into consideration depreciation both observed and calculated. The method which I have used is in theory similar to that pursued by the Government appraiser, Mr. Zelinski, if I understand his testimony correctly. I have considered the age of the property in the sense that I believe age may be an influence that is slowly lowering the condition of the property and in that sense and to that extent I did consider age. I believe Mr. Zelinski considered age in the same manner, that is, that age in itself was not a direct factor but the deterioration would unquestionably be going forward due to the age of the property and what proportion of that could not be restored through maintenance or otherwise would be causing some deterioration.

2003

2004

So with respect to the cattle pens. Most of the construction can be observed, that is, the upper portion of the posts and the surface of the pavement can be observed and from that a reasonable judgment can be formed as to that portion of the construction which is not observable, that is, the inside of the pavement and the part of the posts below the ground.

I have seen a number of rehabilitation programs where the pavement was removed and fence posts were taken out which, of course, gave me some definite, specific idea as to the condition found at that time and which has been, of course, used in.

Has had opportunities to observe underground conditions.

Trans.

forming my judgment to some extent of the probable condition of the portion that could not be seen at this time.

Now with regard to under-ground sewer and water systems:

Past observation of actual conditions relied on.

It was not possible, of course, actually to observe and inspect as of the date of appraisal a large portion of these systems. I did inspect the condition of the manholes and that portion of the sewer and water which was available in such manner. To a very large extent, however, I relied upon my previous observation of the condition of the under-ground lines here and there on occasions when they had been opened for connections or to tie in with construction extensions. I also took into account the character of the soil and the character of the materials comprising the sewer and water lines, and to some degree rested upon my experience in many other similar investigations. As a matter of fact, the larger portions of the systems involved consist primarily of cast iron and vitrified tile pipe. Numerous records maintained by public utility corporations have shown practically a negligible deterioration of either of these materials in service, if properly laid on solid ground. The principal reason for failure and the resulting repairs that have to be made occurs through settlement, that is, the settlement of the soil which causes the joints and connections to break. Usually a brand-new sewer or water system will show greater deterioration as a whole following the first full year or period of operation than it shows after the beds have been properly settled and the preliminary repairs and adjustments completed. Thereafter, excepting by accident, given a reasonably proper soil, little deterioration is anticipated or found.

Trans.

I have prepared a statement setting forth the accrued depreciation as I have determined it for the property of The Denver Union Stock Yard Company, which is marked for identification as Respondent's Exhibit 38. It is entitled, "Development of Accrued Depreciation Rates as of December 31, 1934." It consists of a five-page statement, the first two pages of which consist of a summary by major property divisions and setting up three columns, the first being the cost of reproduction new as established from my appraisal of the property; the

Respondent's
Exhibit 38
described.

2006 second, the cost less depreciation from the appraisal, and the last being the weighted rate of accrued depreciation as determined. The last three pages comprise the further details, taking the major items under each classification and showing the method by which the total rate by classifications was determined. The last page sets forth the grand total cost of reproduction new of the physical properties, excluding indirect construction costs or general overheads and also exclusive of movable equipment, also the cost less depreciation for the same items, the weighted rate being shown as 10.7 per cent. In the summary forming the next two pages all items covered under actual structures have been forwarded from the detail sheets and to which have been added movable equipment items showing both the cost of reproduction new and the cost less depreciation and the per cent of accrued depreciation, the whole being finally assembled and weighted on page 2 under grand total at the bottom, showing a weighted accrued depreciation per cent of 11.1.

2007 The very first heading on page 1 of this Exhibit "Utility Building" should be "Utility Buildings."

The figures occurring in the first column of figures are my totals for the various classes of the reproduction new cost; they are not the Government figures.

Trans.

In spite of the fact that Respondent has accepted the Government figures on reproduction new, I have inserted my own calculations of cost of reproduction new in this Exhibit because the difference up and down in the cost of reproduction new would have made a difference in my calculations as to accrued depreciation, and therefore a difference with respect to condition per cent, probably minor but nevertheless a difference, would have resulted.

**Respondent's
Exhibit 39
described.**

2008 Having reached my percentage which is in the third column, and which I have called "weighted rate" I applied that weighted rate to the Government figures of cost of reproduction new. The result of this calculation is contained in an exhibit now marked for identification Respondent's Exhibit 39. This exhibit is entitled "Development of Cost of Reproduction New Less Depreciation as of December 31, 1934, and Computation of Annual Depreciation on 'Straight Line' basis adopting cost of reproduction new by Mr. Zelinski and the condition per cent and straight line rates as I have determined. The exhibit consists of a tabulation setting up in first column the cost of reproduction new figures contained in Government Exhibit No. 28 in dollars. The second column represents the condition per cent which I personally established, and taken as far as possible from the accrued depreciation and resulting condition per cent as set forth in Respondent's Exhibit No. 38.

In some minor instances, through differences in summarization or method of inventory, it might not have been possible to exactly parallel the items with the equivalent or comparative rates. I think that these are very minor, however, and have no influence on the exhibit or results of the exhibit itself.

Trans.

The condition per cent figures, in other words, represent the deduction from one hundred of the accrued depreciation which I established through my inspection, and as assembled for each of the items as tabulated and taken from Government Exhibit No. 28. The application of the condition per cent in the second column to the cost of reproduction new in the first column results in the cost of reproduction less depreciation shown in dollars in the third column. This has been carried through in parallel with Government Exhibit No. 28 and results in a grand total shown at the bottom of the fourth and last page of the exhibit of \$3,015,222, being the Government's cost of reproduction new of the structural property in total, and including general overheads, and \$2,689,738 in total, being the computed cost of reproduction less depreciation which results in a weighted condition per cent of 89.2.

2010 The grand total of \$3,015,222, of course, would be subject to any further adjustments in the total reproduction figures of the Government to coincide with the changes which Mr. Zelinski, I believe, has agreed to make. This, in turn, would change the figures in the third column to that extent. I would also like to call attention to the fact that the weighted condition per cent is shown to be 89.2, whereas in Respondent's Exhibit 38 the weighted condition per cent would be reflected as the difference between 100 and 11.1 or 88.9. This difference is the natural result of applying percentages to a variation in cost of reproduction new figures. Just where or to what extent change takes place in any item, I cannot say, but the difference is relatively slight, being approximately three-tenths of one per cent. The condition which I established in 1079

Trans.

my own inspection and exhibit as applied to cost of reproduction new figures results in the lesser per cent by that amount.

As to the fourth and fifth columns, I would prefer to postpone a discussion of them until I have submitted another exhibit which I have prepared and will offer. At this time I should like to point out that in Exhibit 38, page 2 thereof, I gave a grand total of 11.1%, whereas on page 5 I have a grand total of 10.7%. This is explained as follows:

The last three pages of Exhibit 38 covered the details of the structural items only, exclusive of movable equipment, which has been included in the appraisal. Those details result in a weighted accrued depreciation of 10.7 per cent. However, when the movable equipment is added in the depreciation amount, a condition in which it was found to exist, the result is to increase the accrued depreciation as an entirety to 11.1%, which reflects a 88.9% condition.

Respondent's
Exhibit 40
described.

I have prepared another exhibit in further explanation of Respondent's Exhibit 38. This exhibit is now marked for identification as Respondent's Exhibit 40. This exhibit is entitled "Cattle Division Accrued Depreciation Summary." The purpose of this exhibit is to give some further details in connection with the depreciation of the cattle division which is shown in one figure only at the top of the 4th page, that is the first item on the fourth page of Respondent's Exhibit 38, in amount cost of reproduction new of \$489,000, approximately; or a weighted rate of 12.7 per cent. Inasmuch as this appeared to be a very substantial item and was assembled by taking all of the combined notes for a very large amount of property, I felt that it would be desirable to furnish some fur-

Trans.

ther details in connection with the condition per cent which I established for that portion of the property. Referring directly to Respondent's Exhibit 40, the first page sets forth the classifications structurally of the property included under the main heading of Cattle Division. In the first column it shows these classifications as fences and gates, hay platforms, mangers, paving, miscellaneous construction, electric lighting system, water troughs and signs. The first column the figures show the appraised cost of reproduction new for each of these classifications, which in turn reflect a total for all such sub-classifications equivalent to the figure for the whole cattle division shown at the first item on the top of page 4 of Respondent's Exhibit 38. The second column shows the accrued depreciation established for each of these structural classifications and the depreciation weighted for each of such structural classifications. The entire amount being weighted and resulting in 12.7% which is shown on Respondent's Exhibit 38. The second page of the exhibit has been designed and developed by 2013 taking the accrued depreciation and distributing such depreciation on the basis of the dates of original installation and location was determined by the detailed notes which had been made of all the blocks and property, and assembling this in accordance with dates of original installation. As a matter of fact The Denver Union Stock Yard's cattle division is laid out and numbered in a somewhat different form or method than is true in most of the stockyards property throughout the country. At the Denver yards the designations are carried forward by alleys or by locations of alleys, each alley being numbered consecutively. The dates of original installation and the area so covered have been taken from a map showing the historical development of the stockyards property as prepared

Trans.

by Mr. Reno, the stockyards' engineer and furnished to me. The map furnished to me by Mr. Reno is the same map that has been introduced into evidence as progress map Respondent's Exhibit 16.

2014 Referring to Respondent's Exhibit 16, the first item shows date of original installation 1917-1919, alleys 1 to 8. On Respondent's Exhibit 16, we find at immediately south of the Exchange Building areas colored in blue and pink, the blue or gray being labeled 1919 and the pink being labeled 1917, and also in the small figures being a part of the original blue print the designations, 1, 2, 3, 4, 5, 6, 7 and 8 which refer to the respective alleys involved in these sections. That is the area I have covered in item No. 1. As a basis for determining the weighted accrued depreciation in this area, I have developed on a unit basis the number of units in fences, the number of units in paving and the number of units in mangers, which in turn having a separate depreciation rate, has been weighted out by units to give 15.9%. The same method carried all the way through for each of the years in question shows a total weighted rate of 12.8%. However, troughs and some other minor items are considered independently, which means an adjustment in the figure in order to reach a check of 12.7 for the entire cattle division.

The note at the bottom of page 2 of this exhibit represents the approximate investment cost of reproduction new in what I have entitled as one fence unit and established for purposes of weighting. This fence unit is determined by taking an average block of 8 pens, measuring approximately 100 ft. by 64 ft., plus the proportionate part of the adjoining alley, and results in a total of 77.5 lineal

2015 feet of fence in what might be termed a standard pen. Now, the pens will vary in size, particularly

Trans.

where there have been catch pens involved and in other points where the fences have been removed or a change, as the case may be, the endeavor being to standardize on the approximate amount of material in a typical pen. Based upon the investment in the fences and the total number of units, the investment per unit is \$114. In the same manner the paving has been developed, which shows 1,160 square feet of paving for one standard unit, or representing \$228 of investment. In the same way one manger reflects \$43.50 of investment. Now, while the mathematical computation would vary slightly, I have adopted for weighting a ratio cost of one for a manger, three for a fence unit and six for a paving unit. The result would not be exactly mathematically correct. In other words, this allocation would not check in even dollars the total depreciation excepting as to the entirety but it shows a relative condition of these different dates of original installation and was so offered or designed.

2016 The third page of the exhibit is a summary in which the dates of original installation and the property installed at that time have been brought together into one total for the year, following which the relative amount of facilities reflected as installed in total for each of these years.

The witness here requested that the column headed "Related Amount" on the third page of Exhibit 40 be changed so that the heading would read "Relative Amount."

(Witness continuing). For example, in the first item, the 1932 construction represents approximately 43 hundredths of one per cent of the facilities of the cattle pens. The second item, 1928 construction represents 17.28 per cent of the total. The third column showing the relative condition com-

Trans.

parative, simply lists in the order of the condition the best, the poorest, and all in between in accordance with the regular 1, 2, 3, 4 system of designation. The last column shows the weighted depreciation per cent, which is simply a final summarization from page 2 of this exhibit. I might state that there are several different ways in which the condition and accrued depreciation could be assembled and weighted, in accordance with the years of original installation. It might be done by the number of square feet actually occupied on the ground area, or by the number of typical pens, or by the appraised investment. I have actually used the number of typical pens for this purpose. There would be slight variations, but not material ones, in accordance with whatever method was used. The particular point to which I would like to call attention in this exhibit is the fact that the date of
2017 installation does not necessarily have a controlling effect on the weighted depreciation or the condition per cent. On the other hand, there are some evident results based upon the age of original installations. For example, the 1924 construction which is shown as the fourth item is represented in an area directly north and slightly west of the Exchange Building, and which was very largely rehabilitated and reconstructed during the period of my inspection last fall, that is, in the fall of 1934. It shows therefore, in my opinion, the highest condition per cent and the lowest accrued depreciation of any other portion of the property, with the exception of the fence construction, being that portion of the yards located at the northerly end and constituting what is known as the loading out chutes, for which a weighted depreciation is given of five per cent. I think the percentage figures of column 3, Exhibit 40, indicate very strongly the up and down swing of the condition and con-

Trans.

sequently the effect or periodic maintenance and minor repairs and replacements that are continuously taking place in the yards. An outstanding example of that is in the item shown as the next to the last on the last page of Respondent's Exhibit 40, 1913, that is the installation which was made in the year 1913, and it shows a weighted depreciation of 23.9 per cent. This area is shown in red immediately north of the Exchange Building and just adjoining the Burlington chutes. In my opinion, it constitutes that portion of the yards that is perhaps at this time in the poorest condition of any part of the property, which is reflected in the highest weighted depreciation of 23.9. The reason for this is seen on the detail sheet, being

2018 page 2 of Respondent's Exhibit 40, for which item four shows the 1913 construction that was installed between alleys 9½ and 13½, the area to which I have just been referring. It shows a rate of 25 per cent for the fences and gates in that area, of 30 per cent on the paving, and 15 per cent on the mangers. It is apparent from a study of the paving particularly that the depreciation in pavement is the largest single item involved in this very substantial accrued depreciation.

The percentages shown in column 1 of Respondent's Exhibit 40 are simply the percentages of area based on the number of typical pens.

2019 Q. Mr. Hyder, in your experience in the appraisal of industrial and public utility properties have you had any occasion to investigate the method used in computing annual depreciation charges? If so, will you state your experience in regard to this item, adding anything you care to with regard to your qualifications.

Annual
depreciation
reserve.

Trans.

A. My company maintains and has maintained for many years a department or division of activities, the time of which is devoted entirely to studies of questions of depreciation, to analyzing the repairs and the maintenance accounts, and rehabilitation expenditures of many of our clients, classifying these expenditures as between maintenance, depreciation and capital, and ultimately reporting to our clients the conditions found and our recommendations. As a part of this work, compilations and statistics are kept of the actual records found to exist in the use of property, or to have developed from the use of property under varying conditions and for various industries. In many investigations we were called upon to recommend rates of annual depreciation for our clients and studies are made of the property itself, to which, of course, we have the added benefit of the statistical records which we have maintained in the past. While not directly under my supervision, this department comes indirectly under a great deal of the work which I am called upon to perform. It is a portion of what we term our continuous service department which is engaged entirely in maintaining the appraisals and records for many industrial corporations.

2020

2021 (Witness continuing). I am familiar with the points of difference and the methods of application of the so-called straight line method as compared with the sinking fund method of computing the annual depreciation charge or allowance. I have made a study and formed an opinion as to the proper annual amount of depreciation which The Denver Union Stock Yard Company should set up as of the date of this valuation, namely December 31, 1934. I have prepared the results of that study.

Trans.

in the form of two exhibits, one marked as Respondent's Exhibit 41 and entitled "Computation of Annual Depreciation Rates and Charges, Straight Line Method;" the other marked Respondent's Exhibit 42 and entitled "Determination of Fair and Reasonable Annual Depreciation Charges." In taking up these exhibits and discussing the figures and studies made, I feel it is necessary to discuss briefly the principles upon which such annual charges are and should be, in my opinion, determined, the purpose of such charges and the manner of their accumulation. My comments are confined specifically to the engineering matters involved. I believe, and I think our experience has shown, that the determination of and the fixing of annual depreciation charges is an engineering matter, whereas the reflection of those on the books of account, of course, is a matter of accounting procedure.

Respondent's Exhibits 41 & 42 described.

Practically all industrial concerns or public utilities subscribe to and adopt what is known as the straight line method.

Government insists on Sinking Fund method.

At this point counsel for the Government objected to any discussion of whether the straight line or sinking fund method should be used, on the grounds that it has become immaterial since the Department has followed the sinking fund method or a composite view, and this method has been upheld by the court. The objection was overruled.

(Witness continuing). Continuing my answer to your general question, it has been my experience that practically every industrial concern or public utility adopts what is known as the straight line method. This method consists first in the estimating of the reasonable life of a particular item and the salvage which the item may have at the expiration of such reasonable life. The net

Trans.

2023 difference between the cost of the item and the estimated salvage is then divided by the number of years and a uniform rate established that will write off this amount over the period at the same sum each year.

As a variation of this method, but predicated upon the same basic computations, is the so-called sinking fund method, whereby the total amount, that is, the difference between the cost and the estimated salvage at the end of the useful life, is treated as a sum which would be required at the expiration of such life, and which need not therefore be assembled on a straight line basis year by year, but which may be obtained by setting aside annually an amount which, at a stated rate of compound interest, would develop such total sum required at the end of the period. For the purpose of providing for the return of a single unit of property at a specific date in the future, where such property is not subject to periodic renewal, it is quite possible, in my opinion, to establish a sinking fund for accumulating the necessary depreciation reserve. Where properties are such, however, as to be periodically renewed in whole or in part through regular replacement, I do not consider the sinking fund method to be applicable.

**Sinking Fund
method not
applicable if
replacements
likely to
occur.**

This method, to work out in practice requires, and essentially, that the reserve shall not be disturbed throughout its accumulation. In other words, the fund set aside must be invested at the stated rate of interest immediately and the interest itself invested along with the succeeding year's reserve until the entire capital sum is returned at the end of the period chosen. The interest being actually and immediately invested, to get the 2024 element of safety required usually compels the placing of the funds in high grade securities or other investments bearing a low rate of interest.

Trans.

This, together with the fact that the fund should not be disturbed, has led to the term sinking fund.

The best example of an asset which would be susceptible to provide for depreciation or retirement through the sinking fund method would be a contract or a patent having a definite stipulated life, and to which there would be no additions or deductions during the period. A leasehold might be another example of an asset susceptible to retirement through a sinking fund.

Now, on a straight line basis, the life is figured in the same way but divided mathematically into the regular amount to be written off for depreciation each year. It has been my experience in actual practice that the straight line depreciation is also somewhat theoretical, and if the assumptions are accurately taken and the money were to be set aside, the amount would not require the earning of any interest in order to replace the item at the end of the period. It would not be good business practice, of course, to hold money idle in a reserve. For this reason it might be possible to invest such funds if the company were desirous of doing so. It would seem, however, that it must not be lost sight of that these funds are entirely and these amounts are entirely the property of the company itself. There is no particular need for the moneys to be invested, they might be paid as dividends, they might be used in any other manner the company might see fit to decide.

2025 Q. You are referring to the income derived are you not, rather than the fund itself to become the subject of dividends?

A. I am referring to the income that might be derived in building up a theoretical fund. In other words, if the funds were actually set aside at interest and this income were to be

Trans.

derived from such funds, in my opinion, that income would belong to the company, and even if it could be used, which in a complex property would be very doubtful, for extensions to property, nevertheless it would be moneys invested in that property which in turn would be entitled to a return on such investment.

Q. And it is the income which becomes available for the declaration of dividends?

A. That is correct, yes, sir. Specifically on the sinking fund and its operation, and assuming that such an annual amount were determined, I would consider that if it were tied up in interest bearing securities, some provision would have to be made for an independent fund to take care of the necessary replacements. If the fund were used for additions and betterments to the plant, new capital would have to be used for replacements. If there were no additions or betterments to the plant being made, and the fund was not invested in outside securities, there would be no use for the fund in the business and in fact it could not operate at all.

Q. In your experience, Mr. Hyder, have you found the sinking fund method actually used by industrial concerns?

Sinking Fund 2026
not adopted
in practice.

A. I have never found the sinking fund method adopted in actual practice, with the exception, as I have stated, that occasionally for purpose of retiring a contract or a patent or a leasehold or some fixed and definitely known obligation, it has been possible to adopt such a method, and in certain instances I have seen this done, but as a whole I have never

Trans.

found any industrial or public utility company adopting the sinking fund method in actual practice.

For about fifteen years I have had experience in the appraisal of stockyards and in studying depreciation of stockyard properties and substantially throughout that entire period I have been familiar with the property and problems in this regard of The Denver Union Stock Yard Company.

Experience
in depreciation
of
Stockyards.

As I have previously testified, the straight line basis is the usual basis or method adopted for this purpose in industrial and public utility properties. In Respondent's Exhibit No. 41 I have developed the annual amount in dollars that in my opinion would develop through the establishing of the normal expectancy of useful life of the respective property items throughout The Denver Union Stock Yard Company properties.

Straight line
method
generally
adopted.

2028 As I stated, the exhibit is built up in detail on the basis of an engineering estimate as to the reasonable expectancy of life of the various items in the property which in turn divided into the cost of reproduction new develops a rate and ultimately the amount of depreciation reflected for each of the years. In this connection, it is my judgment, based on my experience, that there would be virtually little, if any, salvage that would be realized from the stockyards property at dismantlement or at the end of the estimated useful life. Therefore, for all practical purposes, whereas the theory has been maintained, for all practical purposes I have disregarded the salvage and have estimated the entire property to be retired in establishing the amounts. Just briefly referring to this Exhibit 41, the letter of transmittal consists of three pages, and sets out at the middle of the third page a grand total of \$124,798 which, in my opinion, constitutes the to-

Trans.

2029 tal amount of depreciation per annum as applied strictly on a straight line basis. Now, while I subscribe definitely to the straight line method of depreciation, especially in stockyards properties, I find that there are certain factors involved which, in my opinion, would have to be recognized in determining and recommending the proper annual depreciation rates and charges. Therefore, as basis upon the complete study of the straight line method as shown in Respondent's Exhibit 41, I have prepared a further exhibit, Respondent's Exhibit 42, which develops in detail the investigation and conclusions which I have made in connection with this exhibit for The Denver Union Stock Yard properties.

The letter of transmittal which accompanied Respondent's Exhibit 42 reads as follows:

"May 29, 1935.

"The Denver Union Stock Yard Company,
Denver, Colorado.

Gentlemen:

"The questions involved in the fixing of proper annual depreciation rates and charges embrace matters of accounting, engineering and business judgment, and for any particular enterprise specific conditions may be a large factor in determining the method to be adopted and the manner of application.

"Based upon a detailed study of the properties of a considerable number of public stockyards carried on for the past fifteen years, I have worked out a plan from an engineering standpoint that I believe is practicable and that eliminates the greater part of the objections advanced to the adoption of the usual methods of establishing proper depreciation charges in other industries.

Trans.

"This plan is predicated fundamentally upon the fact that the stockyard facilities, while simple in the nature of the individual structural units, are extremely complex as an entirety. A portion of these facilities consist of assets having a definite expectancy of useful life and the remainder, a very substantial proportion, consist of assets having an indefinite or indeterminate life as a part of the whole, and which are, in actual practice, held from year to year to a certain standard of condition, value and expectancy of remaining useful life through regular expenditures in current maintenance expense.

2031

"These indefinite life assets have in themselves variable life expectancies, but in general relatively short as individual units, and the depreciating of such items upon the same basis as a regularly diminishing asset, such as a building, results in a short time in a wide discrepancy between the current value of the asset and the amount set aside in the depreciation reserve for its retirement. If a satisfactory distinction could be drawn between the repairs and replacements or renewals comprising the constant stream of 'maintenance' which in itself brings about the indeterminate nature of such assets, much of this discrepancy might be avoided but no satisfactory or practical distinctions can be made.

"From a practical business standpoint, however, the initial capital investment must be protected from possible changes in the requirements and probable major reconstruction upon an entirely different design or arrangement in order to meet the needs of the service, irrespective of the assumed continuity of life.

"The plan, therefore, provides for the setting out of all items having a reasonably determinable expectancy of useful life and which must be replaced as an entirety at one time and computing the proper depreciation charges thereon separately from those items having a continuing or indeterminable life as used in the operation

Trans.

2032

of the stockyards. To the amount of the depreciation charges computed for items of definite life, would be added an amount to provide for extraordinary expense or general obsolescence that would provide primarily for the major removal and replacement of indeterminate life items from time to time while they are still in normal operating condition. The total of these amounts would be considered as the annual charge to depreciation reserve. Under this plan, withdrawals from the reserve would be limited to the replacement of items included in the definite life classification or for expense incurred as the result of general obsolescence.

"The continuity of indefinite life items would be provided for in the actual maintenance expense, as incurred each year, which would of necessity be considered as not only a maintenance account but in addition would contain all minor and regular renewals and replacements of such items. Further, the minor expenditures required to keep the definite life items in proper usable condition, but which did not extend their expectancy of life, would be carried in the regular annual maintenance expense.

2033

"For example, in the Denver Union Stock Yard property the Exchange Building is assigned a definite life and a regular annual depreciation charge determined. For the cattle pens, however, the annual maintenance would include regular piecemeal renewals and replacements of fences, gates, paving, mangers, water connections, etc., and would be carried in expense as incurred, thus providing for the continuity of the pens in their existing form and condition. Extraordinary changes and resulting blanket replacements would be provided for in obsolescence fund.

"I have made such a study for The Denver Union Stock Yard properties and the results and details are attached. It shows that the annual amount to *depreciation reserve* totals \$73,080.00, of which \$58,090.00 is depreciation as provided for periodic retirements and re-

Trans.

newals of definite life items, and \$15,000.00 is the reserve for general obsolescence.

2034

SUMMARY

	Cost of Repro- duction New	Normal Annual Depre- ciation	Obsoles- cence	Total
Definite				
life items	\$1,742,968.00	\$58,080.00		\$58,080
Indeterminate				
life items	1,194,703.00		\$15,000.00	15,000
Total Depreciation Reserve				\$73,080
Maintenance Expense:	Including minor renewals and re- placements of indeterminate lived items amounting to \$1,194,703.00 as regularly and annually in- curred."			

At this point the witness interjected the follow-
ing explanation: I am aware that if the two fig-
ures shown in the first column of this summary
are added, the result is \$2,937,671.00, whereas the
total shown on Respondent's Exhibit 41, Sheet 4,
is \$2,937,672.00. That discrepancy results from
the fact that in the detailed appraisal all items were
carried out to the cents column whereas in these
exhibits the items have been carried to the nearest

2035 dollar, omitting the cents. In the two exhibits there
was simply an inconsistency perhaps in getting the
totals, so there is actually \$1.00 difference although
they represent exactly the same property and the
same detailed figures are behind them.

(The letter concludes as follows:)

"The past experience of the Company as to
the annual maintenance expense is not neces-
sarily to be considered as indicative of what this
may average in the future. It is probable that
this will increase but this is largely speculative
and under this plan must be provided for as
the condition arises.

"The details supporting these estimates are
attached hereto and form a part of this report.

Respectfully submitted

THE AMERICAN APPRAISAL COMPANY

By K. Lee Hyder,
Supervising Engineer."

Trans.

Annual
depreciation
reserve.

- 2036 (Witness continuing). In my judgment the \$73,080 per annum would be the proper amount to set aside to the depreciation reserve on the respondent's property under the conditions prevailing as of December 31, 1934. This is built up from the normal annual depreciation as applicable to the definite life items of \$58,080, and a reserve for extraordinary obsolescence to provide for the retirement of both definite and indefinite life items that may be required prior to the end of their useful lives and which I have estimated at \$15,000, or making a total of \$73,080. A depreciation reserve in that amount will, in my opinion, provide a sufficient amount for all normal retirements and replacements, predicated upon the assumption that the stockyards property will operate continuously or indefinitely in the future. The reserve, together with the annual expense incurred in maintenance and repairs, as normally provided and set up by the company, will keep the property operating in normal condition at all times. It will not provide, however, for the retirement of any capital represented in the investment in what I have classified as indeterminate life items. That is, the cattle pens, underground construction, and all of the yards
- 2037 area which is continuously maintained in substantially the same condition from year to year by regular expenditures in maintenance and repairs will theoretically not depreciate any further than at present, as long as such degree of maintenance is continued. The tearing out of such facilities to provide for normal expansion, changes in operation, and other similar requirements, is taken care of in the general obsolescence amounts which would be placed in the fund. There is no provision, however, for the return of capital at any time in the future on the indefinite lived items.

Trans.

In other words, my computation provides simply for keeping the property in operating condition at the regular standards required for efficient service upon the principle that the yards will operate as a practical matter almost in perpetuity.

In principle, I believe that capital is entitled to protection through a guarantee of its ultimate return when and as the investment reaches the end of its useful life. However, from a practical standpoint I have noted from my experience in the stockyards that they are necessarily kept to a certain standard of condition and efficiency from year to year, with very little, if any, change in the relative condition as compared with the new. When I speak of "conditions" I am speaking of its entire set-up as an operating property.

2038 The only reason, therefore, for an additional allowance to the amount which I have established would be upon the expectation that owing to some economic change in the handling of livestock, the yards would ultimately have to close down and the company go out of business. While this might theoretically be the case, there is nothing at present in the outlook that would justify such a position, and I feel personally that until such a contingency should arise, the setting aside of any additional amount for this purpose would simply build up an excessive depreciation amount, without any certainty that it would ever be required. In my opinion the amounts that I have established are fair and reasonable both to the capital invested and to the properties and the users of the service.

I heard Mr. Bufkin's testimony on this question of annual depreciation expense and allowance.

Q. What have you to say, based on your experience in such matters, as to the relation, if any, that does or should exist as between

Trans.

the depreciation reserve account on the balance sheet of a corporation and the what might be termed observed condition of the property for which the reserve is set up?

2039

A. I am answering that question now, of course, as I have previously stated, from the engineer's viewpoint. I am not an accountant, but I am called upon repeatedly to consult with accountants and with the executives in the analysis of the depreciation amounts and figures. From the engineering viewpoint, however, it seems to me that there is no relation necessarily and I have found it very seldom, in fact, between the depreciation reserve on the books of a company—the amount reflected in the depreciation reserve on the books of a corporation—and the actual condition of the property at the moment. The depreciation reserve is nothing more than accounting for depreciation, that is, for ultimate retirement or replacement, and is not any measure of the condition of the property or the condition of the property as actually existing. This reserve may be wholly a matter of bookkeeping or an actual fund might be accumulated consistent therewith. A concern which attempted to maintain a theoretical balance would be operating on a hazardous basis, in my opinion. At any moment, particularly in a stockyards enterprise, a change in economic or operating conditions might compel the tearing out of substantial construction still in good condition; under a perfect balance between an accounting for and actual depreciation, the investment in the facilities scrapped in advance of the end of their normal useful life would, in such circumstances, be a total loss and could not be recovered.

Trans.

(Witness continuing). And that is the reason why, in my opinion, there can be no balance between observed depreciation and the depreciation reserve, and in fact I seldom find that there is a balance and I don't believe there should be a balance. If there are risks to the continuity of the property, that may occur at any moment and they are not provided for, which of course would be the case if the two balanced. That, I think, would be a grave error on the part of the operating corporation.

2041 Referring to Government Exhibit 41 and the last page of that exhibit where it contains a hypothetical comparison of straight line and sinking fund methods of depreciation, this comparison is apparently based upon an assumed \$100,000.00 of depreciable assets, having a composite life of ten years, compounded at the rate of 7 per cent semi-annually. That computation, in my opinion, has no applicability to this particular proceeding. In my opinion, it does not illustrate the sinking fund method, but I do not believe that it applies in any sense to the method that is being used in establishing the value and the fair return on Respondent's property. The table sets forth an assumed investment having a gross book value of \$100,000.00 at the time the investment was made, and having an assumed life of ten years. Each six months during this period of ten years, an amount of 7 per cent is set aside as a return on the investment, and in addition an accumulating fund is provided which, placed in investment at a 7 per cent rate of interest, will, at the expiration of the tenth year, result in a total sum of \$100,000.00, or the initial investment.

Government
Exhibit 41
criticized.

Theoretically the table appears to be set up in a manner that would accomplish just this thing. The particular point, however, to which I will take ex-

Trans.

ception in the present case is in the computation of the rate of return which is provided on the basis of 7 per cent of the original fund for the entire ten-year period. If we were to assume that the assets which this \$100,000.00 purchased actually would be required exactly at the end of the tenth year and the moneys could be invested on the basis of 7 per cent immediately upon their availability, or each six month period, then there is no question in my mind but that the \$100,000.00 would be returned. That is a matter of exact mathematics. Nevertheless, if this were done, in order to prevent any confiscation of the original investment in the property, the net return allowed throughout each of the ten years would have to be computed on the basis of 7 per cent against the full \$100,000.00. This would be true inasmuch as the interest on the sinking fund, for which the depreciation or the retirement was being established, would have to be returned to the fund at all times and therefore would be no part of the original or basic 7 per cent return on the investment.

2043 In the present case, or in the stockyards case, the conditions are entirely different; in fact, they are different, in my opinion, on any typical rate proceeding. This is brought about primarily by the fact that the face value upon which the fair return is developed includes the cost of reproduction of the assets less depreciation. In other words, at the date of inquiry the rate base, at least that portion of the rate base represented in the physical property, is a depreciated base. Now, if in this example we were to assume anything less for any one of the years from January 1, 1920, until the expiration of the life of the assets, an amount less than \$100,000.00, and compute our 7 per cent return on such amount, the difference between the return so computed and \$7,000.00 per annum, being

Trans.

7 per cent on the initial investment, would represent the amount by which the corporation failed to earn a fair return on their investment. For that reason I believe the exhibit is not informative and does not in any way tie-in with the plan or program which the Government has used otherwise in establishing the value and fair return on the property.

My criticism then, using the present figures, is this: That assuming a rate of return of 7 per cent the Government method in this and any other cases has been to figure that return upon what they find to be their construction new value less depreciation; so that so far as this example goes in order to make it even remotely pertinent, the Government method would have to be figured on the rate of 2044 return upon my reconstruction new value, and if they did not it would represent an actual confiscation in the sense that the owner of the property would not have received a return on his investment at the rate adopted for the life of the investment.

Q. Now, you also stated that in your opinion, taking this example sheet 20 of Government Exhibit 41, it would return the \$100,000.00 if left to operate exactly as shown there in that tabulation, but I am asking you would that \$100,000.00 be returned under that example or under any sinking fund example of Mr. Bufkin's if the income from the invested installment were used for dividends or for any other corporate purpose other than replacement in the property?

A. No, sir, it would not be returned from the fund which would be available for this purpose. In other words, if the amounts so invested were less than the straight line depreciation which could be reflected for each

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of the periods, then to that extent the initial capital would not be returned.

2045 (Witness continuing). Assuming as a matter of law that any earnings made by investing this depreciation reserve in stockyard property would be income to the corporation available for dividends, income upon which the corporation must pay, under existing laws, an income tax, income which absolutely as a matter of law belongs to the stockholders, in my opinion the only way in which the sinking fund method proposed by the Government in this case could operate is for the corporation, or the stockholders rather, to release their right to that money and have it put in the depreciation reserve.

2046 I stated in giving my qualifications that as a regular part of my duties I have computed the value of intangible property as well as appraised the physical property of public utility companies. In both these and many other cases I have made a study of the elements of value which may be included under the general caption of going value. My study of other concerns has included those operating both in the industrial and the public utility fields.

Hyder on
Going Value.

Qualifications
as expert.

Many appraisals which I have made or directed have been for the purpose of merger or consolidation in some form or another. In a number of cases of this nature I have actually prepared studies not only of the physical property but on the intangible elements involved and have later sat in at the meetings at which the financial and other considerations have been determined. In such cases one of the most important elements is the measure or relative measure of the value of the respective enterprises as going concerns. That is not only as to the direct appraised investment involved but as to the value of the business elements and other

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factors that must be considered in determining a new capital structure as well as the percentage or portion of the securities therein that may be represented by the assets of the respective corporations.

2047 For example, oil refineries,—I served in the capacity of establishing the value of properties in business for the merger of the group of oil refineries in Western Pennsylvania. I have also served in this capacity in several instances for the merger or consolidation of concerns engaged in the exploitation of natural resources, such as sand, gravel, stone and other similar types of industry. I have served in this connection in the building up of drug store chains and the merging of the business of drug companies. Others that might be mentioned are concerns involving laundries, laundry routes, creameries, milk routes, outdoor advertising, grocery store chains, women's wearing apparel and quite a number of what might be termed manufacturing or industrial enterprises.

The establishing of the value of intangible property, that is so-called going value, for public utility properties for which we have made appraisals has been under my general direction and supervision for a number of years. I have personally handled many of these studies and in most of the instances at least during the past several years I have reviewed or passed upon the final conclusion even if handled by someone else in my organization. In 1927 I spent some months, in fact I think about eighteen months, in establishing the going value for carrier operations of the Pullman Company. This Company controls about 97 per cent of the
2048 sleeping car business of the United States, and to my knowledge this was the first attempt made to establish the intangible value inherent in the company. It was obvious from the start that there were

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no precedents laid down as is the case in many public utilities where some studies have been made in the particular type of industry. It was, in other words, an investigation into unknown territory and the results were finally submitted as a part of the entire proceedings before the Interstate Commerce Commission in the investigation of Pullman rates and charges. I have made studies of going value and the matters in connection therewith for many utilities, including the Lone Star Gas Company, the Indiana Gas Company, the Milwaukee Gas and Light Company, numerous bridges, some phases of electric light and power companies, such as Niagara Falls Power Company, and others. I established values in connection with the bridge heads and franchises incidental thereto for the Vallejo and Antioch bridges near San Francisco.

Going Value
defined.

As a blanket term, it is my opinion that going value as applied in public utility rate making practices is related to those values and elements of value that inhere in a going operating property and are represented in the established business organization and other elements incidental thereto, that are in-
2049 dependent or over and above any direct investment of the land and structural improvements. It is my opinion that the concept of going value is no different in a public utility than in any other type of industry. The term is developed automatically from the logical and reasonable assumption that any going enterprise with an established business, a staff of employees and established credit, and other factors essential to operation, and which has required years to bring about, is worth more than the value of the physical asset which the company may be using in conducting its business. The distinction between the usual privately owned industrial enterprise not under regulation and that of public utility comes about primarily from the fact

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that some element which may exist by virtue of established good-will and earning power of an industrial enterprise, strictly, may not be proper for consideration when establishing the value of the public utility enterprise for rate making purposes. It is my understanding that the value being searched for in a rate inquiry is termed "fair value." The United States Supreme Court has, in a number of cases, laid down in its decisions that present value should be given great weight in determining this fair value. In actual practice this means that the investment reflected in the books of the public utility corporation may or may not be indicative of the value of its assets and therefore in the attempt to find fair value present cost or the cost of reproduction new must be given great weight.

When I state that certain things may not be proper for consideration when establishing a value of a public utility enterprise for rate making purposes, and a little bit later speak of fair value, I have in mind the fact that in most public utilities there is a franchise or monopolistic element as distinguished from the ordinary business.

2050 In addition to that, there is, of course, in the private industrial enterprise, no particular necessity of divorcing or attempting to analyze the source of income or earnings. In a rate inquiry, the ultimate purpose is to establish a proper and fair level of rates, which in turn, in the process of being established, requires the fixing of the fair value of the property and the fair rate of return upon which the level or total amount to be developed as a net profit from the schedule of rates will be fixed. Now, in a private industrial enterprise where earnings are not under control, it is quite possible and frequently occurs that the intangible values are lumped in what might be called commercial good-

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will; that is, through the capitalizing of what might be termed surplus or profits in excess of a reasonable return and not attempting to distinguish the actual value that inheres in the business and organization, but simply lumping this with whatever favorable profits may be being earned at the time. That calls for the definite distinction from one standpoint and, of course, in addition, the monopolistic feature that exists to some extent in most of the regularly recognized public utilities would be an important consideration.

- 2051 In my opinion a fair value of a public utility for rate making purposes could not be determined without a consideration of going value or the elements that produce it in addition to the cost of reproduction new less depreciation.

In practically all of the investigations I have made there has been some occasion, at least, to study the business of the companies themselves. I believe I have had an unusually favorable opportunity to become familiar with this situation over the entire period of years of my experience. In 1920 I served on a special committee appointed to visit most of the larger stockyards markets in the United States and assemble information to be used in connection with the so-called Consent Decree, whereby the stockyards properties were to be divorced from the packing house properties. While my direct work on this committee was confined to the study and valuation of the facilities, nevertheless I had unusual opportunities to meet with most of the larger stockyard operators and to gain thereby a considerable fund of knowledge of the industry. Subsequent to that time, I have, as stated, appraised many of the properties of the stockyards companies and in some instances the investigations and appraisals have been carried on not only for the initial year,

Stockyard
experience
gives effect
qualification.

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but for the subsequent years thereafter. At Omaha, for example, I made the first appraisal in 1922 and since that date I have made an inspection and report and appraisal for each of the intervening years. This has required my being in Omaha on the average of three or four times a year and usually has consumed in total a number of weeks each year. At the time of the creation of the South Omaha Terminal Railway, I assisted and supported the establishment of the figures at which the new company was organized. I have worked closely with the accounting officer and records of the Stock Yard Company throughout this period, have followed the ups and downs of business, and sat in during periods of litigation involving various phases of operation. About January, 1927, I was retained by the Cincinnati Union Stockyards Company to represent them in the proposed rearrangement of the stockyards property and the sale and purchase of lands incident thereto. The B. & O. Railroad Company had been attempting since 1913 to effect some arrangement whereby they could increase the size of their railroad yards at Cincinnati and had in mind that certain properties of the Cincinnati Stockyard Company would be needed for this program. My work consisted at first of conducting negotiations with the representatives of the B. & O. in the transfer and rearrangement of lands. I was able to bring this to a successful conclusion in a period of about six months. The final arrangement involved the relocation of the B. & O. right-of-way and the turning over thereby to the Stockyards Company of lands formerly occupied by the former right-of-way, the sale of some improved and some unimproved lands of the Stockyard Company to the Railroad, and other minor details in connection therewith. Fundamental to the consummation of the transaction, it was necessary to very carefully

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study the business of the company and make studies of proposed layouts under different plans to arrive at the most satisfactory way of accomplishing the purpose for the best interests of both corporations. When the deal had been consummated, I then acted as a consultant to the Ferro Concrete Construction Company of Cincinnati, Ohio, which was employed to construct the new hog house and other facilities brought about by the rearrangement. It was necessary in this capacity as consultant to consider very thoroughly the requirements of various classes of livestock and other business elements of the Stockyard Company in order that the facilities might be laid out in the most efficient manner. Following this and more or less as a direct result of the work, I carried on from time to time discussion and negotiations with a local packing concern known as E. Kahn Sons of Cincinnati, who at that time had their packing plant some two or more miles removed from the stockyards. Immediately adjoining the stockyards plant was the site of the old packing house known as the Cincinnati Abattoir.

2054 It had not been operating and it was proposed to have E. Kahn Sons take over the property under lease and construct a new packing plant in order to build up the business of the Cincinnati yards. These negotiations were successful. The packing plant was built, the facilities were designed substantially to develop both the packing business and the stockyard business, and I understand that during all of these years the arrangements have been most satisfactory.

I have represented my company in many appraisals of packing house properties, a number of which were located at the various stockyards markets where the properties of the stockyards companies are located. For example, at South St. Paul, I appraised the packing house of Armour & Com-

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pany chiefly for the purpose of determining the question of obsolescence of packing house properties through over-capacity. To establish these figures, I was compelled not only to go into the business of Armour & Company and the general factors involved in the moving of meat products, but also the potentialities in livestock receipts at St. Paul, and the very important element involved in existing packing house facilities in so far as the stockyards business was concerned. My studies in this connection were later accepted and the principles laid down by me at that time were supported by the Minnesota Supreme Court. I have also examined the books of account and other records furnished to me by various stockyard executives, showing the actual investments made by these companies in building up their business. As I recall, in virtually every instance I have found that the Stockyards Company over their histories have made very substantial expenditures in developing the market, which in turn, of course, resulted in the increase in the volume of their business and justified them in making such expenditures. I have none of these details with me but I can recall, for example, that at Omaha an expenditure totaling approximately \$2,500,000.00 was made over the history of the company.

Based upon all of this experience which I have had I have given a great deal of consideration to the going value or elements of going value of The Denver Union Stock Yard properties, and as a result of that consideration, I have formed some rather definite opinions. Over the period of fifteen years of my general knowledge of the Denver and other stockyards, I have spent, I believe, approximately 25 per cent to 33-1/3 per cent of my time in stockyards or allied work. It is my opinion in the case of the Denver stockyards that the company pos-

Elements of
value over
value of
physical
assets.

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**Established
volume of
business.**

**Established
Organization.**

**Established
Credit.**

sesses, as of the current date, many of the elements that tend to create value in excess of the investment in the physical properties, some of which would include an established business dating from 1886 and showing in a broad way a very favorable development, with substantial stability in volume over at least the last fifteen-year period, a business that on the face of the records available, during my various investigations and as brought up to date at this time would indicate to me a normal volume of approximately 35,000 carloads per annum in receipts of livestock. This carload volume is measured by placing the truck-in receipts on a carload equivalent and adding these to the actual rail receipts. Next, I would say that the company

2056 has an established organization consisting of the executive and personnel who have from my own knowledge and from others with whom I consulted shown definitely that they possess the qualifications which have been assembled into a permanent and efficient working unit, with wide experience in all matters relating to stockyard operation. With this have been developed records and systems required and devoted to the conduct of the business essential to its operation. From my con-

2057 tact and studies with the company and its properties, it is my opinion that it has a sound and well established credit, demonstrated by the public confidence in the securities which the stockyards company has outstanding and which has no doubt resulted not only from the regular increase in and the stability of the business itself, but also from the aggressive, continuing efforts of management to build a strong and sturdy enterprise. The company possesses, to my knowledge, an unusually balanced layout of facilities that permit the maximum of efficient handling of livestock and the furnishing of the best possible service to the user of the market.

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There are also other factors. One of the most outstanding factors was the consideration, in my opinion, of the fact that these conditions have not resulted automatically through the general growth in population and livestock production, but have actually come about to a considerable extent by outright investment upon the part of the company. I knew, of course, before and have now heard Mr. Pexton's testimony showing that the company has expended upwards of \$325,000 in developing the market. In looking over his list of expenditures as compared with other costs involved directly and indirectly in building up intangible property, I believe he is ultra-conservative and has eliminated many other expenditures that might very well be recognized as having added to the value of the property. An analysis of business trends historically shows to me that these expenditures must have resulted and did result in increased volume.

These conditions result from actual investment.

2058 The established market is, of course, a very valuable asset. To a still greater extent, however, I believe it is an asset that reacts to the benefit of the shipper, that is, to the user of the service. Without such established market the business of the stockyard company would, of course, be greatly reduced if not actually expired. The market is primarily brought about by the purchase of livestock or by virtue of the guarantee of such purchase almost immediately upon receipt at the market. This condition is reflected to a substantial extent at least through the existence of the larger packing plants of Armour & Company, Swift & Company, and Cudahy and Company, all located at the Denver yard and buying livestock for slaughter.

Established Market.

It is problematical which expenditures might be required at this time to duplicate the present pack-

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ing houses and other advantageous industries if they were not already existing. That it has cost substantial amounts, however, seems to me to be the best possible evidence that similar costs would be incurred today and very likely such costs would be greatly increased. If the large packing houses were not at Denver, it is probable that packers under the present business conditions would not be willing to make any substantial investments toward that end. In this connection it must be remembered that the market, while resulting to a large extent from the expenditures of a stockyards company in the past, has attained its much larger size and stability from the much greater expenditures put in by the packers and others who were first induced to come here by the foresight of the stockyards company.

Amount in dollars of going concern value difficult to ascertain.

2059 It is difficult to place a definite money measure on the elements of going value. It is not so hard to discover an inventory of such elements, but to place a dollar and cent figure is entirely a different story. However, based upon my experience not only at Denver but at many of the other stockyards, I am inclined to believe that the value over and above that of the physical property might be susceptible to reasonable measurement upon two basic considerations: first, by a study of the combined history of the stockyards industry in building the markets and business volume and other intangible property throughout the country, as measured by the historical records of direct investment; secondly, by the generally recognized "across the table prices" that are paid for established businesses in other industrial lines.

Two considerations for measurement.

1. Historical Investment.

I have also brought out the fact that the records of most of the companies show substantial invest-

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ments that are not inconsistent with the actual recorded expenditures in business development by The Denver Union Stock Yard Company.

Turning to the other angle, it has been my experience in actual practice that business volume is bought and sold on the market irrespective of the net profit, although the net profits potentially might be a factor considered at more or less definite rule of thumb prices. For example, concerns assembling or disposing of filling station sites where an established retail business exists, recognize about ten dollars per one thousand gallons of sales per annum as above the average amount that should reasonably be paid. This is over and above their direct investment in land and improvements.

2. Arms-length bargaining in industry.

Milk supply fields have transferred on the basis of from \$1.00 to \$1.50, per pound of daily supply with a reasonable average of about \$1.25.

Newspaper circulation has been bought and sold on the basis of approximately \$10.00 per subscriber.

Laundry routes at approximately 15 per cent of gross volume.

Even such businesses as towel trade routes and other small enterprises who have built up an established volume of business are recognized as worth approximately \$15.00 for one dollar of weekly sales volume.

In the case of public utilities studies of the cost development in many instances has shown, for artificial gas companies, a range of fifteen to twenty-five dollars or more per customer, and not far from approximately the same figures for electric companies and telephone companies.

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It is practically universal in the industrial and non-regulated fields that business volume, which automatically includes all of the elements of going concern values, are recognized as adding definite value to the assets of the corporation. It is true that strictly on industrial transfers, so-called commercial good-will, that is, the demonstrated past profits above what might be called a reasonable return and which I have previously discussed at some 2061 length, are a big factor in the selling price. It has been my experience, however, that in many instances approximately the above figures which I have quoted have been paid not only for profitable businesses but simply to get the volume, even though the company possessing had for some other reason been unable to earn a reasonable return.

In my present appraisal I have limited my detailed exhibits to the physical property only. In the 1930 appraisal of the property, I made some studies as to the reasonable cost of development; that is, the expenditures theoretically which would have to be made in bringing the company to a status of normal operations following the completion of the physical property. These studies were predicated upon the opinions rendered by several of the commission men and others as to the period of time that would be required to reattach the business if it were to have been lost during the period of time to construct the facilities. The weight of opinion, as I recall, was that this would take not less than five years, and the studies made at that time indicated carrying charges on the physical property of not less than \$200,000.

I have made no estimates in this appraisal as to the carrying charges on any period of years or any attempt to establish the cost of reproducing the business in case it did not exist. Undoubtedly

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such a study would show substantially the same figures. I did not offer this computation in 1930 as a measure of going value but simply as one element of the cost of reproduction new. I have no mathematical basis that I believe would accurately establish my opinion of value at this time. It certainly should be no less than the demonstrated investment of the company if such investment is represented in property which still exists. Since the packing houses and other related activities for the primary purpose of establishing which the investment was made are still available, and in themselves represent much greater investment brought about by stockyards expenditures, then there is no doubt that the factors are still in existence and should be worth at least their cost.

Taking into account the character of the stockyards industry as compared to that of other industries, the general nature of the business itself, it is my opinion that the elements of going value at Denver are worth not less than \$10.00 per car of normal or reasonable annual volume, which for 35,000 cars, would be \$350,000. This would be the minimum, in my opinion, and if capital should come to me with the request that I establish a price which they could afford to pay to purchase the assets of The Denver Union Stock Yard Company as an alternative to making a similar investment in purchasing the land and developing a new stockyards, I would very likely recommend a considerably higher figure than the \$350,000 minimum to which I have just testified.

Amount of
Going Concern
Value.

Summing up my testimony then my opinion is that there should be included in the rate base of The Denver Union Stock Yard Company not less than \$350,000 on account of the going value of said stockyards as of the date of this investigation.

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Cross-examination

2064 As I have stated on direct testimony it is my opinion that the inventory upon which the cost of reproduction new is fixed and the resulting figures developing the total cost of reproduction new as established by Mr. Zelinski is substantially sound and correct.

In my opinion it does not vary from the figures which I personally established of the cost of reproduction new any more than would be anticipated from two equally competent engineers approaching problems and arriving at their results and for that reason I stated that in my opinion the Government figures were substantially correct for that portion of the exhibit. I am speaking now of the cost of reproduction new of the structural improvements on the property. I am not speaking of depreciation. As to that, I disagree with the Government because I believe that the Government condition per cent is substantially too low.

2065 I have had employees working with me, Judge, in each of appraisals I have made of the stockyards property over the various years. In fact, I have had one principal engineer who has been a direct assistant of mine for a great portion of that period. In addition to that, other men, other engineers, were engaged in the work from time to time and I have had the benefit of their judgment and their studies of the different property. However, as far as depreciation is concerned I personally either actually reviewed all of the figures in detail as against the property itself or made an independent complete examination of the property and therefore the depreciation as established is based upon my own inspection. That refers to virtually all of the appraisals I have made and specifically to

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1935. In 1935 one engineer only assisted me in the inspection of all of the property, that is, I inspected it and he, too, inspected substantially all of it. He was familiar with the yards, has been there on several occasions. In order to state how much
 2066 time this engineer actually spent in inspection of the stockyards property with a view to determining depreciation, I would have to make just an estimate in a general way inasmuch as I have not the time sheets divided in that way, but I would imagine he spent several days in just the final correlation of the inspection he had made, probably just the same as I did in my own personal inspection.

As to the duration of my own personal inspection for this 1935 appraisal, I would say the better part of a week was devoted entirely to the inspection of the property itself, in relating and determining the condition and depreciation. However, from time to time through the work notes as to the conditions that were found, of course, were made and tabulated, upon which basis, of course, the depreciation was ultimately determined.

When I use the phrase "from time to time" I mean not only in previous years but actually in this current investigation. For example, I came out here the latter part of July, 1934, and I spent some time at the yards, I have forgotten just how much, and laid out the general work, the work to be done at that time. I was back again at a later date and finally came out in January to complete the work and made a final determination and inspection at that time and was here possibly a week or ten days then.

2067 Referring back again to the time spent by the engineer I would say roughly from my own opinion that he spent close to a week inspecting the prop-
 erty with a view to giving his figures as to the 1117

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accrued depreciation. As a matter of fact a good deal of the inventory was accepted or could be accepted as having been not changed from the previous inspection or investigation that had been made. Some changes, of course, had taken place and these, of course, were recognized in the inventory of the property at 1934, December 31, 1934, but a great deal of it had not been basically changed, that is some of the building, many of the buildings and other types of construction. Therefore a large portion, I might say, of all of the time spent in the 1934 appraisal was devoted to the study of the condition of the property, their relationship as a whole.

After this engineer made his inspection he made a detailed report establishing his conclusions and opinions, and his percentages as he considered them for depreciation on all the various items of the property. This report was made to me. I then took this report along with my own. I accepted his statement and his opinion for what they were worth and wherever there was any particular discrepancy I went back to the yards and looked at it myself to establish my own opinion, whether or not it coincided with his or not, and if I found I had been in error, of course, adopted it, but it was my own opinion, my own final conclusion. However, I found very few discrepancies because this same engineer has worked with me on The Denver Union Stock Yards for a number of years. He is very familiar with the properties and, of course, I am very familiar and we have had these discussions from time to time in the past so that we have already discussed to a considerable extent the general condition of the property.

Referring now specifically to the Exchange Building, I figure that that building, on the basis of an-

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nual depreciation, has a life of 40 years, not 40 years from the date of its construction but theoretically 40 years from the date on which a building of that type and character was constructed.

68 Primarily several structures in the stockyards property would have as long a physical life as would ordinarily be assigned in the study of any type of operating property. For example, the Exchange Building and the reinforced concrete sheep house. Both of these structures would have almost indefinite physical life and it would be very difficult to determine. Therefore, in considering their useful life you must anticipate that structural obsolescence or some other factors might develop which would mean the necessity of accumulating a reserve for their return in something less than the net physical life. In other words, I have adopted 40 years as the maximum that you could reasonably look forward to in the cycle of this property if it were to be constructed new for the limiting life or the longest life asset.

69 The oldest Exchange Building, according to the information I was able to obtain, which building is known as "U-2," was built in 1898. It is, then, 37 years of age. However, I would not say that there remains only three years for that building before it is retired. The mathematics are correct, but, of course, the very reason that I first stated that I did not use the life itself speaking of accrued depreciation is that the estimate as to the useful life of the buildings or structure at the time it is built has no particular bearing on the remaining expectancy of life or its condition per cent, if you wish, at the time you make the inspection, for many reasons.

70 Taking that building and assuming that it was assigned a 40-year life at the time of construction

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that would be a $2\frac{1}{2}\%$ straight line depreciation per year and on the basis of an elapsed time of 37 years the depreciation reserve on that straight line basis would be $2\frac{1}{2}$ times the 37, or approximately 87%. However, I have not established my inspection on the basis of remaining life. Speaking of that building in particular, it is quite possible it would be retired within a comparatively reasonable period in the future. The reason that the figures that you have established cannot be adopted in applying to any particular date of inspection is because the conditions change from the date on which the estimate is made. Now, another factor that is, of course, involved in all property, is the replacement of parts. The life may be properly estimated, but if expenditures are made from time to time throughout the use of that property, as
2071 is always the case in a building subject to such continued use, then, of course, the tendency is to extend not only its economic life, but its physical life more or less indefinitely. For that reason, the expired life has little relation to the accumulation that might be set up for its retirement.

Q. Mr. Hyder, I would like to get your viewpoint on this. I will use these figures simply to illustrate. You need not assume them, but if the Exchange Building depreciation reserve was figured on the basis of a 40-year life, $2\frac{1}{2}$ per cent straight line a year, at the end of 40 years, if that building were still in use by the stockyards, and no immediate prospect of its being retired, how would you handle your depreciation reserve from that time on?

A. You are asking me a question of accounting, Judge. I would start out by saying that I would observe the condition of that property

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and its accrued depreciation as I found it at the time, and then if I was requested by my client as to how many years' life in the future over which the value I had assigned to the building should be written off, then I would render that conclusion and opinion, which would be somewhat different than what you have stated.

Q. Yes, sir.

A. In other words, I wouldn't expect my figures to develop and tie in with the reserve which had been accumulated for the retirement.

Q. But let me put it this way: based upon the stockyard records, the date of the construction of the building, in three years from now the depreciation reserve on the straight line will equal what you call the cost of that building, will it not?

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A. Yes, that would be correct.

Q. Now assume at the end of three years you inspect that building and you say that, "in my opinion it has a 20-year life remaining to it," in your judgment should the value of the building based on 30 years' remaining life be set up as a part of the assets of the stockyards and a depreciation reserve fund be set up for that building?

A. In that particular building—

MR. BOSWORTH: Just a minute, Mr. Examiner, it seems to me this line of questioning is immaterial, irrelevant, and incompetent for the reason that it is definitely opposed to the established principle of reconstruction new theory. This depreciation of which Judge Miles is speaking, based on 37 years' life, and so forth, as his questions indi-

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cate, is based upon cost. Unless he had the premise that the costs at the time of construction 37 years ago are equal to present costs of reconstruction, there is no basis at all for these questions, because suppose your unit value, what I am getting at, had increased, we will say, 100 per cent, in other words, it cost twice as much for lumber, it cost twice as much for labor, it cost twice as much for brick, and so forth, as it did 37 years ago, the fact that you have been depreciating that building upon cost would, on the basis of reconstruction new, leave that building 50 per cent at least out of the way so far as any reserve is concerned. Now, therefore, unless there is a similarity in price structure and original cost with your reconstruction costs, these questions are certainly, it seems to me, immaterial and irrelevant.

MR. MILES: No argument. Take the ruling, then.

THE EXAMINER: Objection overruled.

(Witness continuing). Yes, sir, the building should be set up as an asset and a depreciation reserve established for the building. I believe that I know what you wish by your question and I think I can answer it a little more clearly by using this particular example.

I show for this building a weighted rate of 30 per cent based upon the observed condition of that structure, in my opinion, as compared to a new structure. I would anticipate in a structure of that kind which is becoming to a certain degree obsolete and has been somewhat in that category for some years, I would anticipate and would so recommend to the Stock Yard Company that they should have at this time accumulated a much higher reserve for the retirement of this structure than I find by deducting the accrued depreciation es-

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established by the observed condition. In other words; it might be quite possible in the next ten years that this building would have to be retired. It might be made to last another 30 years if maintenance and replacements and parts and all were put into the property, but strictly from an engineering viewpoint, and as a recommendation in an item of that kind, I would expect to have a much higher depreciation reserve to take care of its probable retirement in advance of many other items that might be no better so far as the condition per cent was concerned.

I would say that it is quite possible that there are several items theoretically that have gone beyond the life which would be established. That, however, would not be true literally because you then have to state to what extent replacements have been made throughout the life and when and to what degree that extended the life of the property.

2076 In evaluating such property under those circumstances I would set up the cost of reproduction less the cost of depreciation just as I found it to exist regardless of what might have been accumulated for its retirement.

I would recommend a depreciation reserve be established in line with my previous exhibits in that particular phase just in accordance with the properties as they now exist, under the assumption that they would at least last through to the proportionate part of the total life that could still be carried out by the property as it now exists. In other words, I would not admit that the life has expired. I do not think that the life has expired. If you renew parts of a property and continue to do so, you can make the life go on for 100 or 200 years. Hence in making the statement I

Trans.

just made, I assume that there were such replacements and repairs, with this exception: on some properties, such as frame buildings where a life of 20 to 25 years has been given in my studies for the annual depreciation amount, it is possible that very little change has been made but that the expected retirement of that property might not have occurred as soon as would normally be anticipated; in my opinion, Judge, the amount to be taken in annual depreciation is looked upon from the view-
 2077 point of the present moment as you gaze ahead. Now, obviously, there have to be factors of safety involved in that computation. It is true that from an engineering standpoint, 10 or 15 years later you might find that through different changes in the property, through rehabilitation or various things, that your life has been definitely extended, even though you haven't put it back in dollars, but nevertheless as a factor of safety the provision should be made in order to retire that property over what you estimate to be its normal useful life.

2078 If you start out with a very simple piece of property and taking strictly that one item of property, you reach a point where the depreciation reserve equals the cost of reproduction new of that specific item of property (I say cost of reproduction new because I believe in the accumulation of reserve for replacement rather than for retirement), when you have reached that figure I would not, of course, recommend any longer accumulating a depreciation reserve against that property, but where you have a complex property and where it all goes in the same hat, so to speak, then of course the retirements are made both before and after the time when it was originally established the properties would be retired, and over a long period of time they usually cancel one another out.

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It is true that if a building today is constructed of stone or concrete, and in the natural course of events would have a 30-year life, and if because of unusual conditions it is torn down at the end of ten years, the fact that it is destroyed at the end of ten years has its influence in the preparation of life tables throughout the country. However, I wouldn't subscribe to life tables and I find in most instances that these tables are built up from the experiences of particular classes of industry. The attempt is made undoubtedly to recognize any factor that would tend to retire that type of industry. But when we say that an ordinary good structure has a life or expected life normally of 40 years, we are taking into account the ordinary factors that occur that might retire the property as an average condition. Largely I take account of the physical nature of the structure, the way in which the materials are put together, the tying in of the structural elements with the equipment elements and we ultimately reach a point that if we maintain a property in 100 per cent condition, at the end of 40 years the probability is that we would have expended the full amount of the first investment in maintaining it in such condition. These expenditures would not be in the nature of repairs but rather in the nature of replacements periodically throughout the life of the building.

Leaving this subject for a moment and referring to my Exhibit 38, I made the statement that if I did not include the movable equipment, the condition per cent would be increased; that is, the way I put it the accrued depreciation would be decreased and would amount to 10.7 per cent rather than 11.1 per cent. As an example of what I included in movable equipment, I might say that in the case of cattle pens the only thing included as movable equipment is the fire protection equipment.

Trans.

I have not prepared any exhibit that would show all that I have included as movable equipment.

It is true that I have inspected the property of The Denver Union Stock Yard Company over a period of years beginning somewhere around 1920. I have in the past furnished the Stock Yard Company with some opinions as to the percentage applicable to the various assets for depreciation use.

No, I did not advise the company to increase the depreciation rate on the sheep barn from 1% to 2%. As a matter of fact, I understand that the Stock Yard Company is still depreciating the sheep barn on the basis of 2 per cent per annum, which would seem to indicate a 50-year life, while originally it was on the basis of a hundred year life, but I had no knowledge of that.

I have no specific knowledge of why the Company changed from a 50-year life on the scales to a 33-year life. Referring now to the watering troughs on my Exhibit 41, sheet 2 thereof, I set up the water troughs on the basis of \$22,000 plus, with a life of fifteen years. Some of the watering troughs are concrete and some are corrugated iron.

2084 In order to reach this 15-year life period, I took a composite on the basis that there is practically an even division at the present moment between the concrete watering troughs and the metal troughs, for example, the record shows a cost of reproduction of \$10,099 approximately for the concrete troughs as compared with about \$11,900, or \$12,000 for the metal troughs. I have adopted a life which would be the mean. Had they been all concrete or all metal, I probably would have used a different life.

Trans.

used and that fund is kept intact and earns the actual rate of interest that it is supposed to, that it will replace the property at the end of the life period; that is, I do not subscribe to that statement unless you are taking a single item of property. I do not believe that the sinking fund so operates on a complex property. In a complex property your estimated life, as we have previously stated, might be in error. We might have estimated it a little too long a period, or a little too short a period, or for some other reason retirements might have been made in advance of the actual theoretical estimate which you had made, so even assuming that your estimate was absolutely correct for the date at which it had been made as to the life, then, whatever outside influence or some outside influence which cannot be foreseen might necessitate the removal of the certain item of property in advance of the end of its life. If the moneys were removed from the fund in order to make your replacements, then, the fund automatically falls down and the additional accruals in later period are not sufficient to make it up. In other words, you would have to have overage sufficiently greater to offset much earlier retirement of the property.

Sinking Fund method fails unless applied to single item.

Q. Then, let me ask you this, if the straight line be used and if the company does invest that at any rate of interest, and it is kept intact, then, the company will have even in a complex property a sum greater than is necessary to take care of the original investment, would it not?

MR. BOSWORTH: That raises, as a matter of fact, and calls for a conclusion of law of this witness. We are entitled to that money, Mr. Examiner, those earnings, as much as we are entitled to

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earnings derived from yardage, from private investment of surplus, or any thing else, then, as a matter of law the question comes up as to whether that is in excess of the amount in the depreciation reserve, or what is the amount necessary to repay the capital, that is why I said this calls for a conclusion of this witness, that is a law point and nothing else but a law point.

2087 THE EXAMINER: Well, never mind what the law is on the proposition, you tell us what you arrived at from the standpoint of an expert on the question put to you and let Mr. Miles and Mr. Bosworth then argue about the law after you give your statement of facts.

(Witness continuing). I would say taking first the statement and then answering your specific statement, that in my opinion, the value of the asset, plus the amount in the reserve should be at least the total investment originally put into the property, and I am assuming by investment the cost of reproduction new in order to avoid the price changes. In other words, this fund that was available, which would include the moneys that the fund might earn would have to be at all times at least equivalent to the amount of depreciation on the property. Otherwise it would fall down, and that it is not in any way taking into account the point in my opinion as to whether or not the company is entitled to expend such earnings on that fund as they see fit. I would expect in any event, regardless of where the money came from that the property should be fully protected in accordance with an accumulation on the straight line basis. Thus if we assume that you have a property life of say ten years on the straight line, you will set aside 10 per cent a year, and at the end of ten years, if that fund has been left intact, you will

Trans.

have 100 per cent. Now, if we assume that at some time, the first or second year you invested that, that you got some rate of interest, perhaps 1 per cent, perhaps 5 per cent, at the end of ten years you would have the entire 100 per cent plus a certain amount that you had earned as interest.

MR. BOSWORTH: Mr. Examiner, let the record show that I am objecting to this entire line of testimony upon the same ground, namely that it is incompetent, irrelevant and immaterial as to whether we make any earnings upon the depreciation reserve or not. That gives the Government or the rate payer right to insist that the earnings shall be spent in any particular way or devoted to any particular purpose and for that reason I insist that it is incompetent, irrelevant and immaterial.

2089 THE EXAMINER: Objection overruled until further notice on that point.

(Witness continuing). In my opinion this extra amount could be used for any purpose that the owners saw fit.

Q. Yes, sir, and if it could be so used, then, the yards has earned more than the Secretary has found to be a fair rate of return on it, assuming that first point, more than a fair rate of return, then, that interest, to this extent, they have earned more than a fair rate of return, have they not?

A. Again taking your assumption without regard to whether I might agree with that assumption.

Q. Surely.

A. I would say that they still had not, for the very reason I gave in discussing Mr. Butkin's Government Exhibit 41, page 20, that the

Trans.

2090

only way I can answer that question yes, which would be my honest opinion would be that the fair return would have to be computed upon the cost of reproduction new, that is the first investment for each of the years throughout the life, and in that condition, then, of course, you would be duplicating if you added this into that straight line depreciation fund. Now, then, that explains my theory that is consistent with my thinking on this subject for a great number of years; I have constantly studied this and I feel now and have felt for many years that the approach to this whole question is somewhat unsound. I have already testified that I do not believe the observed condition to be the proper method of establishing value for rate making purposes. On the other hand, if you are going to use a sinking fund method of depreciation or we are going to put into the reserve a portion of the earnings from the straight line depreciation which I think belongs to the company because it has properly used it in service, if that is used, why, then, it is the company's money. Now, if we are going to say that that must be taken into the fund, then, in turn we must give the company the return on every dollar from the year it started until the year it ends. If you do not it is inevitable confiscation. You cannot have it both ways. It must be one way or the other. If we are going to take a life basis of depreciation and bring the property down upon which reduced basis the fair rate of return would be computed, then, we have to get a straight line on that for our reserve.

Trans.

2091 be sound, and it can be supported, certainly that is the historical fact that should be given some consideration. You have too, of course, determined that you are talking about a property now that is undoubtedly changing materially from when the actual figures were compiled. You have to also remember that there are changes in the price levels, changes of conditions and other factors, so that the mere historical results of the operations of the company are only to be given consideration and very likely many times they will have little weight and again may have considerable weight. It depends upon the nature of the property and the life of the property and the accuracy of the figures available.

2092 Q. Let me see if I can put it this way: assume that you will give a life to the pens here of 20 years, then, that is five per cent of a year straight line?

A. Yes, sir.

Q. Supposing that at the end of ten years you find that from the depreciation reserve the company has not taken 50 per cent, but has expended only 10 per cent, or at the end of the 20-year life the pens are still going and it has used only, we will say, 20 per cent of the depreciation reserve, would you consider that fact and those circumstances?

A. As a matter of fact, I did find that particular situation and I have considered that fact. In other words, that is the reason for my recommendation of the fair and reasonable annual depreciation rates and charges, just because the nature of the stockyards business not only at Denver but practically at every other market that I have investigated is such as to require the expenditure continually on

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matters of repair and maintenance, and over a long period of time these automatically form major replacements, if you wish. Now, every time a board is put on the fence, it may be treated as a maintenance expense, but after all as an entirety, all such boards become a definite replacement of the pen, so that over a certain length of time, of course, the repair and maintenance account will maintain the property, will replace the property. I believe that the records of actual inspection, or if they are recorded, as far as that is concerned, and you have ways and means of checking the manner in which they were recorded and what they reflect and to what property they apply should be considered. The great difficulty is that it always relates to a property that may be basically changed from the dates on which the records were compiled. For example, a stockyards property, take the Denver property, has grown materially since 1915. It is an entirely different physical property. What might have been necessary to keep this property in good condition at that time would be entirely different under conditions of 1934, both for the size of the property, its character and the price levels at which labor and materials would have to be purchased to do this.

- If my estimate of the future as to the condition that will prevail coincided with the conditions under which these facts had been determined or it were possible for me to form my judgment as to the change, then, of course, I would give very definite consideration to that. In other words, the actual operation of property, or property in operation under known conditions, if you can relate these conditions, they are a material help to you in estimating the

Trans.

lives and possible expectancy of lives of the assets as you find them, and that I have definitely endeavored to do in this particular study in arriving at the expected life of the various classes of assets.

I have established what I believe to be the necessary amount to the reserve with the expectancy of the continuity of the enterprise indefinitely in the future. I have also stated in my direct testimony that in my opinion, and under the usual business conditions, I would recommend that a reserve be maintained or be accumulated for the ultimate return of capital from any cause such as the possible going out of business entirely, but that in this particular proceedings where I know that the effort is to fix a reasonable amount to be used in a rate analysis, then, I think it would not be proper to estimate or to predict that the stockyards company in Denver is going out of business and accumulate a reserve for that purpose; therefore, in my estimates I have eliminated that factor from consideration.

It is my personal conception of rate making that the rate payer should pay for the cost of all service rendered to him, plus the reasonable profit or return on the investment in property. Now, other costs, as I see it, would be the amount of property that is being used up in rendering that service. If a property had a life of ten years ~~definitely~~ ~~then it seems to me that~~ the rate payer should pay one-tenth in his rates each year for the amount of property consumed in rendering him that service, just exactly the same in the case of the stockyards as the hay that the animals that he ships to the market may consume. I see no difference in theory or principle between the consumption of hay and the consumption of some por-

Trans.

tion of the pens in which the stock is yarded. Now, if the service is being rendered under a limited period of years, or a period of 20 years, obviously that is being consumed by the shipper in the service that is being rendered because it could only last the 20 years; therefore, I think it should be established and placed in the rates under that assumption.

Per Cent
condition
based on
judgment.

- 2098 On my direct examination I testified that Mr. Zelinski's condition per cent was too low, though it is true that that condition per cent is a judgment which Mr. Zelinski arrived at after study, and it is also true that my condition per cent is based on my judgment.

Long know-
ledge assists
this judgment.

I don't think it is possible to mathematically determine condition per cent to a dead certainty. I think it is possible, by perhaps a longer familiarity with the property, to form, perhaps, a more detailed judgment and study of the conditions that exist.

- 2099 In the 1930 hearing I went on the basis of deducting the actual depreciation that I felt affected the capability of the property to render service as compared to new property. I didn't use that method in this hearing.

It is my view that Mr. Bufkin basically presented the sinking fund, or so-called sinking fund method of establishing the amounts predicated on Mr. Zelinski's engineering findings, from which I understand that he actually made a further deduction which of course restricted the amount that the stockyards company would have for that purpose still more than would have been shown in the sinking fund itself.

I would say that the method I have submitted is the straight line method modified to recognize

Trans.

the actual conditions of this particular property and the method by which the costs of property maintenance and replacement would be carried out in actual practices. It is, however, fundamentally the straight line method. The use of that method is my choice based upon a long study of stockyard operations.

I heard Mr. Pexton's testimony relating to certain land donations, etc. and that they build up what he calls the value of the market. It is not my thought that my figure of what we may call going concern value if adopted should be added to the figures testified to by Mr. Pexton. That is not my thought because I have approached it from an entirely different angle. I have looked at it from the standpoint of the situation as I see it at the date of this inquiry; that is, at the end of 1934 or of as approximately the present date. Mr. Pexton's tabulation has to do with the historical records of investment upon the part of the stockyards company in certain assets, which of course I have given consideration in arriving at my figure. However, it is not predicated directly on Mr. Pexton's showing in that regard.

Value of the
Market.

2101 I testified yesterday that I appeared as a witness for the Pullman Company in building up going concern value. That case went on the Interstate Commerce Commission docket. I do not recall the docket number; to the best of my recollection the case was heard some time in 1927 or early in 1928. In a broad way I think it has been decided by the Commission, although there are still some phases that are still probably under consideration. My position on going concern value was rejected by the Commission in common with all other decisions of a similar nature which the Commission has made.

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2102 In that case the intangible values as a whole were established by me. Some phases of the intangible values were presented by executives or others of the Pullman Company where the matters involved related to their previous operation. Some phases I presented. But the entire claim was developed by me or directly under my supervision. However, as I previously stated they rejected all values as far as intangible property was concerned.

Hazards of
this
Industry.

Now with respect to the hazards that I think are found in the stockyards industry. It would be my opinion, to start with, perhaps the major hazard in the stockyards industry is the competitive conditions found in the character of the industry. I would say that was the greatest hazard to be faced. There are following that many smaller or individual hazards in connection with the handling of livestock, or the making of such livestock available for market. There are the local hazards involved in climatic conditions, drouth, the many factors that might have an influence on the volume of business that might be anticipated at the individual markets. That does not entirely finish the list, but most of the hazards that I would express would be somewhat similar to the ones I have now stated. Some of the hazards may be insured against to a degree, it is true, but of course you would not insure against the value of livestock that would be received.

I regard the climatic conditions as a hazard primarily because of drouth which might affect the health of the livestock on the range, which in turn would have a material bearing on the receipts at the yard.

Established
records are an
element of
going value.

2104 Yesterday among the elements of going concern value I mentioned what might be called records that the Stock Yard Company has built up. I

Trans.

would think that some of the records or some of the basis for establishing the records might be secured from Government sources. It would be my opinion, however, that if a new stockyards were to be undertaken at a new location that appeared to offer potentialities to make the investment worth while, that the logical and proper step would be to consult with the various stockyards now in operation and from them determine what might be a background for a setup of records and systems at the new market. However, that doesn't in any way state that the information assembled by the Government might not be of some advantage. However, it is true that such records could be secured with very little time, trouble and expense. Nevertheless I think that item does enter into going concern value. It would be difficult to state to what extent.

2106 Mr. Pexton's figures show roughly \$325,000 of expenditures. I gave those expenditures just the same weight as I did the evidence of similar expenditures at all of the other stockyards markets that I have found, through my experience in the past. In other words, I did not give any more weight to that than I did to the general condition that I have found that such expenditures had been made by all of the stockyards markets. In my approach to this question I necessarily took into account the development of the market and the cost so expended upon the part of the Stockyards Company more to convince myself that the elements which I found to exist at this market and believe to exist today had not been a gift upon the part of the users of the service but had actually been paid for by the capital invested in the stockyards enterprise. The purpose of the investment, in my opinion, in a fundamental way, was to build up the market, which, in turn, of course, would react to

Trans.

the benefit of the Stock Yard Company in increasing their business. By building up the market, I mean building up the buying power which in turn would bring more livestock into the market. We thought those expenditures were to the advantage of both the stockyards and the shipper to the market. Had those expenditures not been made it is a little difficult to state what would be the situation at the stockyards today.

- 2107 I heard Mr. Pexton's testimony, which was rather interesting to me having been a resident of Denver for many years, in connection with the possibility of a market at Pueblo or at Cheyenne, both of these points being on the main line and having probably an equal opportunity, or, perhaps, in some respects, better opportunity to have developed a substantial market. By virtue of the effort and expenditures on the part of the Stock Yard Company the market was actually established at Denver. I can only state that had these expenditures not been made I could not conceive that the stockyards properties would be as large or expensive as they are today, in which case they would be only large enough to handle the volume of business that would be now available, and, of course, in that case they would not be worth today's value because there would not be as much property. In a broad way it is my opinion that there would be no salvage value to the stockyards. There would be some; there would also be some expense, I believe excess expense in which you would actually pay to have some of the property removed. As I understand Mr. Zelinski's appraisal and testimony it included what is known as construction overhead or those costs that are incurred in the process of reproduction of the property, but it does not include intangible property. By intangible property I have in mind all factors existing and
- 2108

Trans.

possessed by The Denver Union Stock Yard Company other than the land and physical structural improvements thereof. I would not care to state that going value is one of the major items. I would think that a number of the values and elements of value existing at the market would be embraced in the general item of going value.

I am aware that in Mr. Zelinski's appraisal he considered the material as being new and considered the cost of labor in putting it in place.

In my opinion, \$350,000 is a minimum figure that would have to be allowed and added to the value of the land structural improvements and
2109 working capital, in order to arrive at a reasonable and fair value of this property for rate making purposes. That opinion was supported by the figure of \$10.00 per car for a 35,000 car business.

If it were my judgment that only 10,000 cars a year would be received, it would affect the going value very materially, for the reason that the capacity of this property, that is the size and extent of the facilities would be substantially in excess of what I found to be a reasonable relationship in other stockyard investments for which reason I would feel that the investment was beyond the needs and very likely the total would have been reduced materially, and had it been in my opinion that 10,000 cars would be the basis I would not
2110 multiply that 10,000 cars by \$10.00. Taking
2111 to all of the other property exactly as it is, I would not feel that the property would justify an investment up to the physical value as determined.

The question of how much I would cut down my going value on the basis of receiving only 10,000 cars is, of course, a hypothetical question that would be almost impossible to answer. It would, as I say, and I am perfectly willing to admit, have a

Trans.

result very likely of eliminating any additional figure as applied to the physical property, that is over and above the physical property. However, it might be possible that there would still be elements of going value and that in turn would have to be considered on the basis of a much smaller investment essential to handle that amount of livestock. There, of course, is another factor in there that must receive serious consideration and that is the changes or lack of uniformity perhaps in the receipts of livestock not only during the varying months of the year, but during the different years because of other conditions which in turn is another reason for the hazards which I have previously mentioned. In other words, an absolutely uniform volume of business, a 35,000 car per annum coming in regularly would enable the Stock Yard Company perhaps to handle the total volume for any one year with less facilities. Those, of course, are all speculations. I have taken the conditions as I found them, and in my opinion, even though there

2112 may be an upward or downward swing, the records of livestock receipts during at least the last 15 years would seem to indicate approximately a 35,000 car volume. Now, a \$10 per car might be varied, depending entirely on the nature of the stockyards business that you were appraising just as it is in any other type of industry. My assumption and my figures must, in the final analysis, depend upon the shippers continuing to ship to this market. In other words, my judgment, and my opinion is taken from my long familiarity with the Denver market, the study of the conditions as they here exist, a study of the statistics of receipts, and, of course, the studies I have made of other markets to make comparisons with the conditions at this market.

Trans.

- Among the factors I mentioned yesterday as contributing to the going concern value is the fact that there is an established organization of personnel. If we assume for the moment that both Mr. Shoemaker and Mr. Pexton should leave the employ of the yards, it would affect my opinion in certain respects for at least a temporary length of time. In other words, if capital should be interested in acquiring the stockyards property and should come to me for an opinion as to what they might afford to pay for it, I would state that to some extent at least during probably some years
- 2113 in the future they would be much better served by retaining the present management than by attempting to get a new management. However, ultimately over a period of time we know that it is possible to replace management who might have some different ideas, as a whole and would gradually work out and we will have the problems that have already been solved by the present management.
- 2114 I would say that the management factor is of great importance, more perhaps in what they have been able to bring about in the past than from entirely a future condition. Unquestionably, the management of any industry has material value for it until such time, at least, in the future as it could be replaced by equally competent management. To that extent a higher price would be justified if the management came over at the purchase than would otherwise be the case.

It is true that if I had taken the actual receipts of livestock each year from 1930 up to 1935, I would have found varying figures. From my experience with the yards during the past 15 years, I would be inclined to think, if we could exclude extraneous economic conditions, which is quite difficult, that the basis, that, is the volume of business would not have materially changed in so far as the future

Trans.

outlook is concerned for a number of years. Now, it is true that the immediate outlook is not particularly favorable, as Mr. Pexton has testified, and as I found to be true at other markets. It is also true, at least from the studies that I have made of the receipts, that the growth has been slow and I might almost say stable for perhaps 15 years insofar as the total volume of receipts is concerned, 2115 but the growth has been very material in the internal handling of the business, in other words, the facilities, the character of the facilities necessary in the handling of the business of the type that it is at the present time has shown a very substantial growth and change over this 15 years, even though their volume has been relatively constant. Now, to that extent, if we go back several years, say, to the earlier years of the 20's, then, perhaps, I would not have found as high value, even though the volume was the same, but going as far as 1930, I would not anticipate a great deal of difference in the figures. The reason that I take as my basic figure \$10 per car instead of say \$8 or \$12 is based primarily from my judgment after studying all of the markets for so many years, the character, nature of the business, the relation of the investment per car of livestock received at the various markets, the sources and volume of that business, that is, the nature or character of it as compared to these different markets, and finally my best judgment as to the reasonable price that might be paid as a minimum for that volume of business which represents the elements that I considered to be going value.

Reason for
figure of
\$10. per car.

2116 Yesterday I mentioned in passing the estimates of commission men as to recapturing business if it were lost, for a period of five years' time. However, I gave no weight to that and I think I stated simply in passing, as you may say, that in the

Trans.

1930 hearing I made some estimates strictly upon the cost of reproduction new under the assumption that the stockyards facilities, that is, the improvements were removed entirely from the site, but that everything else remained, including the packing houses and the roads and the general improvements, that it would require a certain length of time to reproduce these facilities. During that time, of course, the market would not be available. Testimony was introduced in the 1930 hearing by commission men and others based upon their experience in going out into the field and getting business as to how long it would take to bring back the livestock receipts up to the point that they were in 1930. As I recall, it was approximately five years.

Now, strictly in answer to your question, the figures that I stated in my direct examination represented simply the carrying charges that might be incurred on the physical property investments, if it took that length of time to bring the business back. It did not enter into my computation or my opinion in any way in the present case.

2117 Whereupon Respondent's Exhibits 38, 39, 40, 41 and 42 were offered and received in evidence subject to the Government's reservation that it be not bound by what the figures in said exhibits showed. **Respondent's Exhibits 38-42 admitted.**

2118 ARTHUR H. BOSWORTH, a witness called by the respondent after being sworn, testified as follows:

My name is Arthur H. Bosworth. I reside in Denver, Colorado; I am a dealer in investment securities. I am president of Bosworth, Chanute, Loughridge & Company, with offices on the ground floor of the Securities Building.

Trans.

I was employed by William E. Sweet and Company about July 1, 1908, and that firm was merged with another, forming Sweet, Causey and Foster Company in 1914. I was an official and director of William E. Sweet & Company and after the merger I became vice-president and director of Sweet, Causey, Foster & Company. I remained with the latter firm until the fall of 1916 when I left with Mr. Chanute and Mr. Loughridge to establish our own company,—Bosworth, Chanute and Company. Later the name was changed to our present name, Bosworth, Chanute, Loughridge and Company. As to the type of business, William E. Sweet and company was chiefly a municipal house, but after the merger, Sweet, Causey, Foster and Company, while still active in Municipals, were particularly interested in dealing in and originating corporation issues. Bosworth, Chanute, Loughridge and Company has always been active in municipal bonds, but they have been even more active in dealing in corporation bonds. This firm participates in underwritings and distributing groups, and also originates many industrial issues.

New issues, as everyone knows, until this year, have been exceedingly rare since 1929. The capital issues market was frozen tight, first, by economic conditions from 1930 to 1932 and then by the securities legislation which became laws in 1933 and 1934. It is only recently that the capital issues markets have begun to thaw out. Going back some years, among the issues in which we were either the sole originators, or one of the principal originators, I might mention those of the following companies:

B. J. Johnson Soap Company (now Colgate-Palmolive Peet Company)
Denver Fire Clay Company

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Irving Pitt Company
 Sheffield Steel Company
 Denver Rock Drill Company (now Gardner-Den-
 ver Co.)
 Daniels & Fisher Stores Company
 Denver Union Stock Yard Company
 General Stockyards Corporation
 Driver Harris Company.

Some of these issues are bonds, some preferred stock and some common stock. Of course, there are many more which could be listed.

In my 27 years of experience I have had many occasions to investigate many concerns with a view to possible financing not only in this immediate locality but elsewhere, in fact, in many parts of the United States; and in those investigations I have called upon, or rather, it has been my practice to consider and pass upon the soundness of these companies, their financial structure and the rate which we felt was necessary that they should return in order to attract capital to them.

In 1925 our attention was called to the fact that under the Consent Decree entered by the Federal Court, as the culmination of the Government's case against the packers, Swift & Company and Armour & Company, who at that time owned The Denver Union Stock Yard Company, were obliged to sell their stockyards holdings. Our firm had financed the Blayne-Murphy Company, an independent meat packer located at the Denver Yards, and as a result we had gotten well acquainted with a number of people out at the stockyards. We believed that The Denver Union Stock Yard Company was a very valuable property and we thought it would be not only a profitable piece of business to us, but a very constructive happening for all concerned, if we could bring the ownership of the Yards to Colo-

Trans.

rado investors. We consulted principally with Mr. Joseph A. Shoemaker, and with Mr. Joseph P. Murphy, and with a number of others, and we negotiated with Armour & Company and Swift & Company. After lengthy negotiations, in 1926 we were successful in purchasing from them the entire common stock issue of The Denver Union Stock Yard Company. Shortly after the purchase was made we successfully distributed the securities of the company, that is, preferred and common stock, to the public.

At the time we completed the purchase from the Chicago packers, I asked Armour & Company if they would give me the opportunity of considering the purchase of any other stockyards which, under the law, they were required to sell. Our negotiations had apparently been satisfactory to both sides, and they said there probably would be more business of that kind and they would bear me in mind. Mr. Ellis, vice-president of Armour & Company, told me that they would probably consider the sale of the Fort Worth Stockyards in the near future. He mentioned that they were having appraisals made and were bringing audits up to date, and so forth. I asked Mr. Shoemaker as a favor to me if he would accompany me to Fort Worth, which he did, and we studied the yards from the standpoint of a possible purchase by my firm. Meanwhile, Messrs. Stone & Webster and Blodget had noticed our Denver purchase and they approached Armour & Company to see if they might have something to sell. Our firm had enjoyed a great deal of business with Stone & Webster and Blodget and when they learned that we were actively working on the Fort Worth Stockyards, we formed a joint account and negotiated with Armour & Company together. These negotiations were practically closed, all the terms having been agreed to and

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2122 lawyers summoned from Denver and New York to draw up contracts with the attorneys of the sellers, when one of the parties interested, suddenly changed his mind and refused to sell. We, Stone & Webster and Blodget and our company, then suggested to Armour and Company that we organize a company, which would be an investment company in stockyards securities and that this company purchase all the stockyards investments of Armour & Company. After protracted negotiations this was done late in 1927 or early in 1928, and the General Stockyards Corporation was formed. The preferred and common stock issues of this company were sold to the public by Stone & Webster and Blodget and ourselves. Because General Stockyards owns a substantial interest in the common stock of the yards at Fort Worth, Sioux City, St. Paul and St. Louis, I have kept in rather close touch with the developments from time to time in these markets. About a year later we secured an option to purchase a substantial block of the Union Stockyards Company of Omaha, and after going over financial statements, and so forth, I went to Omaha to size up that situation. Owing to existing market conditions at about the time our option expired, we decided not to exercise the option.

I am a member of the Board of Directors of the General Stockyards Corporation and of The Denver Union Stock Yard Company. When ownership of The Denver Union Stock Yard Company was transferred to Denver and vicinity, Mr. Shoemaker felt it would be very desirable to have a Board of Directors composed of people who had a real interest in the company, either from a financial standpoint, or from the fact that they were actively interested in the business of the yards. Therefore, it was decided to invite as directors

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several men who are livestock producers in this territory, the managers of the principal packing plants at the yards, representatives of the commission men, in addition to having representatives of the stockholders.

The Board of Directors is as follows:

Joseph A. Shoemaker, president of the company.
Edward Sargent, of Chama, New Mexico.
Murdo Mackenzie, of Denver, Colorado.
William C. Harris, of Sterling, Colorado.
Harry W. Farr, of Greeley, Colorado.
Nate Warren, of Fort Collins, Colorado.

These last five men mentioned are actively engaged in raising either cattle or sheep and are among the most prominent livestock producers in the territory served by The Denver Union Stock Yard Company. Mr. Ben Kemper, who is president of the Denver Livestock Commission Company, and Charles G. Smith, manager of John Clay and Company, are the commission men on the Board. S. A. Middaugh of Swift & Company, 2124 and James P. Murphy, formerly of the Blayney-Murphy Company, are the packers on the Board. Mr. Robert Bosworth, the Company's attorney, is a director. Philip K. Alexander, vice-president of the First National Bank of Denver, Paul Loughridge and I represent many stockholders—some large holders, and some small ones.

The market for stockyards securities is rather inactive and I would not want to give the impression that we have a great many dealings in them every week or every month, because sometimes the dealings are rather infrequent. I have talked to Babcock-Richton Company, and Swift, Langill and Henke, both of Chicago, and I find they have had the same experience. These are firms which are

Trans.

more active than any other firms in Chicago in the stockyards securities. Oftentimes, when stock is offered for sale, it is necessary to search for a buyer.

- 2125 Based upon my experience I have formed an opinion as to the rate of return that stockyards companies in general, and The Denver Union Stock Yard Company in particular, should be permitted to earn in order to function properly and to be attractive to capital. I have prepared a statement setting out my views, which is as follows:

Unless any well regulated business is permitted to earn a satisfactory return on the capital invested in it, that capital will be drawn away from the industry and the industry will be unable to render satisfactory service to the public. If the opportunity for profitable investment is taken from any field, capital will cease to flow in that direction. The stockyard industry is no exception to this rule. Moreover, many millions of dollars, during the past fifty years, have been invested in stockyards properties, and this capital is entitled to reasonable protection. The protection results from establishing a fair valuation on the property and then by fixing a fair rate of return on that valuation. Therefore, I consider that this question of what is a fair rate of return, is one of the most vital points at issue in this hearing.

Rate of return must be adequate to attract capital.

- If it were possible to point out another business which would be really comparable to the stockyards business, and upon which the courts had fixed a definite rate of return, it would be an easier matter to fix upon a proper return for a stockyard property. After careful study, I know of no line of business which is closely comparable to the stockyards business. Sometimes there is a disposition to compare stockyards companies to
- 2126

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railroad or public utility companies, serving the public with gas, electricity or transportation, but a careful comparison in every case will disclose such great differences that, in my opinion, there is little value in such comparison. For various reasons this is true of comparisons with companies whose business it is to manufacture and sell ice, or who are in the business of distributing natural gas. Therefore, I have come to the conclusion that one must study the stockyards business—the property; the earnings throughout the period of years; the yield of stockyards securities during this period, etc., in order to reach a conclusion as to what is a reasonable rate of return.

Government
Exhibit 45
criticized.

I have carefully read Dr. Dozier's testimony in this hearing on the rate of return, and I have also carefully gone over his list of securities contained in Government Exhibit 45. I do not think the securities listed in this exhibit are comparable to securities of the various stockyards who have securities outstanding with the public.

Companies
listed are not
comparable.

In the first place, all of these securities are issued by very large corporations. The assets in practically every case are many times those of The Denver Union Stock Yard Company. Second, the companies are nationally known, and in many instances internationally known, with thousands of security holders scattered all over the United States and in many foreign countries. Third, the line of business in which they are engaged is not comparable to the stockyards business. Fourth, practically
2127 all of the securities are listed on the leading stock exchanges of the country and they have a broad, active market. They are exceedingly liquid, whereas, the securities of The Denver Union Stock Yard Company are held locally for the most part, and are inactive. I do not think that whatever the

Trans.

yield is on these securities has the slightest bearing on the yield that the public would demand from securities of The Denver Union Stock Yard Company.

Many people believe that the stockyards companies buy and sell livestock. Probably everyone here knows this is not true. The stockyards companies do not deal in livestock, they merely provide a market place for livestock, where buyer and seller may meet. They also provide the facilities for care of the animals, and for the protection of all parties to the dealings that take place in the market. It has always seemed to me that a stockyards company is essentially like the New York Stock Exchange, or a Produce Exchange, except that the stockyards deal with a commodity which must be physically present for inspection when sold, because each unit of the commodity is, or may be,

2128 different. If you could picture the New York Stock Exchange with a safety deposit box for each owner's shares, and a requirement that every buyer, or his agent, could inspect the shares before buying, these safety deposit boxes would be tantamount to the pens in a stockyards, but that isn't necessary because every share of stock in a corporation is like every other share of stock in that corporation. The yardage charge of the stockyards is essentially a charge for the use of the market. Few people know what it means to build up a market, —years of work, great expense, and it is necessary for the management to be always on the alert, so that the facilities of the market are always adequate—not only physical properties, but the necessity of fostering the demand from livestock traders, livestock feeders, packers, etc.

The stockyards business is essentially a "service" business, in contrast with a manufacturing or merchandising company. Because the stockyards busi-

Stockyards do not buy and sell livestock

The Stockyards is a market like N. Y. Stock Exchange.

Charge made is a marketing charge.

Stockyards a service business.

Trans.

Hazards of the business should be considered in fixing rate of return.

ness has practically no inventory (except a modest amount of feed and other supplies), and because most of the transactions are on a cash basis, certain hazards which inevitably accompany merchandising or manufacturing are absent in this case, but there are many other hazards in this business, and in discussing rate of return these hazards must be given consideration.

In the first place I believe the theory of limiting electric light and power or other similar public utility concerns, to a fixed rate of return, is in large part due to the fact that such a utility exercises a governmental function, frequently this is under a franchise which is a truly monopolistic grant, and generally is accompanied by a truly sovereign grant of eminent domain. Where the Government elects to delegate the individuals the right and power to perform its duties (the performance of which if done by the Government would theoretically be on a non-profit basis, or if profit were made it would go to reduce taxes) the Government unquestionably has the right to say how much compensation the individual shall have, i. e., how much they shall be permitted to earn. In stockyards companies, as I see it, the situation is different; they do not exercise a governmental function, do not have the right of eminent domain, and they are certainly not a monopoly. The Denver Union Stock Yard Company is one of the most competitive markets in the country. It competes directly with stockyards companies in Ogden, Utah; Omaha, Nebraska; Kansas City, Missouri, and various other points for shipments to its market. It is necessary to employ solicitors, who travel throughout 8 or 10 western States, spreading the gospel of "Ship 'em to Denver." Nor is the competition limited to that of other stockyards. It is necessary to compete for shipments to the packers,

Stockyards exercise no governmental function.

No right of eminent domain.

Competitive nature of the business.

Trans.

auction yards, and with certain organizations of producers, who during recent years have more and more been inclined toward direct buying or marketing.

One of the hazards of the business is weather. It is easy to appreciate this fact in the light of events during the past few weeks. Floods in the territory tributary to the Denver market have washed out many miles of railroads, with the result that thousands of livestock, unquestionably bound for this market, had to be diverted elsewhere. The great drouth of 1934 and the spring of 1935 resulted in the death of thousands of head of livestock in the intermountain and prairie states and competent authorities on live stock estimate that it will require several years to bring back the livestock population to the figures of 1933. To meet this emergency the Government carried out its huge cattle buying program in the second half of 1934. This greatly increased stockyards earnings in that year, but at terrific cost to the yards, if future years are taken into consideration. The serious decline in receipts, and earnings, for the first six months of 1935 is evidence of the truth of this statement. Abnormally cold weather during the winter months interfere with shipments and consequently adversely affect earnings. Operating expenses of the yards may be substantially increased by heavy rains or snows.

**Weather
Hazard.**

The business is frequently placed in jeopardy by changing freight rates. These rates may restrict the territory from which livestock is sent to the Denver market. The relationship between freight rates on the live animals and on finished meat products has a great influence on the receipts in Denver, and a variation in this relationship may affect earnings seriously.

**Freight rate
hazard.**

Trans.

**Hazard of
price fluctua-
tions.**

The fluctuating prices of livestock are frequently responsible for a certain decline in the earnings of the stockyards companies. It has been the experience in Denver, that when prices are low there is a tendency to ship to more distant markets with the hope that prices will improve while the livestock is in transit. When livestock prices are low production is naturally restricted with the result that the stockyards suffer and it usually takes several years before receipts come back to normal.

**Disease
hazard.**

- 2131 Another hazard is disease. Occasionally it is necessary for the Federal Government or the State Government to quarantine against various animal diseases and to prohibit shipments. Sometimes these quarantines last for several weeks and longer, and not only are the earnings lost during this period, but it takes a considerable time to persuade shippers that it is safe to send the livestock back to the market which has been quarantined. Due to the vigilance and able management of The Denver Union Stock Yard Company, and also of the representatives of the Bureau of Animal Industry, there has not been an epidemic at the Denver stockyards for a number of years, but there is always a possibility of a quarantine. Capital is nervous, and this is a hazard which does have some effect on the rate of return investors demand from stockyards securities.

It is always easier to raise capital for an enterprise which bids fair to grow rapidly in size and importance. It is true, too, that investors prefer to place their money in common stocks of going businesses which are enjoying rapid growth in sales and earnings. Purchasers of common stocks almost universally buy stock not only on the strength of the current showing of earnings, but on prospects of earnings as well. Therefore, if there is

Trans.

reason to expect increased earnings they are willing to buy the stock on a lower yield basis than otherwise would be the case. Investors in bonds and preferred stocks, because all they can ever expect to secure is the fixed rate of return, are more interested in stability of earnings and a sufficient margin above interest and dividends, so that the fixed rate of return will be paid continuously. The common stock purchaser, however, has a different view. If one studies earnings records of stockyards it is apparent that this is not a line of business where very rapid growth can be expected. The holder of common stocks of stockyards companies can rarely expect a stock dividend, or any great increase in cash dividends. Therefore, it is necessary for the common stock of stockyards companies to pay a much higher yield, if the investor's dollar is to be obtained.

It seems to me that the best measure of what the public will demand as a rate of return on a stockyard property is the composite rate of return at which the securities of stockyards have been selling in the past. This removes the discussion from the realm of theory to the more definite realm of experience. I am offering an exhibit which gives certain data relating to The Denver Union Stock Yard Company.

Whereupon the exhibit was marked Respondent's Exhibit 43.

2133 (Witness continuing). Respondent's Exhibit 43 shows, with respect to The Denver Union Stock Yard Company, the amount of bonds, preferred and common stock outstanding in the years 1930 to 1934, inclusive; the interest and dividends paid in those years; the market price of the securities and the yield of the bonds, preferred stock and common stock. It also shows the earnings per share of

Respondent's
Exhibit 43
described.

Trans.

common stock; the percentage of these earnings to the market price (market as of Dec. 31st of each year) and the composite return by averaging the interest paid on the bonds, the dividends paid on the preferred stock, and the earnings per share on the common stock. This average is a weighted figure—the different amount of each class of security being taken into consideration. The reason that the earnings per share of common stock are used in this connection, instead of using the actual dividends paid per share of common stock, is that the common stockholder is more interested in what his stock earns than what is being paid in dividends.

I think we will all admit that the Government's cattle buying program in 1934 resulted in grossly abnormal business for that year. In fact, I have been shown figures by The Denver Union Stock Yard Company which state that of total receipts 2134 in 1934 on a car basis (including drive-ins), approximately 35% were Government receipts. It would probably present a fairer picture of the situation if 1934 were eliminated from Respondent's Exhibit 43. You will see from this exhibit that the average Composite Returns, eliminating 1934, is 7.75%. The five years' average, including 1934, is 8.39%.

Respondent's
Exhibit 44
described.

Respondent's Exhibit 44 was then so designated.

Respondent's Exhibit 44 shows, as of Dec. 31, 1934, the same data for the stockyards operating at Wichita, Omaha, St. Louis, St. Paul, Fort Worth, St. Joseph, Kansas City and Sioux City. You will observe that the composite return for these yards average 9.923%. This figure for Denver for that year was 10.965%—about 1% higher than in the case of the other yards. I have already stated that in my judgment 1934 is not a fair year, and there-

Trans.

fore, it would be unsatisfactory to submit only this year. You will remember that in 1933 receipts were, to some extent, increased by the Government's hog buying program of that year, and therefore, it would be more representative, I think, to take another year than 1933. I have therefore prepared the figures for 1932 at Omaha, Kansas City, Fort Worth, Wichita and St. Paul.

Respondent's Exhibit 45 was thereupon so marked.

2135 (Witness continuing). I will not take the time to go into the details as set forth in this Exhibit 45, but it shows that the composite return for these markets averaged 8.2% in 1932.

Respondent's
Exhibit 45
described.

Certainly a company cannot be bonded for its full valuation if the bonds are going to be considered high grade bonds. There should be real value back of the bonds, the Preferred Stock and the Common Stock. Dr. Dozier, in his testimony, touched on the present condition of the bond market, mentioning the fact that Government bonds are selling to yield very low interest returns. There is no argument with Dr. Dozier on that score. At the moment the bonds of The Denver Union Stock Yard Company are selling to yield less than 5%, and the Preferred Stock to yield about 6.70%. If we suppose that the company has no securities outstanding at this time, it might be possible to issue bonds on a 4½% basis and Preferred stock on a 6½% basis. These securities would sell at these rates only in case a substantial portion of the valuation of the property was represented by common stock. In my judgment the earnings per share on this common stock would have to be very attractive—at least 10% of its par value or market value, in case the stock had no par value. Giving consideration to this market situation and taking into ac-

Trans.

Rate of return
of 8% be-
lieved proper.

2136

count the market values, interest and dividend yields of the earnings per share of the common stock during the past five years, it is my belief that The Denver Union Stock Yard Company is entitled to, and should have, a rate of return of 8% on the valuation of the property. In a general way I would say that the factors which determine the cost of corporation financing are the following:

- (1) The general credit of the company issuing the securities.
- (2) The size of the issue.
- (3) The form the issue takes—Common Stock, Preferred Stock, Debentures, or Mortgage Bonds.
- (4) The ratio of the amount of the issue to the net worth of the issuing corporation, and the ratio of the corporation's earnings to the dividend or interest charges on the securities proposed to be issued.
- (5) The knowledge investors in general have of the corporation, i. e., the securities of a widely known, successful corporation are easier to sell and command a better price than the securities of a smaller inconspicuous corporation which may be just as successful as the widely-known concern.
- (6) The industry in which the company is operating, i. e., certain industries are considered by the investor to be more hazardous than other industries and, naturally, the cost of financing for companies in the more hazardous industries is much greater than it is for companies operating in safer lines.

2137

Trans.

- (7) The condition of the investment market at the time the offering of securities is made.

In answering this question I am assuming that the company which goes to the public for financing is an operating concern with a record of earnings for a period of five years or more. A new enterprise is a new matter and the cost of securing capital from the public for a new enterprise is always higher.

There are many items which make up the cost of assembling capital. In the case of an established business the first step is the contract between the management of the business and the bankers. In most instances such contract must be drawn up by attorneys and the proposition of the bankers is usually made subject to a satisfactory report by auditors, appraisers and/or engineers and experts who have specialized knowledge of the particular industry in which the concern operates. The bankers then proceed to get these reports which, if carefully prepared by well-known people, cost a great deal of money. If these reports are satisfactory to the bankers, attorneys are then employed to examine the titles and to prepare the legal procedure incident to the bond and/or stock issue. These

The cost of assembling capital.

2138 attorneys also prepare the form of the securities and issue their approving opinion as to the validity of the securities. Since these attorneys represent the bankers it is customary for the concern to have its own attorneys to check the work of the other attorneys and to protect the interests of the corporation. The attorneys' fees are a very considerable item. The attorneys for the bankers also attend the listing of the issues on some recognized Stock Exchange and qualify the issue for sale in certain states where the bankers expect to secure distribution and in which there are so-called Blue

Trans.

Sky laws. In the case of a bond issue, a Trust Company is usually the Trustee and that requires another fee. If the issue is in the form of Preferred or Common stock, it is usually necessary to have both a Transfer Agent and a Registrar—and Trustees, Transfer Agents and Registrars all have to be compensated for their services. The issue must be registered with the Securities and Exchange Commission,—another fee, and large printing expense.

Within the last year or thereabouts the rules of the SEC covering the registration of securities have been changed so frequently that it has added a great deal to the expense of the preparation of registration certificates. I was in Milwaukee about three weeks ago negotiating for a piece of financing
2139 of only \$300,000. I asked Mr. Arthur Fairchild, who is one of the best known attorneys in that city, and whose opinion is usually obtained on corporation issues originating in that vicinity, for his estimate as to what it would cost to register this proposed issue, because the management had asked me for an estimate. He said it was nothing but a guess but that would probably be \$15,000. I exclaimed that that was 5% of the amount of the proposed issue and seemed to me to be utterly exorbitant. He stated that in the case of a recent telephone refunding issue in connection with which the legal proceedings and the registration was handled by his firm, the cost was about \$35,000. He stated that the printing bill alone was nearly \$25,000, because it was necessary to keep the forms set up and make changes from time to time. Today a new issue of Bethlehem Steel refunding 4 per cent bonds has been offered to the public. I have been told that the legal and registration expense in connection with this issue exceeds \$150,000. Of course, this is a large issue, \$55,000,000, and consequently the percentage of expense for legal fees

Trans.

and registration is not so high. The existing laws and regulations seriously penalize any corporation in the issuance of any securities in the amount of less than \$5,000,000. By that I mean that the costs of a small issue are relatively very much higher.

Up to this point in the cost of assembling capital no provision has been made for the bankers who agree to purchase the issue. In only a few instances does the investment banker expect to retail the entire issue himself. As a rule he expects to place with investors a portion of the issue and the balance is handled by wholesaling to other investment bankers on a division of the gross bankers' profit. The original banker expects a profit on the entire issue, although he does not retail all of it, because he takes the risk of purchasing it. If he is unsuccessful in interesting other investment bankers he must be prepared to take the issue himself and to work out of the situation as best he can. The houses that retail the securities must have sufficient profit in the business to enable them to pay their overhead, including the compensation of their own salesmen. It is difficult to state what percentage of the par value of the issue is necessary to cover the cost of assembling capital, for the reason that this varies so greatly on account of the variation in the type of the issue as well as the constantly changing condition of the investment market. I believe I am conservative in stating, however, that all of the items enumerated above as represented in the cost of assembling capital will average at this time, for bond issues, approximately $7\frac{1}{2}$ per cent of the par value of the issue, if issues of \$5,000,000 or less are considered. For stock issues, the average would be approximately 10 per cent of the par value, or if the stock issue is of no par value, then 10 per cent of the price at which the stock is sold to the public.

Trans.

Cost of
assembling
capital a
necessary
expense in
Public
Utilities.

2141 The cost of assembling capital is certainly a necessary investment in the usual industrial concern or public utility. Almost without exception some costs of this nature are incurred at the inception of any enterprise and, of course, during the growth and development of the enterprise quite frequently additional capital is raised from the public and the above mentioned costs must necessarily be incurred.

I have made a study of and am familiar with the capital structure of The Denver Union Stock Yard Company. Early in 1926 the Company issued \$1,500,000 in bonds to replace a maturing issue. I have before me a statement of the bond discount and expense connected with the refunding operation I have just mentioned.

Respondent's
Exhibit 46
described.

This statement was then marked for identification as Respondent's Exhibit 46.

2142 This Exhibit 46 shows that the expense to the Company of selling these bonds amounted to \$61,953.77. I do not consider that this is representative at all of what the cost would ordinarily be. I make this statement because at that time we endeavored to purchase the bonds associated with other investment dealers. We made a bid for ~~the issue and our bid was approximately two per~~ cent lower than the bid accepted by the Company. You will notice that these bonds were sold to the Stockyards National Bank for the account of the First National Bank of Chicago at a discount of \$55,950, or 3.73 per cent. Swift & Company and Armour & Company who were the owners of The Denver Union Stock Yard Company were very large depositors with the First National Bank of Chicago and that bank purchased these bonds at a price which was higher than any of the other bids submitted. This expense of \$61,953 on an is-

Trans.

2143 sue of \$1,500,000 makes the money cost the Stock Yard Company for a 20-year term exactly 5.35 per cent. In other words, it adds 35 hundredths of one per cent to the coupon rate, and at the time this issue was sold the issuing company was an established concern. It had been established for many years. If it is assumed that The Denver Union Stock Yard Company is not in existence and someone wants to start a stockyards as a new enterprise, I believe that it would require for assembling capital a sum of money equal to at least 15 per cent of the total amount necessary for the acquisition of the property, the construction of pens, alleys, sewers, and so forth. I have enumerated above a number of the items which go into the cost of assembling capital. Security salesmen who handle the promotion of new enterprises rarely receive less than 10 per cent of the amount of their sales and, as we all know, very frequently their compensation is double that percentage. If the men who are back of the enterprise endeavor to raise the money without the use of professional stock salesmen, they always find their work is very expensive. It requires a great deal of time, advertising campaigns, and so forth. Naturally the cost of assembling capital is very much less in case the enterprise *has been in existence* for a number of years and it can show a record of satisfactory earnings. I believe that about $7\frac{1}{2}$ per cent is a low percentage figure for the cost of assembling capital under these conditions, during reasonably good times.

2144 Referring to Respondent's Exhibit 46, the first heading there, discount on bonds 3.73 per cent, that represents the difference between the par value of the bonds and the cash price paid by the Company for them.

Trans.

Government
sinking fund
rate
criticized.

Now on another line with respect to the testimony in this case with regard to what is known as the sinking fund method of depreciation, which demands the investment of the annual depreciation allowance and the compounding of interest thereon during a period, I know of no bonds or securities having the safety of Government bonds, that is, having the absence of hazard to the extent of Government bonds, which can be purchased today at a return of 5 per cent. I know of no securities which can be purchased with a return of 5 per cent which are comparable to U. S. Government bonds 2145 from the standpoint of safety. It is considered good policy to invest the funds of the sinking fund in securities which are as free as possible from hazard.

The amount of interest we could receive upon a sinking fund properly invested would determine to some extent on the length of time you wanted it invested. That is illustrated by the fact that if you are going to buy 90-day U. S. Treasury certificates, you will get a yield of about seven hundredths of one per cent per annum. If you are going to buy long term U. S. Government bonds, take the 3's, due around 1955, the yield is about 2.7 per cent, so you will have to consider the maturity of your investments, of your sinking fund investments if you are trying to establish a rate. If your object was safety, plus liquidity, I would say that you can have nothing comparable to Government bonds, either in respect to security or liquidity.

Cross-examination.

It is true that the Stock Yard Company has invested its depreciation reserve in the stockyards buildings and equipment, but when I answered the question a few minutes ago, I understood I was

Trans.

stating as to the investment in securities, not in property to be used by the Company. I reiterate that I know of no security that is as safe as U. S. Government bonds. My recommendation boils down to this,—that the Secretary find a rate of return **Rate of return** of 8 per cent on whatever is determined to be a **of 8%.** fair valuation of that property.

2146

Referring to Respondent's Exhibit 43, sheet 1, on that sheet which is captioned "December 31, 1930," is given the bonds, preferred and common stock. As of today I would quote the bonds as about 102 bid and 103½ asked. There are no bonds that I know of offered for sale and there are no orders that I know of for bonds.

2149

As of today there are \$1,135,000 of bonds outstanding. That figure is based on the par value of the bonds outstanding. We are today quoting the preferred stock at 103 bid, 105 asked. There are 8,945 shares of preferred stock. There are 31,200 shares of common outstanding, selling at 33 bid, 35 asked. That would figure the total value of the common stock as of today as \$1,060,800. Adding all three together, that is, bonds, preferred stock and common stock at their today's estimated value, I make it \$3,090,300. I do not know how that compares with the values found by the stockyards appraisers. I think the rate of return ought to be on the valuation as determined by appraisers instead of solely on this. I think the market on the securities may have some indication as to the value, but I don't claim it is conclusive. The Secretary should permit us an 8 per cent return and if that 8 per cent when applied to the value of the stockyards properties as found by the Secretary would result in an increase in yardage charges, I would still feel that we were entitled, as a matter of right, to earn 8 per cent upon a fair valuation

Trans.

of our property. Other considerations might enter into the wisdom of attempting to do that at a certain time. For instance, a couple of years ago
 2150 in the depth of the depression, the management felt it was advisable, the management of The Denver Union Stock Yard Company felt it was imperative to make some concessions to shippers and did make substantial concessions to shippers, even though we felt that we were entitled to earn more money than we were earning. However, business once in a while has to forget its selfish interests to keep the customer alive, so when you ask me if I would favor increased yardage rates, other conditions would enter into the matter than just our right to have such a return, that is, I would want the right even though we did not exercise it.

Turning to Exhibit 43 at which we were just looking, taking the date 1930, opposite bonds I have the figures 98 at 100. That means that at that date on a market that is inactive it is customary to state a quotation which you believe would be bid for bonds if any bonds appeared for sale on the market, and also a quotation at which you thought you could supply bonds if an order appeared on the market. So 98 is the bid price and 100 is the asked price.

2151 The next item under the title "outstanding" shows the par amount of the bonds outstanding. In the next to the last column I had the figure 7,194,825. To arrive at that figure we multiplied the market price of the bonds, that was 1,410,750 by 5.10, which is the yield. The last column is to get a weighted average return on all three issues. You therefore do it by multiplying the principal amount at its return, taking the total and then dividing by the total market price. You are simply weighting out the averages. Now I might illustrate it this

Trans.

way. Supposing you have \$1,000 out at interest at
2152 5 per cent, and you have \$2,000 at interest at 6
per cent, and you have \$4,000 at interest at 7 per
cent. If you want to know the average rate of
return you are getting on \$7,000, which is the total
amount of your money, you multiply the \$1,000 by
5, which gives you \$5,000, you multiply the \$2,000
by 6, which gives you \$12,000, you multiply your
\$4,000 by 7, which gives you \$28,000. You take
the total and you have \$45,000, and you divide by
2153 your 7 and your average rate of return is 6.45 per
cent. I think the thing that confuses you, Mr. Miles,
is that it would be possible to take this percentage-
wise and then you wouldn't get your figures in the
millions, but you would get exactly the same net
result because in the example I have used, instead
of using 5 per cent I have multiplied the \$1,000
by 5, not by 5 per cent, and multiplied the \$2,000
by 6 instead of 6 per cent, and the \$4,000 by 7 in-
stead of 7 per cent. I then divide the total by the
total funds at interest and you get your answer,
2154 6.45. If we were permitted to earn 8 per cent and
we actually did earn it we would, out of such earn-
ings, first of course pay our fixed obligations such
as interest on bonds. It is not in the discretion
of the management what they do to that extent,
they have to pay the fixed obligations. Over and
above their fixed obligations it is a matter for the
directors to decide what they shall do with the
surplus earnings.

With respect to any excess over and above the
amount necessary to pay fixed obligations, I think
the dividend policy of a company ought to be as
liberal as possible with the stockholders, but it
should not be so liberal that it does not build up
some reserve to take care of possible catastrophies
which might be incurred or unforeseen contingencies.

Trans.

- 2155 I cannot state definitely just what, in my opinion, should be paid by the common stockholders without taking into account many considerations which may change from year to year. If you have a company without any bonds or preferred stock outstanding, with all the working capital that is needed in the business, I see no reason why the total amount of earnings cannot be paid out as common dividends, and conversely, if you have a company which is handicapped by lack of working capital oftentimes it is unwise to pay any dividends even though earned. I cannot lay down any definite rule, it depends on so many considerations that change from year to year that I do not think you can lay down a flat rule as to what the management should do. That is why you have directors in a company who presumably are men of experience and men of ability and whose counsel is valuable to the company. I believe every business is better off if they have a surplus, how much of a surplus, as I have said before, depends on how much you have ahead
- 2156 of you in securities. Certainly if this company should come along to a time that is only a year or two ahead of its bond issue, of the maturity of its bond issue, the directors would hesitate about paying large dividends there; they might say: "We may be put to unusual expense at the time this refunding has to be accomplished; we had better begin to save it. You cannot tell, the market may be so bad at that time that we may have some difficulty in refunding these bonds. Now, if we accumulate and get ready for it, we are doing a wise thing for the common stock." After all the common stockholder is the owner of the business.

Q. Now, taking a stockyards as it is now financed, with your present issue of bonds and preferred stock and its common stock, how much, in your judgment, should be set aside

Trans.

for a surplus each year on the assumption that you are earning your 8 per cent?

2157

A. I do not think anybody can intelligently answer that question for the reason that if we should, in the near future, go ahead with the plan to change our physical layout out there, if we could move our hog division so as to expand our sheep division, which in turn would cause us to change the location of a good many of our cattle pens, we are faced with this situation. We have a closed first mortgage bond issue. We cannot issue any more bonds for development of that kind. We have a preferred stock issue that has some authorized but unissued preferred stock. That, however, depends a good deal on financial conditions. I have seen the time only a year or two ago when we could not have issued preferred stock except at ruinous prices. Well, now, if the management or directors are thinking of something of that sort, isn't it good business for them to hold back some of the earnings rather than pay it all out to the stockholders because you cannot go to the stockholders and say: "Here, we paid you a lot of money last year and we want some of that money back this year because we are going to do something for the business here." My point is that you cannot lay down a flat rule as to what percentage out of the 8 per cent should be retained year in and year out.

(Witness continuing). As I remember my testimony in 1930 I said I thought that The Denver Union Stock Yard Company was entitled to a rate of return of 10 per cent. I also took issue with

2158

Dr. Dozier on his statement that in his judgment the ideal capitalization for a stockyards company

Trans.

was one-third bonds, one-third preferred stock and one-third common stock, and I remember stating that I hope to live to see the time when The Denver Union Stock Yard Company had no bonds outstanding. What is done with the money earned by the stockyards is, I believe, within the discretion of the Board of Directors. If these Directors say to themselves: "We will pay our bond interest, we will pay our preferred stockholders, then we will pay every last dollar out for the common stockholders," they are doubtless within their rights, they probably would not be considered generally very conservative directors as if, on the other hand, they were really going to pay some dividends, some bonds, some preferred stock. I think that is a matter entirely within their discretion. I say that I do not believe that 8 per cent, when you figure out of that 8 per cent you have to pay interest on your bonds and your preferred stock dividends and certainly some dividends to the common stockholders, that there would be sufficient balance to pay for your bonds at maturity. I do not think it could be done out of the 8 per cent. That is my point. I have already stated that the directors should be the ones to decide what should be done with the earnings. Personally I believe it is conservative for any company to get out of debt and therefore my personal inclination would be to devote some of your money to paying off the debt of the company.

The stockyards were refinanced in 1926. At that time the bonds were sold to the public at 98¾. The preferred and common stock financing was not done at the same time the bond financing was done. The bond financing was handled by Armour & Company and Swift & Company before they disposed of their stockholdings in The Denver Union Stock Yard. At a later date as I have stated, Bosworth,

Trans.

Chanute & Company, as it was then known, bought the common stock of the company and changed its capitalization. The outstanding preferred stock at the time of purchase was called and it was replaced by new preferred stock issue. My recollection is that the preferred stock issue was sold to the public at \$100 per share. I would like to check that with Mr. Shoemaker or Mr. Reinhardt to see if my recollection is not correct. I am quite positive of it, it was \$100 per share, wasn't it?

MR. REINHARDT: That is correct, yes, sir.

THE WITNESS: (Continuing). The common stock was sold to the public at \$33 per share. There were some special sales made at \$32. It is rather interesting that today the market is about what it was in 1926.

2161 The market for our securities at the present time is higher now than it was in 1926 on the bonds and on the preferred stock. By coincidence, however, I think you will find the market on the common stock is exactly the same now as when it came out. Under the terms of the bond issue, we have the right to call the bonds on payment of par, accrued interest and a premium, which was originally 103. The present call price is 102¾. The premium at which they are callable decreases one quarter of one per cent each year. It seems to me it was originally 105, and the one quarter of one per cent reduction reduced it to 102¾. We have a right to call the preferred stock at 105 and accrued dividends.

2162 In my opinion the right to call the bonds naturally tends to hold down the market price of the bonds to something like the callable price. You will find that securities in general are selling a point or two above the call price but they won't go very much higher than that. The same would be true of the preferred stock.

Trans.

Q. Now, what, in your opinion, would your bonds be selling for, let us say, December 31, 1934, when the price was 101 to 103, what would have been the selling price of the bond without that call feature, in your judgment?

MR. BOSWORTH: Mr. Examiner, at this point I wish to object as incompetent, irrelevant and immaterial. We are confronted with a condition, not a theory, here. We cannot vary the contract rights of the various holders and what these bonds might sell for under some different conditions is certainly irrelevant insofar as any rate making theory is concerned and I insist that this is incompetent, irrelevant and immaterial.

MR. MILES: Take the ruling.

THE EXAMINER: Objection overruled. Read the question.

THE WITNESS: If the bonds had not been callable, I think they might have sold at about 104 or 105 on December 31, 1934. If the preferred stock had not been callable, it might have been selling on perhaps a 6½ per cent basis, which would be approximately 110.

2163 I am acquainted with the conditions of the reorganization of the American Crystal Sugar Company, formerly the American Beet Sugar Company, about which Dr. Dozier talked. The American Crystal Sugar Company had outstanding approximately \$5,000,000 of preferred stock some years ago. It had been unable to pay dividends on this preferred stock for some nine years and therefore the preferred stock had accumulated unpaid dividends of \$63 per share as of July 1, 1935. The management of the company offered a plan to the preferred stockholders for funding these arrears in dividends by the issuance of 1.6 shares of new 6

Trans.

per cent preferred stock for each share of the old 7 per cent preferred stock, plus \$3 in cash. I don't know whether that answers the question you meant, but—I was very much amused that Dr. Dozier would pick on a preferred stock of that character to cite as an instance of what preferred stock would sell—like The Denver Union Stock Yards would sell at, because he was picking a stock that had a face value, due to these arrearages of \$163 a share and which at that time was selling at about \$120 a share on the strength of a recapitalization, a probable recapitalization. I thought it had absolutely no relationship to a preferred stock which had regularly paid its dividends year in and year out. It was a speculation, to make my point clear, rather than an investment.

The Denver Stockyards has not defaulted on its bonds or on its preferred stock. I would not say that that is quite contrary to the usual experience of hundreds of industries in this country. I think it is one of many, many companies that have not defaulted on bonds or preferred stock. I would say that the majority of companies have not had to default. We are apt to get the impression because you and I get hit once in a while on a security that does default, we are apt to think everybody is doing it, but I believe statistics will show that there are more bond issues which did not default than those that did.

- 2165 In 1926 underlying railroad bonds of the highest grade were selling on about a $4\frac{1}{2}$ per cent basis. In 1930 the yield was around 5 per cent and today it is around 4 per cent. Of course the question of
- 2166 maturity enters in. Long term bonds have a greater fluctuation in yield than a short term bond. I would say that the yield, the trend on yield on the bonds has been downward decidedly from 1928 to

Trans.

this time. I would think that there is very little difference in the yield on preferred stocks in 1935 as compared with 1928. I think the yield on common stocks is approximately the same. You see, 1928 was a year prior to the culmination of the greatest bull market in the history of this country, and while common stocks as a class are paying lower dividends in dollars per share now than they
2167 were in 1928, I think the price is lower correspondingly and the yield on common stocks today I believe is not greatly different than it was in 1928. I am merely giving this from recollection and as a matter of opinion. I am not stating a fact.

Q. Surely, that is understood. Do you know whether any stockyards in the United States have defaulted in the past five years on their interest?

MR. BOSWORTH: Objected to as incompetent, irrelevant and immaterial as to whether they have or haven't, on any question here.

(Witness continuing). I would like to know what you mean by stockyards. Dr. Dozier showed that there were 88 stockyards in this country and I did not know there were so many, or even if, as Mr. Bosworth tells me, there were 83 I did not know there were so many. Therefore, if you take all of those in I cannot answer. I know only about 15 or 20 stockyards that I have always considered the stockyards of the United States. Of all these
2168 major stockyards, I know of no actual defaults. I know of two situations which would have defaulted had it not been for Swift & Co. and the General Stockyards Corporation who stepped in and prevented it.

There have been many defaults in the industrial line and public utilities of the country in the past five or ten years.

Trans.

I have stated that I know of no industry comparable with the stockyards by which you could use their securities as the basis for an opinion of the rate of return of the stockyards. I do not say that there is none but so far as I am concerned I know of none. You can call the figure, I suggest a judgment figure if you like, but I tried to make it clear that if you recognize the necessity of attracting capital to a business, you must find a rate of return which, as a matter of judgment, is necessary to cause that capital to flow to that business. It seems to me that the best index of what is necessary in this case is to endeavor to find out what stockyards securities for some years past have offered to the investor through yield or return. There have been manufacturing businesses that have been fully as stable as the stockyards industry during this time of depression and for the past ten years, such as the Bon Ami Company, in whose securities we have recently been interested. They are, however, the exceptions.

For many reasons the investor in the stockyards would not be satisfied with the same interest, the same rate of return, as he would receive on Government bonds. When you buy Government bonds you have the I. O. U. of the Government. You have no problems in management, you have no hazards except possibly the hazards that some day some nation will be big enough to come over—of course we will never see that happen, but we will agree that there are practically no hazards. When you go into any line of business you immediately have a lot of problems and a lot of troubles and a lot of situations you have to meet, and it is a very different matter than simply paying the obligations of the strongest country in the world.

Hazards of business must be considered.

The problems of management are all problems to be considered by the management that we secure

Trans.

by going into the open market and bidding for that management. That management is paid for out of the operating expenses of the company. Among the hazards of this business because of which the public insists upon receiving a larger return than they would receive from Government obligations are: weather, freight rates, fluctuating receipts and many things.

I stated that, "one of the hazards of the business is weather." It is easy to appreciate this fact in the light of events of the past few weeks. Floods in the territory tributary to the Denver market have washed out many miles of railroads, with the result that thousands of livestock, unquestionably bound for this market, had to be diverted elsewhere. I was referring to the floods around McCook, Nebraska, and other sections of Nebraska, or western Nebraska, and western Kansas where the railroads were washed out to such an extent that shipments were stopped to Denver and it was told to me several thousand head had to be diverted. I received this information from the management of the Company when I inquired about it, and in my opinion the conditions just referred to caused a permanent loss to the stockyards in that we permanently lost the revenue of those particular head of livestock. I don't claim that the stockyards has suffered a permanent loss because that business that is tributary to this market is going to come back when the facilities are reestablished.

Public
reaction.

I want to emphasize that as an investment banker I have to appreciate the way the public is going to regard these hazards. You and I, from our experience, may have specialized information on any situation, and you and I are not influenced by some of these things to the extent that the public is influenced. For example, when we had this sale

Trans.

in transit case before the Interstate Commerce Commission, we had many security holders that were very greatly frightened because the newspapers presented the matter as a life and death situation. We felt that it was a terribly serious situation, but not a life and death situation. Those newspaper articles disturbed the security holders and they came running into our office to make inquiries about it. Now, in testifying to these hazards, I have endeavored to testify as to what the investing public was afraid of in this business, and why they would not go into, invest their money in this industry unless they had an 8 per cent return, in my opinion.

That is, I have attempted to evaluate the fears of the public rather than my own conception of the hazards.

Whereupon Respondent's Exhibits 43, 44, 45 and 46 were offered and received in evidence.

Respondent's Exhibits 43 to 46 Admitted.

2176 MR. A. REINHARDT, witness for the respondent, after being sworn, testified as follows:

My name is A. Reinhardt, I am employed by The Denver Union Stock Yard Company as Secretary and Assistant Treasurer. I am in charge of the accounts. I was present when Mr. Bufkin testified. I remember Mr. Bufkin's testimony to the effect that accounts receivable were not included in the working capital allowance as made and recommended by him because the business conducted by the Stock Yard Company was practically a cash business. I have analyzed the accounts receivable of The Denver Union Stock Yard Company as of

Accounts receivable excluded from working capital.

2177 December 31, 1935 and they are, as shown by our tabulation, in the amount of \$23,271.40.

Government Exhibit 38, the first page, showing the balance sheet as of December 31, 1934, shows under the current asset column accounts receivable

Trans.

**Analysis of
Accounts
receivable**

in the amount of \$23,233.52. In other words, there is a difference of about \$40.00 between Mr. Bufkin's figures and mine.

My tabulation shows that the shortest period of time represented by any account shown there is ten days, and there are numerous items running 30 and 60 days. For instance the rent account of the Bureau of Animal Industry in the amount of \$554.81 was outstanding 240 days as of December 31, 1934.

The witness then presented a tabulation of the accounts receivable, made as of the date of the witness' testimony. Many of the items shown were read into the record, together with the lengths of time each had been outstanding.

2181 (Witness continuing). The total of all the items that are shown on this tabulation, which I will reduce to typewritten form and furnish to the Government, is \$23,271.40. Our accounts receivable at the end of the year are less than they are as an average for the year. The average accounts receivable on the basis of a monthly average for the year 1934 were approximately \$38,000.00, and in my opinion, the age of the average account of this monthly average of \$38,000.00 is about the same in makeup as that which I have read.

The condition as to the age of the accounts as revealed by my analysis as of December 31, 1934, is a fair representation of the age of the accounts at the closing period of the years 1930, 1931, 1932 and 1933. In other words, there would be approximately the same number of ten-day old accounts, same number of 30-day accounts, same number of 60-day accounts, etc., and in approximately the same amounts.

Trans.

The total of approximately all the \$38,000.00 of outstanding accounts to which I have testified represents the amount of cash necessary to carry the accounts receivable.

2182

Cross-examination

The reason why this bill of the Bureau of Animal Industry outstanding eight months has not been paid is, I believe, because of some voucher difficulty at the Washington office.

2183. MR. BOSWORTH: I would like to have it appear on the record that with the estimable credit of the United States Government, we are not exactly worried about the fact that the B.A.I. is 240 days back, but we are offering this evidence from the standpoint of showing that this company, contrary to what Mr. Bufkin testified, is not entirely on a cash receipts basis and has need in its working capital for the usual allowance for accounts receivable. I don't want it understood that we are kicking at the fact that the Government owes us several hundred dollars. We would like to have more credit of that sort.

(Witness continuing). This 240 days delinquency of the Government is probably unusual, but as a rule they are from 60 to 90 days behind. We have a lease with the Bureau of Animal Industry covering this rent.

Q. What actual outlay of cash was made by you in connection with this lease to the B.A.I. covering this eight months period in which they were delinquent?

A. Well, I could best answer that by stating that it is among the group of our accounts receivable, which total quite an item during the year.

Trans.

Q. Yes, sir, do you think that the rate payer when he pays his rates should pay for the delinquency of the Department of Agriculture?

A. I believe that the rate payer should pay a sufficient amount to provide a working capital.

Q. Now, specifically, should they pay for the delinquency of the Department?

A. Well, there will be some delinquency in all accounts and in all business.

MR. BOSWORTH: Now, Mr. Examiner, I would like to object to this line of questioning on the ground that it is incompetent, irrelevant and immaterial. The theory back of accounts receivable in working capital certainly does not mean that the delinquency of one who owes us a bill is charged against somebody else who doesn't owe us a bill, any more than a working capital allowance for a gas company or an electric light company. I, as a patron, may pay my bill and yet my rates must include a proper allowance to that electric light company to take care of the fact that maybe Mr. Reinhardt hasn't paid his bill.

In other words, this line of questioning is entirely beside the point of the question of working capital, which is all this witness was interrogated about.

MR. MILES: There is this difference between the Captain and myself. He is dealing with a theory and that theory is kicked to death by a fact, and I am trying to develop a fact, that is the only difference.

THE EXAMINER: Well, I think you can bring out the facts but I think it is a question of law after you get the facts as to whether the rate payer should pay or not.

Trans.

(Witness continuing). Leaving out of consideration our rental accounts it remains true that all of our business done at the stockyards is charged. It is not done on an actual cash basis or a 24-hour basis. I would say that it is a four or five day basis according to when the livestock is sold. It is true that with some of the people for whom we charge we expect to collect from them the next day after we render the bill.

Outside of the leases practically all of these bills are due when we present the bill. That follows in our business as well as in others.

2191 J. A. SHOEMAKER, a witness called by the Respondent, after being sworn, testified as follows:

My name is J. A. Shoemaker. I am President and General Manager of The Denver Union Stock Yard Company. I have been acting in that capacity since 1926. From January, 1913, to 1926, I was General Manager of the Company. I have been connected with the stockyards industry as such since 1907,—a period of twenty-eight years. I am also President of the General Stockyards Corporation. I was here when Mr. Pexton testified and heard his testimony, and I concur and agree there-
2192 with. His testimony, in the main, expresses the considered views of the management of The Denver Union Stock Yard Company.

Testimony of witness Pexton presents considered views of the management.

With reference to Mr. Wolf's testimony, he was asked if trader livestock could not stay in the pens indefinitely. There is no difference in the trader's livestock in this respect and the livestock of the grower, the feeder buyer or any other buyer. The yard trader receives practically the same services from the Stock Yard Company as that available or received by any other buyer on the market.

All livestock unlimited as to stay in pens.

Trans.

**Expansion
Plans.****Chute alleys
generally
used.**

At another point in the testimony there was introduced into evidence a plan concerning the erection of pens on the area north of Race Court. There was also testimony by Mr. Pexton concerning the removal of the hog facilities and the enlargement of sheep facilities. These, among other plans for extension and improvement of the yards, have been discussed informally with the Board and Executive Committee at different times during the past few years, as mentioned incidentally by Mr. Arthur Bosworth this morning. I heard Mr. Christensen's testimony. He recommended the disallowance as a stockyards facility of certain alleys which he designates as chute alleys, on the grounds that they are transportation facilities used in connection with and almost exclusively for the unloading of livestock. These chute alleys are so called because they are the alleys nearest the chutes. There are four of them running lengthwise of the yards, one on each side of the cattle division and one on each side of the hog and sheep division. While naturally these alleys are used for the movement of livestock to and from the unloading chutes, they are used, I would say, much more for miscellaneous operation of the stockyards. For example, the truck-in livestock is moved to some of these chute alleys to reach sales pens. Likewise, hogs, sheep, and cattle use these alleys from the stockyards to the packing houses, both those packing houses adjacent to the yard and at some distance. These alleys are frequently used for livestock going out into the country by truck and livestock moving from one end of the yard to another, or from one part of the yard to another. These alleys are used, in addition, in the distribution of hay and bedding and cleaning pens. I would consider them more generally used than any other alleys in the yards, though all alleys are naturally provided to get

Trans.

around blocks of pens, and no alleys are limited to any specific use and cannot be. Mr. Christensen attempts to classify the alleys as a specific use, calling some general alleys, and so forth, and as a part of that classification he had this classification of chute alleys. There is no such thing as a specific use for alleys in stockyard operation. The alleys are like streets in the city. They run between blocks in all directions and are used for all purposes of stockyard operation.

All alleys generally used.

In my opinion the Stock Yard Company does not have excess cattle facilities considering the peak seasons which cover the fall shipping season, that is, the four months of fall, September, October, November and December, during which time is received the peak of the business. For these four months our receipts of cattle and calves run from 50 to 60 per cent of our total receipts of cattle and calves for the year. During this time our facilities are unusually taxed to their capacity and frequently we would be glad to have more pens. It isn't simply a question of taking care of the receipts for one day, but there is always a carry-over from one day to another. Half of them will be carried over to the second day and a substantial part of this will still be in the yards the third day. I would say the receipts of cattle and calves arriving at the yards in one day will average two days in the yards. A great many of these cattle do not get into the sales pens until nearly noon and frequently by the time they are sorted up and taken care of, the market has closed and naturally a great many of these cattle are not out of first hands until the second day. Of course, the market has a lot to do with the time livestock will be here in the yards, whether it be an active or slow market. On an active market we will turn our receipts faster than when the market is slow and dragging.

No excess cattle facilities.

2195

Trans.

Hog facilities
inadequate.

2196 Now with respect to the hog and sheep division. During the fall of the year and in the case of hogs, 2196 more especially during the winter months, there is more or less congestion. I have seen days when we have had hogs all over the downstairs of both the hog division and the sheep division.

No excess
sheep
facilities.

In the case of sheep, in the fall of the year our sheep facilities are taxed to their capacity. We try to relieve the barn as much as possible by yarding through sheep in the cattle yards. In other words, our barn is not now sufficient in capacity to handle the entire receipts of sheep through the peak season. As a matter of fact 60 to 70 per cent of the earnings of the Stock Yard Company are made in four of the fall months, and if we did not have facilities to take care of these peak months, the best part of the year's earnings would disappear.

Q. Are you familiar with the area which the Government counsel and real estate witness have apparently picked as a stockyard location or comparable land —

MR. MILES: Objection, certainly most emphatically. There is not a scintilla of evidence in this record that we ever picked it as a stockyards, never.

MR. BOSWORTH: How about as comparable land, Mr. Miles?

MR. MILES: Never heard of it, Captain, completely in the dark about what you are talking about.

2197 MR. BOSWORTH: Is that officially on the record that you have no such intention when you talk about the sale and so forth of this area between 48th and 52nd and Race Court, and Steele Street?

Trans. 7

MR. MILES: Why, Captain, let me say this, I thought you were laboring under a delusion and I still think so, the question you propounded to the man was whether an area of so many acres, conservatively 70 and maximum of 130 of vacant ground could be found. Well, surely we could prove that it could be and we did but never had any intention of locating a stockyards there or any other stockyards.

MR. BOSWORTH: Well, for fear that the reviewing authority may be perhaps laboring under the same misapprehension that I am, I am going to hand Mr. Shoemaker a group of photographs and ask if he can identify those photographs.

A. Yes, sir.

MR. BOSWORTH: (Continuing). Will you have those marked as Respondent's Exhibit 47 and 47a to 1 inclusive? Now, Mr. Shoemaker, I am handing you a map which you have marked also as a Respondent's exhibit, I believe Respondent's Exhibit 48, and I will ask you whether or not the location where each of these photographs comprising Respondent's Exhibit 47a to 1 was taken, so the record may be clear; each photograph is numbered on the face of it consecutively 1 to 13, that is the numbers run from 1 to 13 consecutively. Mr. Shoemaker, the question which I asked was whether or not the location and direction from the location in which these pictures were taken is shown upon the map Respondent's Exhibit 48?

Respondent's
Exhibit 47,
47a to 1, and
48 identified.

2198 The witness then identified the photographs and the map, pointing out the dissimilarity of the land to the stockyards land. In view of the fact that the final report of the Secretary does not mention this land, the testimony is omitted.

Trans.

2200 In my opinion, the land included in the area bounded in red on the map, Respondent's Exhibit 48, is not comparable in any manner to the stockyards area involved in this case; of course, I am not speaking of the quality of the soil. The Platte River, insofar as the drainage and possibility of sewerage is concerned, is about half a mile from the nearest point. In my opinion, this land is not in any manner comparable to the stockyards tract. An area 75 to 110 acres could not be carved out of that tract which would be comparable to the stockyard tract without great expense.

R. B.
Trackage.

2203 Now, with reference to the agreement between the Stockyard Company and the various railroads covering the joint use of railroad tracks and fixing the value of that railroad trackage owned by the Company at \$8,772.00: This agreement, of course, was not reached in a day. It involved a considerable period of time to reach a basis which was satisfactory to all of the parties. The Stock Yard Company insisted on the valuation of this land on the basis of \$10,000.00 per acre, plus cost of railroad tracks and grading and interest at the rate of six per cent per annum on the total of this valuation, and an allowance for general taxes. It took many meetings and considerable correspondence to finally get the difference between the parties ironed out. The executives of the railroads and the stockyards reached an agreement whereby the railroads would pay six per cent interest on the value of the land at \$8,772 per acre, on the railroad tracks \$3.17 per foot, plus grading and filling, and in addition pay the Stock Yard Company an amount equal to the mill levy for general taxes on one-half of this total amount, and left it to the engineers of the various railroad companies to later report on the length of track, acres of land and value of filling and grading, which they did. In other words, the

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value per acre was fixed and agreed upon as raw land with the railroad executives and the amount of fill and other cost items were left to be fixed by the engineers.

From my experience in the management of the 2204 stockyards, I am of the opinion there is an advantage in the Stock Yard Company owning the tracks serving its facilities. Before we had the tracks on the river, we were very badly congested at times because of so many railroads wanting to use the few tracks we had. We have had more cars of livestock waiting to load or unload which could only use the Burlington tracks than there were trackage facilities to accommodate them. The same thing has happened with reference to the Union Pacific. It has frequently happened that at the time when we were lining up to load livestock out of the yards on the various lines, there was livestock coming in in numerous quantities on those lines. We could not unload Burlington livestock on the Union Pacific tracks, neither could we unload Union Pacific livestock on Burlington tracks. We could not unload Denver and Rio Grande livestock on Union Pacific tracks because that business was switched by the Burlington Railroad. We could not unload Santa Fe livestock or Colorado and Southern livestock, either one, at the Burlington chutes, but both of these had to be handled by the Colorado and Southern which had joint use of the Union Pacific tracks. So we had only one set of chutes, which are now those on the easterly side of the sheep and hog divisions, which were served by the tracks owned by the Stock Yard Company, and this track was nearly all the time overtaxed, especially during the busy season, it being the only track in the yards which could be used by all railroads. This situation was greatly relieved when we built the other tracks on the river side of the

**Advantages
of Company
ownership
of trackage.**

Trans.

yards, and I am sure that if we had control of the tracks that are owned by the Burlington and the Union Pacific our operating problems could be more simplified and even better service rendered more economically that it is now being done.

2206 The patron, and by patrons I include the producer, benefits from such ownership in the way I have described, in the saving of time of getting his livestock unloaded at the part of the yard where it can be unloaded with the least shrink, and likewise in getting cars placed for loading at the part of the yard where they can be loaded with the least delay.

Trackage and
chutes are
Stockyard
facilities.

In my opinion, the Stock Yard Company trackage, chutes, chute pens and chute alleys are used in handling of livestock in commerce. The tracks, as I have described, unquestionably those tracks, the chutes and chute pens are used for the handling of livestock in commerce. The chute pens are the pens into which the livestock is unloaded from cars and placed for loading into cars and are in the same relative location as the chute alleys elsewhere referred to, along both sides of the cattle yards and along both sides of the hog and sheep divisions.

It frequently happens during the busy seasons when our sheep runs are heavy that we take sheep directly from the scales and yard them in the chute pen of the river chutes or the U. P. chutes, of which there are 26, and sometimes in the Burlington chutes, what we call the Burlington chutes, if we believe the sheep are going to be ordered shipped out that day and are not required to go on feed again before being shipped out. This saves pens in the sheep barn which are needed for sheep that may not be going out, or at least any number of pens which this does release in the sheep barn are used as needed.

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2207 The same thing is true with reference to the cattle division. In the fall of the year there are many days when we can and do use these chute pens for yarding carloads off the scales, which we know are going to be shipped out that same day. This not only saves pens which may be needed for cattle or feed and water, but it also saves the Stock Yard Company time in yarding cattle from the scales. Ordinarily the first pens to be filled by cattle from the scales are those nearest the scales, so that the more cattle that are weighed the further they have to be driven from the scales to be penned. To save time the Stock Yard Company will put carloads of cattle into chute pens on either side of the yard if those chute pens are not immediately required in the process of loading and unloading.

Chutes often
used for
yarding off
scales.

Now with regard to another point which has been touched upon in testimony, that is, the question of manure disposal: We had some controversy with representatives of the Government and the Department of Agriculture concerning that matter; that controversy is shown by certain letters which have been made exhibits in this case.

Manure
disposal.

2208 Prior to the acquisition of the 30 acres of land from the Riverside Cemetery Association, which was purchased in December, 1916, the only place we had for dumping manure was a limited area along the river back of the packing houses, and the small area which we owned north of Franklin Street. Disposing of manure at that time was a serious problem. We used the manure dump to load it out and in effect gave manure away to people to get them to take it. We dumped it any place where we could find room because our space in which to dispose of manure was very limited, and we had to use every nook and corner of vacant land available. I remember, I think it was in the

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summer of 1916; the Post Mortem Division of the Bureau of Animal Industry was conducting a campaign to eradicate the fly nuisance around packing houses. About this time a Mr. Joss of the B.A.I. came to me and protested about our dumping manure close to the packing houses. He got rather tough about it and told us that we were liable to prosecution for doing that sort of thing, and I remember that I stated that I didn't understand that we were subject to the packing house inspection rules. Dr. Mohler's letter shows that the Department agreed with our position reluctantly.

But in any event to comply with their insistent demands, we tried burning it. The smoke from burning manure is not the most agreeable odor that you can imagine—it isn't any Coty's perfume—so that we had only gotten nicely started on this program when we began to receive protests from the east end of the city, particularly from the residential section nearest the yards. The city health authorities came out to see if we could not get some other way to dispose of manure. For a while we talked them out of it as it was the only way we knew how to handle the problem. Furthermore, after we got started burning this manure, we found the fire was not as easy to stop as it was to start, and we frequently had to call the fire department to get the fire under control.

2209 We managed to get along in a haphazard sort of a way until this time we bought 30 acres of land from the Riverside Cemetery Association adjoining our property on the north. We bought this land on an option for stockyard purposes, one of which was manure dumping. In any event, having purchased the land, our difficulties in this respect were solved. The Bureau approved the dumping of manure on this land, and since this time we have

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had no further complaints from the packing houses nor from the Bureau of Animal Industry. If we had not bought the land from the Riverside people we would have had to buy land from somewhere else or made some other arrangements for the disposal of manure, which would have been more expensive.

When we fully utilize this tract with structures, as we expect to do, we will have to buy more land whether we like it or not for manure disposal.

Now with reference to the effect of the so-called Social Security Act or the Social Security program upon the stockyards. I have been following that Act, though I have not been able to keep informed as to the various amendments proposed. The tax on each will be one per cent beginning in 1937, increasing one-half per cent every third year until it reaches three per cent after 1948. This will mean that the Stock Yard Company will have to pay on its payroll one per cent in 1936, two per cent in 1937 for unemployment insurance and one per cent for retirement annuities. In 1938 these taxes will total four per cent; in 1939 they will be four and one-half per cent the tax for retirement increasing one-half per cent every third year until it reaches three per cent after 1948, after which time the unemployment insurance will also be three per cent, or the two will total six per cent at that time.

Our annual payroll will run from \$150,000 to \$170,000. Of course, that is what it has been running in recent years, so that for 1936 the tax would be one per cent, or a minimum of about \$1,500; in 1937 it would be 3 per cent, or \$4,500; in 1938 it would be 4 per cent, or \$6,000 if our total payroll did not change and would reach a total of 6 per cent after 1948, which would be \$9,000.

Trans.

I mention this merely that the Secretary's attention may be called to the matter, for I appreciate that he will be in better position at this time to know the effect of this legislation than we do, not having the bills before us nor knowing of the various amendments that have been made to the bill.

Traders' strike.

2212 Now with reference to this so-called traders' strike, on September 15, 1931, we wrote a letter addressed to the Denver Livestock Exchange, commission firms, stockyard traders and others concerned; it was written as a result of an inquiry and hearing conducted by the Secretary of Agriculture during the month of February, 1930. This letter was sent to the yard traders and others advising yard traders in particular of that fact that certain half yardage charges, as they were called, had been assessed against them by the Secretary of Agriculture. This document is now marked as Respondent's Exhibit 49.

Respondent's Exhibits 47, 47a to 47l, 48 and 49, admitted.

Whereupon Respondent's Exhibits 47 and 47-a to 47-l, inclusive, Respondent's Exhibit 48 and Respondent's Exhibit 49, were offered in evidence and an objection thereto on the grounds of immateriality was overruled and the exhibits admitted into evidence.

Cross Examination.

I was present when Exhibits 47 and 47-a to 47-l were taken. In taking those photographs the camera was at an elevation of approximately 3½ feet above the ground. In my opinion, these photographs accurately reflect the conditions that they are supposed to show. I don't believe they could exaggerate very much.

Hog facilities in peak seasons.

2214 With reference to the removal of the hog and sheep pens and the installation of cattle pens north of Race Court: Our plans are rather indefinite at

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the present time. I do not know what they will be a little later because we make plans and sometimes modify them, but certainly we have plans for needed changes in the yards and those changes we feel are imminent, and what I mean by that is that they may not have to be done next week or next month or possibly this year, but we naturally recognize the necessity for further improvements in the hog and sheep facilities.

We have been discussing these matters at our meetings for quite a while, I would say more or less for the past five years.

Now with reference to the hog congestion during the winter months: It is true that up to date we have been able to take care of all the hogs that arrive at the yards during the peak season; of course, not in the manner in which we would like to do it always. As I say, we should have better facilities and more pens to take care of our hogs. When we get large runs we have to spread them out over into the sheep barn. While Mr. Christensen testified that those facilities for hogs and sheep might be used interchangeably, it is not entirely satisfactory to do that. We find that our sheep friends object to hogs being put into the sheep pens. Now, I do not know whether the sheep or the hogs have any objection or not. However, by using the sheep and hog facilities interchangeably during the peak season we get by, lots of times not satisfactorily though, and we naturally over a period of years keep in mind or try to have in mind the needs, the things that need be done, because after all we are there to serve the men that bring us our money and if we do not take care of their business satisfactorily, why we soon lose it; there are too many places they can go, they are not tied up or sewed up to The Denver Union Stock Yard or the Denver Livestock market.

Trans.

**Peak season
for sheep.**

We cannot use the cattle pens for yarding hogs but we do use the cattle pens somewhat for sheep, as I have described, the sheep that do come on to the market, that is we will say through shipments that are not offered for sale. We try to keep the barns free from that so we will have room to do the things we need to do for the market sheep. The peak season for cattle and sheep are the fall months; I would say it might be a month or two different, according to whether they started shipping early or late, but they run September, October, November and December. Peak, our peak shipments on sheep are usually August, September, October and November. Hogs are the winter months and by that I mean, November, December, January and February, more especially November, December and January.

It is of course possible to figure mathematically the capacity for cattle, sheep or hogs. We have something over a thousand cattle pens. They are not all carload pens, but assuming that we had a thousand carloads of cattle coming in here in one day, it would be possible to put a carload of cattle in each one of these pens. Of course, when we get the checker board full, there is no place to move
 2217 them, so we cannot do business with all of the pens full. The number of head which it would take to fill those cattle pens would differ with the season of the year. For instance, in the fall season you have younger cattle and you run more to the pens just as the number of cattle in the carload runs more to the car. In the case of sheep it is a good deal the same way. Assuming that we do not use the various facilities interchangeably, that is sheep facilities for hogs and hog facilities for sheep, but instead use cattle facilities only for cattle, hog facilities only for hogs and sheep facilities only for sheep, I would say that we could handle in our

Trans.

yards in one day approximately 5 or 6 hundred cars of cattle; if sheep, not over 150 cars, say rather 100 to 125 cars. We certainly could not handle as many hogs as we do now; I would say that about 100 cars per day would be about as many as we could take care of. The largest number of hogs that we have actually handled in a day is about 10,000 head, that is about a hundred cars. The hogs will run about 75 to the single deck. Of course, they will run more in the latter part of the shipping season than in the beginning.

In the case of sheep we have had 100,000 in the yards in one day. However, I want to make it clear that when we have had 100,000 sheep arrivals in one day that means that they have a lot more sheep in the yard than that, and that is true with reference to hogs and also with reference to cattle, so when we handle 100,000 sheep in a day there are more sheep in the yards than 100,000. They are put in the cattle yards from one end to the other. The largest number of cattle we have ever received or handled in a single day is 28,000.

Re-direct Examination

When I spoke of 100 cars of hogs I was speaking of single deck, around 75 to the car.

Whereupon the witness was excused.

2220 MR. L. M. PEXTON, a witness called by the Respondent, having previously been sworn, returned to the stand and testified as follows:

Re-cross Examination.

On cross-examination I was asked to determine the cost of grading certain railroad tracks owned by the Stock Yard Company. Our books show that we expended in 1915 \$6,273.00 for filling; in 1916, Cost of grading and filling.

2221 \$4,000 and in 1917, \$28,161. These were straight

Trans.

out of pocket expenditures specifically for filling. The majority of this amount was expended in the sheep barn district and along the river tracks.

2222 I was also asked to estimate the probable future receipts of the Company over a 5-year period from 1936 to 1940. I have spent the last several nights working on this problem and endeavoring to make some kind of an estimate for the years 1937, 1938 and 1939. We have already estimated our receipts for 1935 and 1936. Due to the many factors which influence livestock production and receipts at the Denver market, we find it practically impossible to make any estimates for the years 1937, 1938 and 1939 which would not be highly speculative and a mere guess. As is common knowledge, livestock production depends upon climatic conditions, amount of feed available, livestock prices, industrial conditions, Governmental regulations, forest reserve restrictions, public domain restrictions and other matters of a similar nature. For these reasons, we have found it impossible to make anything more than a mere guess which anyone familiar with livestock receipts at Denver could do.

(Witness excused).

**Respondent's
Exhibit 50
admitted.**

The tabulation of accounts receivable as of December 31, 1934, concerning which Mr. Reinhardt testified, was offered and received in evidence as Respondent's Exhibit 50.

MR. BOSWORTH: Mr. Examiner, early in this hearing as to certain features of the case, Respondent objected on the grounds that that matter or those matters had been decided by the statutory court of three judges in the prior hearing, known as The Denver Union Stock Yard Company against the United States of America, the Secretary of

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Agriculture, which case was reported in 57 Fed. (2nd), I think at page 745. I am not exactly sure of the page.

MR. MILES: Correct.

MR. BOSWORTH: Our objection was overruled by the Examiner. We would like to have it understood that insofar as the testimony of the Government is contrary to that decision, our going forward with evidence in answer to the Government's case is not a waiver of that objection. Of course, it follows that as a matter of law the Government has the right and Government counsel has the right to claim that that case is not binding or to take any other legal position they care to take with regard to that decision. I merely want it understood that that objection, whether good or not on our part, goes to such testimony and such evidence as donations, what might be termed land for expansion, railroad trackage and facilities, the stock show and stock show property, and other similar items which we feel have been decided by that prior case. As I stated before, I do not mean to foreclose in any manner the Government from taking the position from a legal standpoint that the case is not controlling. I believe the Government counsel has no objection to our objection applying to that line of testimony.

MR. MILES: That is correct. I will say, however, that by that position I do not mean to waive the right of the Government to stand on the legal proposition if such there be.

2226 MR. BOSWORTH: That is absolutely understood, of course.

MR. MILES: Yes, sir, and I wouldn't want your statement that it was understood that you should put this on to mean that there is stipulation that your position was correct.

Trans.

MR. BOSWORTH: Oh, absolutely not, Judge Miles. I am not seeking in any way to take any advantage or any unfair advantage.

MR. MILES: I know you are not, sir.

MR. BOSWORTH: No, I want you to be perfectly free to maintain your position and we to maintain ours.

MR. MILES: I appreciate that, sir.

MR. BOSWORTH: With that, Mr. Examiner, the Respondent rests.

Government's Rebuttal Testimony

MR. MILES: Mr. Examiner, during Mr. Dozier's testimony there was introduced Government Exhibit 53 entitled "The Direct Marketing of Hogs." It is publication No. 222. We agree to furnish copies to Respondent. The copies are now available to you.

MR. C. L. HARLAN, a witness called by the Government in rebuttal, after being sworn, testified as follows:

My name is C. L. Harlan. I reside in Washington, D. C. I am an employee of the Department
2227 of Agriculture and have been so employed for about thirteen years. I am now in the Bureau of Agricultural Economics and have been there thirteen years. My title is Principal Agricultural Statistician. I have charge of the livestock work of the Division of Crop and Livestock Estimates and also the Crop Reporting Board. I have been in charge of that work for about eleven years.

I have a university degree. I have taken special work in agricultural economics. I have operated a farm in Iowa for about nine years and a ranch

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in Wyoming for about three years, from 1910 to about 1913 or 1914 and since from about 1920 up to the present time.

I was requested to make a study of conditions prevailing in the livestock industry in and about the Denver territory. I began work on that study about two and one-half months ago. For my sources of information I rely largely on records available in our office in Washington. They are public records to the extent that they are available to people who wish them in most cases. To some extent, however, they are records furnished us by stockyard companies as being confidential and in that
2228 respect we do not give them to anybody except with the approval or consent of the stockyards involved.

In this work I was assisted by two clerks in the office.

I have prepared a statement which embodies my views based upon my study. That study is as follows:

2229 CATTLE AND CALVES

Practically all of the cattle and calves received at the Denver Stock Yards came from 5 States which ranked according to importance are Colorado, Wyoming, New Mexico, Texas and Nebraska. Of these 5 States, Denver is the natural market for the first three,—meaning by “natural” market one which is situated along the route by which livestock normally moves from areas of production to areas of consumption. The general direction of the normal movement for the whole area between the Missouri River and the Rocky Mountains is from west to east and from southwest to northeast. The receipts from Texas consist almost entirely of stock cattle going for grazing and largely passing through Denver and not offered for
2230 Sources of cattle supply at Denver.

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sale. Receipts from Nebraska tend to be moved against the normal current of traffic, but come to Denver because of the convenience of that market from the standpoint of distance for a few counties in the southwestern corner of the State. Receipts from Colorado and Wyoming, and to less extent, New Mexico, will tend to be influenced by changes in numbers in those States. Receipts from Texas and Nebraska are little related either to cattle numbers or total marketings from those States.

From 1900 to date (see table 1) the receipts of cattle and calves at Denver have tended to be an increasing percentage of the cattle on farms in the 3 States of Colorado, Wyoming and New Mexico. While there have been cyclical movements both in cattle numbers and in receipts at Denver, the average of these receipts over 5-year periods as a percentage of the same 5-year average of cattle numbers has increased. Total estimated cattle numbers in these three States on January 1, 1935, was about the same as on January 1, 1929, 1913 and 1904. January 1, 1929, was the low point of a cycle of numbers but 1913 and 1904 were intermediate points; 1935 was probably a low point. Cattle numbers during the next five years in these States will tend to increase but the increase will probably not be as marked as in the 5 years, 1929 to 1934, which it was about 28 per cent, although in 1934 numbers were materially below 1918 (about 16 per cent). It is to be expected that 2231 the marketings of cattle and calves from these 3 States during the 5 years, 1936 to 1940, will total more than for the 5 years, 1929 to 1933, but will be considerably smaller than they would have been if the sharp decrease in numbers had not taken place in 1934.

Since Colorado is the principal source of supply of cattle and calves at Denver, a more detailed con-

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sideration of the relationship of numbers, total marketings and marketings at Denver may be desirable. Table 2 shows this information for two 5 year periods (1924 to 1928) and 1929 to 1933 and for 1934 and 1935. The number of cattle in Colorado January 1, 1934, was the largest for the period and on January 1, 1935, had declined to about the number in 1930, but larger than in 1926, 1927, 1928 or 1929. The average yearly marketings during the first five year period, both total and at Denver, were larger than for the second period. The percentages that Denver receipts of cattle and calves were of total marketings fluctuated from year to year, but for the two periods, were about the same. Yearly marketings during the second period were a considerably smaller percentage of the average number of cattle on farms January 1 than during the first period. This is accounted for in part by the fact that the second period was one in which numbers were increasing and the first period one when numbers were decreasing; also by the fact that the number of cattle grain finished for market was smaller in the second period than in the first.

2232 The relationship between the number of cattle on feed in Colorado and receipts during the first six months of the year are shown in Table 3. Cattle numbers in Colorado may be expected to increase during the next five years, 1935 to 1939. Marketings at the beginning of this period (1935 and 1936) may be small as restocking takes place, but for the period as a whole, there seems no reason to expect them to average smaller than for the five years, 1929 to 1933. If the volume of cattle feeding in Colorado tends to increase from the comparatively low volume of recent years (1931 to 1934), marketings may average higher than during the five years 1929 to 1933. Whether such

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increase occurs or not will depend largely upon feed conditions in Northern Colorado, and grain production in the State and somewhat on financial conditions. At the present time, conditions point to a considerable increase in cattle feeding in 1936.

If feed conditions in Colorado and the Northern Great Plains areas are favorable during the next few years, there is likely to be a rather heavy movement of stock cattle into the sections where cattle numbers were greatly reduced in 1934 as a result of the drouth and the relief programs. In the past many of such cattle have come from Texas through the Denver Stockyards and a rather heavy Spring movement of Texas cattle through Denver in 1936 and 1937, such as occurred from 1928 to 1930, might be expected.

HOGS**Sources of
hogs at
Denver.**

Receipts of hogs at the Denver Stockyards have tended to increase rather steadily during the 15 years from 1920 to 1934. The principal States furnishing supplies have been Colorado and Nebraska, with nearly all the balance coming from Wyoming and Kansas. While cyclical changes in hog numbers and hog production in Colorado have been reflected in changing numbers of hogs arriving at Denver from Colorado, these cyclical changes in numbers either in Colorado or in the four States have not apparently greatly affected the total supply at Denver.

Supplies from Nebraska and Kansas have tended to increase rather sharply both in numbers and in proportion of the total during the past few years, Table 4. This doubtless reflects the growing use of truck transportation in the marketing of hogs which has made it more convenient for hog pro-

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ducers in the western parts of these States to ship to the Denver market; also the competitive advantage of the Denver market over the Missouri River markets because of the demand for hogs in California.

Table 5 shows the disposition of hogs received at Denver for the years 1920 to 1934. The decrease in the proportion of the hog supply that was locally slaughtered and the increase in both number and proportion of hogs shipped are marked. Practically all of the hogs shipped go to California packers.

2234 Tables 6 and 7 show figures for Colorado and Nebraska for the years 1924 to 1935, of hogs on farms, total marketings, marketings at Denver and the percentage that Denver marketings are of the total. These tables show that the proportion of total hogs marketed from Colorado that have gone to Denver has tended to decrease in the last seven years, and especially in the last four years. On the other hand, the Denver percentage of the Nebraska total has tended to increase. The decrease in the Denver proportion of the Colorado total has been due to the increasing movement of Colorado hogs to California through Ogden and North Salt Lake City. The causes of the increasing proportion of the Nebraska total have already been given.

Hog numbers have been drastically reduced over the entire country and especially so in the States that furnish supplies to the Denver market and undoubtedly this will result in a sharp reduction in hog receipts at Denver for the balance of 1935 and for the greater part of 1936. Even if feed crop production in the Denver hog territory should be greatly increased this year and should be normal or better in 1936, it is probable that hog production in this area will expand somewhat slower

Reduction in
hog supply.

Trans.

than in the main Corn Belt. Hence to the extent that Denver hog receipts depend upon production in this area, it hardly seems likely that yearly receipts during the five years 1936 to 1940 will average as large as during the years 1929 to 1933. To some extent, however, a further expansion in the area resulting from the California competitive demand might offset the smaller supplies in the present area. It is perhaps significant that for the first four months of 1935 the receipts of Nebraska hogs at Denver have decreased much less compared with the same months in 1934 than have receipts from Nebraska at the Missouri River markets.

SHEEP

Sources of
sheep at
Denver.

2235 The supply of sheep at the Denver Stockyards comes from a much larger area than do supplies of either cattle or hogs. This situation arises from the fact that a large part of the lambs raised in the Intermountain and Pacific States move east for slaughter, while few cattle and no hogs from these States go east. The Denver sheep supply comes largely from eight western sheep states, which in the order of their importance are, Colorado, Idaho, Wyoming, New Mexico, Utah, Oregon, California and Texas (based on five years, 1929-1933 average). Table 8. There is a considerable variation among these States in the period of years when sheep from them are received at Denver.

The Colorado receipts are fairly equally divided between the first and second six months of the year. The supply during the first six months is almost entirely fed lambs and depends to a considerable extent upon the number of lambs that are fed in Colorado, especially the number in Northern Colorado. The relationship between Denver receipts of Colorado sheep and the number of lambs

Trans.

on feed in Colorado is shown in table 9. Receipts from Colorado in the second half of the year are largely of range lambs and sheep, many of them going through to Northern Colorado and Nebraska feedlots. Receipts from California are almost entirely in the first half of the year. Some fed lambs are received during the first half of the year from Idaho and Wyoming but most of the receipts from States other than California and Colorado are of range lambs in the second half of the year. Table 10 shows the distribution of total receipts of sheep at Denver by months from 1929 to 1934. For the five years, 1929 to 1933, the percentage distribution was 35 per cent in the first six months and 65 per cent in the second. These percentages indicate in a general way the extent to which Denver receipts depend upon feeding activities and upon range production and marketings.

2236 Table 11 shows the estimated number of stock sheep and breeding ewes on farms in the eight western sheep States in the Denver market area, the estimated lamb crop, the percentage lamb crop, the marketings at Denver and the total at ten markets for these States for the years 1924 to 1934. These totals at ten markets are not comparable over the whole period, since they do not include Salt Lake City, Los Angeles or San Francisco in 1924, Los Angeles and San Francisco in 1925, or San Francisco in 1926. Hence the proportion of the Denver marketings to the total in these years is exaggerated. Beginning with 1927 there was an upward trend in the Denver percentage of the total, especially marked from 1932 to 1934. The reason for this increase in last three years is probably to be found in the advantageous position occupied by the Denver market as against the markets to the eastward, with respect to transportation privileges.

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It is to be noted with regard to this table 11 that the receipts at ten markets or at all markets are not dependable indications of total marketings, either by States or for the eight western sheep States as a whole. There is a very large movement of feeder lambs from some of these States that never show up at any market as originating from these States, but are credited to the States where fed. There is also a large element of duplication between markets. For example, the total reported receipts of California sheep at these ten markets is grossly exaggerated due to the fact that many of the same lambs are counted two or three times. In 1934 the reported receipts from California at eight of these markets (excluding Los Angeles and San Francisco from the ten) had a total of 764,000 head from California, which is 50 per cent larger than the number of sheep shipped out of the State according to railroad billings.

2238 The number of stock sheep and breeding ewes on January 1 in these 8 States increased markedly from 1924 to 1931, changed little from 1932 to 1934, but declined in 1935. The number of breeding ewes on January 1, 1935, of 18,446,000 was about the same as in 1930, below the 5-year average, 1929 to 1933, but much above the 5-year average, 1924 to 1928. The lamb crop in these States, however, is not entirely determined by the number of breeding ewes, since the number of lambs docked per 100 ewes (the percentage lamb crop) is also a factor of importance. The variation in this percentage for the years 1924 to 1934 is shown in table 11. It will be noted that this percentage lamb crop has tended downward since about 1928. This has been a result partly of the low prices of lambs and wool and the difficult financial situation of many producers since 1930; partly because of the increasing proportion of Texas

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ewes in the total since the lamb crop in that State is always relatively low; partly to a succession of years of sub-normal rainfall and resulting poor range and feed conditions; partly to the increasing proportion of old ewes in flocks. The variation from year to year around the trend has been caused largely by weather conditions during lambing and during the preceding winter.

The 1935 lamb crop in these 8 States will doubtless be smaller than the 1934 crop and below the 1929-1933 average. This smaller crop will result from a reduced number of ewes as there is little likelihood of the percentage lamb crop exceeding that of 1934 enough to offset the decrease in ewes.

2239 If feed conditions continue to improve in 1935, and if, during the next few years, range conditions should be fairly similar to those between 1924 and 1928, there is every reason to expect the percentage of lamb crop during the five years, 1936 to 1940, to average higher than from 1929 to 1933. Under such feed conditions, there will also be a tendency to increase breeding ewes so that the average lamb crop over the next 5 years, 1935 to 1939, would be larger than during the past 5 years, in spite of a small crop in 1935.

To the extent that probabilities favor a series of feed years from 1935 to 1939 better than from 1929 to 1934, the average number of lambs raised in these 8 States in the latter period can be expected to be as large as or larger than in the earlier. Changes in the size of the lamb crop will tend to affect Denver receipts during the second half of the year. Changes in the first half of the year will depend largely upon the number of lambs fed in Colorado and nearby areas. There is no reason to believe that this number will average smaller

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during the next 5 years than during the last five, and if feed production is more normal than during the past five years, it may average higher.

The preponderance of evidence as to business and industrial conditions during the next five years is that they will average higher than during the last five. This will result in lamb and wool prices higher on the average from 1936 to 1940 than from 1930 to 1934. Higher prices and an improved financial situation will bring better care of flocks and tend to raise the percentage lamb crop.

2240 A large part of the old ewes in these States were eliminated from flocks in 1934 through the drouth relief purchases so that at the present time the average age of ewes in these States is probably smaller than for some years. This also should tend to increase the percentage lamb crop.

Hence it is concluded that lamb supplies in the 8 States that furnish practically all of the Denver receipts will be smaller in 1935 than in 1934, and below the 5 years, 1929 to 1933, average. For the 5 years, 1936 to 1940, however, there is little reason to believe that the average will be below the 1929 to 1933 average and it may be above.

The witness then presented for the record, fifteen separate tabulations showing respectively numbers of the different species on farms, numbers marketed, etc. No objection predicated on these tables is relied upon. Hence they are omitted from the abstract, but it is stipulated and agreed between the parties that either party may refer to these tables in oral argument and briefs should it become necessary, such tables being on file in the office of the clerk of this court.

2254- That completes my testimony. I have nothing
A further to say with regard to this situation.

Trans.

I have been furnished with a copy of Mr. Pex-
ton's testimony and have gone over that testi-
mony and am prepared to make some comments with
regard to certain parts thereof.

At the bottom of page 1508 it states that "These
trends, we believe, are the cause of the decrease
in Denver cattle receipts during the past five years
in the face of an increased supply. Colorado ship-
ments to the Denver market have decreased from
438,000 head in 1929 to 299,000 head in 1933, a de-
crease at Denver of 139,000 head, or 32 per cent in
the face of an increased supply." This statement
seems to give the impression that the receipts of
cattle at Denver during the past five years were
due to the fact that cattle from Colorado were
going elsewhere rather than to Denver. As a mat-
ter of fact total marketings from Colorado have al-
so decreased and receipts at other markets, at mar-
kets other than Denver have decreased to a great-
er extent than receipts of Colorado cattle at Den-
ver. The reason of this decrease in Colorado cat-
tle marketings, and this applies to marketings from
these other States, has been the fact that over this
period of 5 years from 1928 to 1933 cattle numbers
were increasing quite rapidly in these States and
this increase was due to the fact that marketings
were low. That is, cattle instead of being marketed
were being held back on ranches to increase num-
bers until numbers reached a very high point at
the beginning of 1934 and then, as a result of heavy
commercial movement and the Government pur-
chases in 1934, practically all of this increase that
had taken place between 1928 and 1934 was wiped
out in one year and cattle numbers on January 1,
1935, were back to about what they were at the
beginning of 1928 or 1929.

Government
purchases
of cattle
wiped out 5
year excess
in one year.

Trans.

On page 1512 at the top of the page and following the question "Q. Mr. Pexton, in your opinion, what are the prospects for marketable livestock during the next five years at Denver?" "A. In my
2256 opinion the prospects are that the average supply of livestock coming to the market will be greatly reduced." (Continuing)—to the extent that that judgment is based upon the number of livestock in the area from which Denver draws its supplies, I do not think that it represents what the situation will be over the next 5 years except possibly in the case of hogs.

I think that the production of lambs during the next 5 years in the 8 States from which Denver draws its supplies is apt to be just as large on the average as it was during the preceding 5 years and I think that marketings of cattle from these states may also be as large as the average of the past 5 years or even larger. That is leaving out 1934.

On page 1514 down about the middle of the page, this is referring to the Government cattle purchase program, it has the number of producers who sold cattle to the Government in total 696,679. I might state now this is not particularly material except that those figures that have been issued by the cattle buying office do not represent farms selling. There is a mixture of farm selling and total sales, that is, a great many producers sold more than one time, and in tabulating these figures in some of the States they included all of the sales and in other States they included the farm selling, so this does not represent the actual number of farms that sold.

2257 And then at the bottom of the page, page 1514, it says, the second column says, a total of 25,253,425 cattle owned by these producers. (Continuing). Now, that is a figure that does not re-

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present the number of cattle that were on farms that were sold. When these sales were made each person selling gave an inventory of the cattle remaining on their farms, but in a great many cases these inventories were furnished after each sale so that for the same farm or ranch there might have been two or three or four different inventories included, which tended to exaggerate the number that were on these farms that sold. At the present time my office in Washington is tabulating all of these inventory records from these cattle sales in which we are trying to eliminate this element of duplication by taking only one inventory for the same farm or ranch that sold a number of times, and it is going to show a substantially smaller number of cattle on these farms and ranches that sold than these figures that have been currently published now.

On page 1520 it states at the paragraph at the bottom of the page: "The Government estimates that 80% of its purchases in the west were female cattle. It purchased in Colorado 289,000 cattle. 80% of this number is 231,000. Therefore, the number of female producing cattle on hand in Colorado on January 1, 1935, may be considered as being 951,000 less 231,000, or 720,000 head." (Continuing). Now, that statement of 80% of purchases being female cattle is used here and applied to the total purchases of cattle and calves. Now, from our tabulations to date about 23% of the total purchases of cattle and calves were calves, so that the total purchases of cattle one year and over would only run about 75 per cent. As a matter of fact

2258 I have the exact figures for Colorado, which show that the total purchases of cattle were 289,000. Of these purchases 61,000 were calves, which leaves cattle one year old and over of 228,000. Of the cattle one year and over, 186,000 were cattle two

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years old and over, leaving about 42,000 as yearlings. We have not yet made a segregation of these purchases of Colorado cattle by sex and age, but we have in a number of States and on the basis of the percentages of cattle two years old and over in these other States that were cows and heifers, I would figure that the number of cows and heifers two years old and over bought in Colorado would run between 175,000 and 180,000 head. Of course, that being the case, then, the computations following in the other page in which it was figured that there was a decrease of 231,000 head of cows in Colorado

2259 would necessarily be erroneous. These figures that I have just given you as to the purchases from Colorado are obtained from the auditor's office of the A. A. A. here in Denver, and those are taken from the vouchers which showed the kind—the ages of the cattle purchased, so presumably they are correct to the extent that the vouchers themselves are correct. The figures making a separation between two-year-olds, yearlings and calves are now available for Denver. This other separation that we have been trying to make in Washington, I am not sure for Colorado whether we will show this separation as between cows, steers, and bulls. We have done that for a number of States, but we may in these remaining States take a sample out of each State, say, a number of counties in different sections of the State and find out what that separation was in that sample. I might say, though, that for the States that we have already tabulated, those percentages run quite close.

On page 1521, at the top, it states: "On February 15, 1934, the Government estimated the Colorado cattle population as of January 1, 1934, to be 1,650,000 head. A year later they apparently found this to be wrong and raised the estimate as of that date to 1,713,000, an increase of 63,000, which, in a

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measure, explains the difference in our figures." I might say in regard to that that the estimates that we put out for the current year are tentative estimates always subject to revision in the following year, and that in the case of Colorado the reason for that revision was very largely the records that we obtained from the State showing the number of cattle returned to taxation, that is, we usually revised our estimates of numbers, January 1, in line with the change shown by the number returned for taxation. Of course, our estimates are much above the numbers returned for taxation, but we find that the changes, the relative change in the number returned for taxation, is one of the best guides that we have for the change in the total.

Another point with regard to these cattle purchases in Colorado as affecting the probable receipts of cattle at Denver from Colorado is that the big part of these purchases in Colorado were made in the southeastern and eastern parts of the State, areas that normally do not ship cattle to the Denver market. That especially applies to the southeastern part of the State. I have here a table made up from the records of purchases which show by counties the number of head purchased in the different counties with sub-totals, showing the number by Crop Reporting Districts. Now, in District 9, which includes the southeastern part of the State, the total was 113,670 head out of a total of 289,000 for the State. District 6, which is the east central part of the State, the total was 89,207 head, the total in these two Districts being 195,877 head out of a total of 289,499 head. In the areas in the State which normally ship to Denver, the Government purchases were relatively much smaller than in this other area, and in a good many cases apparently they represented a selling of cattle to the Government that normally would have

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come to market except for the fact that the Government price was higher than the market price at that time and were not strictly drouth relief cattle. I can furnish you with this table. This table was prepared by Mr. Beier, who is a regional livestock statistician for our division and is also assistant to Mr. Petrie in the Denver Cattle and Sheep Buying Office. This was made up from the records in the auditor's office in Denver. I believe this to be correct.

Q. I would like to offer this, and it is a question of convenience whether we would have this copied into the record or have others made up for you.

MR. BOSWORTH: It doesn't make any difference to me.

MR. MILES: (Continuing) Well, then, I suggest that you read this into the record.

2262

COLORADO

Dist.

1

Counties	Total Cattle Purchased.
Chaffee	2,260
Clear Creek	.....
Eagle	1,141
Gilpin	.....
Grand	358
Gunnison	1,831
Jackson	3,327
Lake	.....
Moffat	6,154
Park	1,006
Pitkin	199
Rio Blanco	2,330
Routt	2,627
Summit	30
Teller	1,141
17	22,404

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810

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Dist.

2

Boulder	451
Jefferson	179
Larimer	915
Logan	2,417
Morgan	5,183
Sedgwick	560
Weld	6,366

22

16,071

2263

6

Adams	3,311
Arapahoe	3,311
Cheyenne	9,962
Denver	-----
Douglas	2,707
Elbert	9,362
El Paso	10,640
Kiowa	8,327
Kit Carson	13,622
Lincoln	11,284
Phillips	515
Washington	9,375
Yuma	6,791

23

89,207

7

Archuleta	1,597
Delta	5,476
Dolores	1,248
Garfield	4,273
Hinsdale	125
La Plata	6,605
Mesa	5,247
Montezuma	4,312
Montrose	3,564
Ouray	768

San Juan

San Miguel

654

12

33,869

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8

Alamosa	2,336
Conejos	2,736
Costilla	609
Mineral	179
Rio Grande	2,495
Saguache	5,930
<u>6</u>	<u>14,285</u>

9

Baca	19,756
Bent	14,024
Custer	2,953
Crowley	5,510
Fremont	4,058
Huerfano	6,767
Las Animas	22,176
Otero	11,861
Prowers	15,873
Pueblo	10,685
<u>17</u>	<u>113,670</u>
State	100
	289,499

2265 On page 1524, it states: "The Government Program is against expansion in several ways. Live-stock production in the west depends to a great extent on range conditions and the numbers allowed by the Government on forest reserves and the public domain. Forest reserves have been dry along with the rest of the country and any change will be a reduction in numbers allowed to graze, rather than an increase. The public domain heretofore has not been under Government regulation and has been seriously over-grazed. It is now being regulated under the Taylor Bill. We may expect a curtailment of the numbers allowed on these lands under regulation intended to restore good grazing conditions compared to the old basis of everyone grazing when and where they wished." I do not agree with that as far as it applies to the Taylor Grazing Bill providing for the establishment of grazing districts or leasing of the public domain. My judg-

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ment is that the control of the public domain under the Taylor Act will make possible an increased production of livestock rather than a decreased production in that where land is leased to adjoining holders, it will make possible the development of water, and fencing of the range, the dividing of the range into pastures which will tend to increase the carrying capacity above what it is at the present time, so that I think that over the period of the next five years, that this range regulation, as far as the Taylor Act is concerned, will probably tend to an increase rather than a decrease in production, especially in the matter of cattle.

2266 On page 1526 it says: "By the same method of calculation as employed before, prospective decreases from New Mexico, Texas and Wyoming to the Denver market figure as follows:" I think that that, of course, is subject to the same error that was involved in the Denver computation or the Colorado computation, since it is based on the same method and the same assumption as to number of female cattle.

On page 1532 it states: "It might be argued that even with a shortage, Colorado feed lots could secure a normal supply by paying sufficiently high prices, however, lamb feeding has not been profitable in Colorado over a period of several years and, unless prices are attractive, Colorado feeders will not purchase and take the risk of incurring losses. In other words, the purchases of Colorado feeders would be materially higher if feeder lambs were only 5 cents per pound than if they were 8 or 10 cents, as they are likely to be with a shortage of supply."

That is apparently forecasting a price of 8 or 10 cents a pound for feeder lambs to go into Colorado this year, which I think is much too high an esti-

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mated price. As a matter of fact, lambs have already been contracted to go into Colorado at 6 cents per pound, and there is apparently no great effort to contract lambs at the present time at a price above 6 cents a pound. The trend of lamb prices during the last half of the year is very largely determined by the prevailing level of prices during July and August, and there is nothing in the present price of lambs that would seem to forecast feeding lambs at anything like 8 or 10 cents a pound this year.

2267 There is one other reference made to these Government cattle on page 1800. It states: "For example, an actual count was made at San Francisco to which point we shipped several hundred cars of cattle. As I recall, the actual count there showed 85 per cent females."

The shipments of cattle from Colorado to California practically included no calves, so that all of the cattle that went to California were cattle one year old and over, so that that proportion couldn't apply to the total Government purchases, but I have no doubt that of the total that that was possibly a fair sample of the cows that were in the shipments that went from here to California.

I think that is all.

Cross-examination.

With reference to my comment on Mr. Pexton's testimony which appears at page 1800 of the record, I stated that that total could not apply to the total Government purchases because the cattle out there, that were sent out to California, were one year and older. I stated that the reason it didn't apply and couldn't apply to the total was because there were calves in that total.

Trans.

Q. Well, now, do you know what percentage of these cattle were female? As I understood your testimony, the Government kept no track of that total?

2268 A. No, but this states that 85 per cent of these particular shipments to California were cows.

Q. Yes.

A. Giving the implication that 85 per cent of the total Government purchases were cows, which is the figure of 80 per cent that is used in computing the reduction in the number of cows in Colorado. That is, I think this 85 per cent here is simply supporting this other figure of 80 per cent used in reaching the number of cows purchased in Colorado.

Q. Well, coming to the figure of the number of cows purchased in Colorado, I understand the Government made no check whatever of the female or the heifer calves?

No check on number of cows and heifers purchased by Govt.

A. No.

Q. So that you do not know and your Department does not know what percentage of female calves there were purchased?

A. No, sir.

(Witness continuing). The Government did, however, keep track of the sex of the yearlings it purchased. However, the Denver figures showing the sex of cattle bought from Colorado are not available; that is, showing this separation of two-year-olds and yearlings into sex groups.

I stated that of the 289,000 cattle purchased in Colorado, 228,000 were one year and older, and of that 228,000, 186,000 were two years old and older,

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2269 and that based on percentages in other States, you would say that between 175,000 and 180,000 were cows. In other words, my estimate is not made from figures available with reference to Denver but upon the percentage as our Department worked it out in other States.

Now, as to the yearlings, the percentage of females and yearlings in other States was about the same as it was in two-year-olds. With regard to calves, nobody knows what the distribution was as between male and female. My opinion is that in a great many cases that the number was about fifty-fifty male and female; that is, the States like North Dakota, Minnesota, most of South Dakota, and Wisconsin, where a large part of the cattle bought were from small farm herds and largely dairy herds, that they sold all the calves that they had and the normal distribution would be fifty-fifty as between males and females. I have nothing on which to base a judgment as to what that separation would be in the beef cattle areas, as to whether there would be more tendency to sell the heifer calves than steer calves.

As far as my own sales and my own ranch is concerned, we sold no calves except perhaps five or six head, and they were culls, that is, the calves who could not be weaned from the cows at the time the cows were sold. But my observation does not go to all the Wyoming, Colorado and New Mexico area as to the percentage of heifer calves and I would not care to express an opinion upon it.

We have no information in our Department nor have I gained any information from my observation that would lead me to believe that in the beef area the percentage was different than that indicated for one-year-olds and over. My own judgment would be that in the calves bought there would

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be a larger proportion of males than there would be in the yearlings and two-year-olds, because a great many ranches tend to sell all of their calves and keep their breeding heifers and cows, so where all the calves were sold, they would tend to run fifty-fifty males and females. That from my experience is about the normal proportion between males and females in a producing herd.

When a heifer calf comes into production depends something upon the range practice that is followed and that differs somewhat in different States. In Texas, for example, where all the cattle are run under fence and in pastures, the general practice is not to breed their heifers until they are coming two-year-olds because they can control the breeding. In areas where the cattle run on the open range or on the forest, and the herd all runs together, why a considerable proportion of the heifers will have calves as two-year-olds, so that you can't make a general statement.

As a rule, before an animal produces a calf it must be what is known as a long yearling or a two-year-old, and in some places they are practically three-year-olds before they start producing calves, so that a heifer calf produced, say, in 1935, would not normally start producing calves until pretty nearly 1937 at the earliest, and naturally when the female has been slaughtered, it is not going to produce any calves.

Leaving out the possibility of importing cattle from other areas it necessarily follows that due to the Government slaughter which, as I have indicated from percentages in other States, runs around 90 or 94% on two-year-olds, it is going to take some one year to two years to make up that decrease.

Trans.

2273 Of course, you always have considerable marketing of calves from these States, which includes heifer calves, so that it is a question then of how many more were taken out of the herds in these States as a result of the drouth, by Government purchases last year than would normally have been taken out.

Large slaughter of female animals.

2274 We have records furnished by slaughterers all over the country reporting monthly showing the distribution of their slaughter as among cows and heifers, steers and bulls and on the basis of those percentages reported the Department makes an estimate of the distribution of Federally inspected slaughter each month as among cows and heifers, steers and bulls, and calf slaughter is reported separately, and I admit that there was an unusual and a very large slaughter of female animals due to the Government's program during the year 1934.

Decreased marketings due to low price.

(Witness continuing). As I stated, the average number of cattle on farms on January 1, 1935, in these three States of Colorado, Wyoming and New Mexico, is practically the same as it was in 1928, so that during the period from 1928 to 1933 marketings of cattle from these three States were relatively small, due to the fact that cattle numbers were increasing rapidly. A part of that big increase in cattle numbers during that period was due to the fact that prices of cows were so low that they would hardly pay their freight to market and cows that normally would have been marketed during this period were not marketed for that reason, so that marketings during this five-year period were relatively low and numbers increased rather rapidly during the coming five-year period. I can see no reason why your marketings over the five-year period won't average as large or larger than they were during this other five-year period unless we should run into the same situation that we have in

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the last two or three years where cows won't pay their marketing cost and will be held back on ranches and farms and go to increase numbers. What happened was that there was this big accumulation of these cattle back on these ranches because of the price situation, and then the drought came along in 1934 and the Government purchases and the regular slaughter practically wiped out all of this accumulation in one year. There is no experience in any other years that would show that same shift from the peak of the cattle cycle as we were at the beginning of 1934 down almost to the bottom of the cycle as we were at the beginning of 1935. If it had not been for the drought and the Government purchases undoubtedly cattle marketings during the period of 1934 to 1939 and 1940 would have been much larger than they were during the period from 1928 to 1933.

The cattle numbers in these states had reached the point where it would have been impossible for them to increase them by simply holding them off the market.

I am not making any estimate as to the number of cattle that may come to Denver during this period because there are a great many things that can happen that will change the proportion of cattle going to one market or to another. All I am trying to do is to reach a conclusion as to about what the production of cattle will be in this area from which Denver draws its supply but not expressing any opinion as to what proportion of that supply may go to Denver.

I will admit that my estimates may be thrown completely out of line by, for instance, weather, prices or feeding conditions, including the cost of feed, by range conditions and by financial and economic conditions. However, based on the law

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of averages and the trend of weather conditions in these range States over periods of years. I would rather favor an opinion that range and feed conditions will be much better during the next five years than they have during the past five years.

In "Miscellaneous Bulletin 215" it is stated: "Of the total number of cattle to be finally slaughtered probably 80% will be cows and heifers." That
 2280 does not apply to calves. It states above "Of the cattle and calves purchased by the Government and shipped by the end of October, about 23% were calves."

I feel that the 80% figure as used there did not relate to cattle and calves,—solely to cattle. I
 2281 think that probably of the number of cattle one year old and over that were bought by the Government, more than 80% of them were cows and heifers.

Now with reference to calling Denver a natural market. It is true that there is the Pueblo gateway, 120 miles to the south, and the Cheyenne gateway, 110 miles to the north and both are on main lines to the Missouri River and that there has been at Pueblo a feed lot almost as long as there has been a feed yard, that is, pen area, at Denver. I called Denver a natural market in that it is located between the area where this livestock is produced and the area in which it is consumed, that is, the natural movement of cattle and sheep raised between the Rocky Mountains or in the Rocky Mountain area and eastward is from west to east or from southwest to northeast, so that this market is in the natural direction in which that livestock is moving to market from Colorado, Wyoming and New Mexico only. It is true that the big consuming centers of the country are Chicago and
 1224 East, so that the Missouri River markets are be-

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tween the producing end of the game and the consuming end of the game while Denver, until the building of the Dotsero Cut-off, was off any main line, but I still call Denver a natural market for a considerable part of Colorado and Wyoming and New Mexico, in that it is much closer than the Missouri River markets, that livestock can be trucked to this market when it could not profitably be trucked to the Missouri River markets. It is true that trucking is a recent development but producers in this area can get their livestock to Denver market and sold and get their returns quicker than they can if they go to the River with it. I
 2283 think that they will move sheep through from Laramie to Omaha or the Missouri River without stopping to feed en route. Undoubtedly, though, a train load of lambs leaving Laramie billed for Denver and another billed for Omaha, the one would reach Denver before the other reached Omaha. It must be admitted, however, that they would not arrive in time for any earlier market session because the market opens at 8 o'clock in the morning in both places, so a shipment might come in at Denver at 12 o'clock midnight from Laramie or arrive at Omaha at 4 o'clock in the morning but they would still be on the same day's market at the two places.

Undoubtedly there has been a tendency over the last seven or eight years for an increasing amount of livestock to go direct to packers and not through
 2285 the Public markets.

Of course, we make a distinction as a matter of direct marketing as between a movement to public stockyards and a movement that does not go to public stockyards. At the present time, this Grand Island market and the Norfolk and probably several others are posted markets. It is true that livestock is not sold in the same way there that it is at your other public markets, but it is a question

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whether you will call those public markets or some other kind of a market, but they are posted markets.

Q. Well, have your estimates, then, of increase in your statement taken into account and given full effect to this increased tendency to direct buying and to the effect of auction sales and these other direct movements in your opinion?

A. No, as I stated, my statement was intended to cover the trends of production in this area, without expressing a judgment as to how that production would be distributed.

The transit privilege.

It is true that, in my statement I mentioned the fact that Denver was in an advantageous position on account of the transit privilege. Though I do not know it directly, I have been advised that the transit privilege on sheep has been allowed to the Missouri River markets commencing July 15, 1935. Whether or not that will affect in some manner Denver's advantageous position, would be pretty hard to say. I think it would depend something upon the buying situation as it develops in Denver. If these eastern packers can continue to buy lambs at Denver so that they don't cost them any more laid down in New York, or wherever they go, than they would if they buy them at the River markets, I think they will continue to buy them in Denver the way they have been buying. Even though they do the same thing at the River, and if these shippers from Idaho and Utah and these other States shipping fat lambs either to Denver or the river markets find that they can get just as much for the lambs in Denver as they can get at the river markets, why I think they will continue to ship them to Denver.

Trans.

2295 It is true that under the transit arrangement the producer pays his proportion of the through rate from point of origin to Denver and the purchaser pays the balance of the through rate from Denver to point of destination.

Q. Under that situation how can you say that the producer will get the same price if transit is at the river, at Omaha or Denver, as he will at the other place?

A. I mean, price was not really the word that I meant, I mean net return, that is, if his net returns from his shipment will be about the same from Denver as from the river he would tend to still ship to Denver.

Q. In any event, however, the advantage which Denver has now and which is to be removed, will it not?

A. Why, I would say that the way these river markets have been fighting to get this privilege that they figure it is going to make some change in the situation.

(Witness continuing). In my testimony I stated that I had made no forecast whatsoever as to the receipts at the Denver market but merely as to, you might say, the livestock population and how quickly they would come back.

2296 Assuming that the Denver market could maintain throughout the period 1935-1939, inclusive, the same proportion, we will say, of Colorado cattle that were received in the past; my judgment is that after 1935, the marketings in the Denver yard from Colorado will tend to come back toward a normal or an average. In 1936 they may be below the 1929-33 average, but I would think that in 1937, 1938 and 1939 they would be considerably above that average, so that the average throughout the

Trans.

period will be equal to the 1928-1933 average. In other words, the production of cattle in Colorado for the period 1928 or 1929 to 1933 would justify a much larger or would result in a much larger marketing than actually took place if cattle numbers in Colorado had not increased quite rapidly, that is, that in none of those years did they market their production so that if during the next period there is no such tendency to increase numbers, you would naturally expect that the yearly marketings will exceed those during this period of 1928 to 2297 1933. In my opinion there will be no such tendency because during this next five-year period, I do not think that the prices for certain classes of cattle will be so low that they will not make any return to the producer if they are shipped to the market so that he holds them back on the ranch rather than to ship them.

Talking livestock economics for a moment, I would say that at the present time considerable part of the high price on cattle is due to the very short supply of hogs. The supply of cattle has not been reduced to anything like the supply of hogs, and if the supply of hogs had been normal the last five or six months, the price of cattle would not be near as high as it is today with the supply of cattle today. In other words, a deficit of hog products or beef products leads to an excess demand for beef. There seems to be very little relationship, however, between the supply of hog products and beef and the demand for lambs.

2298 I think much of the situation in cattle between 1929 and 1933, especially from 1931 to 1933, was due to business and financial conditions but not to cattle supply condition. As a matter of fact, the slaughter of cattle in 1933 was the smallest of 1228 the five-year period and prices were lowest.

Trans.

What I said with regard to cattle, and my statement that I was not forecasting market receipts, applies also to hogs and sheep.

It is true that the drought, or any condition of that sort, generally results in poor breeding conditions, but I do not think that the drought, as it affects the condition of cattle at breeding time or calving time, will greatly affect the character of the cattle when they are ready to be sold as yearlings or two-year-olds. It would if they were to be sold as calves, probably. However, I do not think that the drought does affect the calf crop in the sense that you would expect it to be smaller than if feeding conditions were better.

2300 If the producers are going to be able to build back their herds, they must hold back more heifer calves and more ewes than they have in the past, although in meeting a shortage of cattle in states like Wyoming and to some extent in Colorado in the past, there has been a tendency to ship in stock cattle to use the available feed. Now there are certain counties and areas in Colorado and Wyoming where cattle numbers were cut down very sharply last year and I would think that in those counties they will tend to ship in stock steers to use the feed, as well as to ship in cows and heifers to replace the ones that were sold.

2301 Take a state like Texas, whether the calves raised in Texas during the next year or two will stay in Texas or will be bought as yearlings and go to Wyoming or South Dakota depends largely upon whether the grower in Texas will pay more than the man in Wyoming and South Dakota will for them. You understand there is always a large number of heifer calves sold as stock calves out of Texas every year. That is regardless of the supply of cattle in Texas. The tendency will be for people

Trans.

who want to get back into the cattle business to pay more for those heifer calves than feeders will pay for them, so that they will be preserved as breeding stock rather than go for feeding cattle.

It is true, as a matter of fact, that Denver as a market has had no shipments from Texas up through Wyoming this year. You would not expect them to. Feed conditions did not get good enough in Wyoming until about three weeks or a month ago so that there was any place in the State for any cattle above what were there at the time. There has been a considerable movement of Texas cattle to Denver every year but it is much smaller the last three or four years than it was back in 1926, 1927 and 1928, and whereas Denver used to get a sizeable movement out of Arizona, practically all of the Arizona cattle will now go West.

(Witness excused).

Mr. John A. Zelinski, a Government witness, was recalled.

Direct Examination.

I have made an investigation into the facts of the so-called Pitkin sale and the facts of the Legge sale and the Legge lots so far as they affected the value of Zone 5.

Pitkin sale. 2302 First, as to the so-called Pitkin sale, I gathered the impression that at the time Mr. Pexton testified in regard to this sale that he did not know who Robert Knox Pitkin was and so I investigated the records further to find the history of the Pitkin transaction and found that Pitkin acquired the property on the same day on which he transferred it to The Denver Union Stock Yard Company. The property was acquired by Pitkin from John and Leonard Walters and Frank X. Aicher. I endeavored to find out if any of these gentlemen were

Trans.

• still in the city, and talked on the 'phone with Mr.
2303 Aicher and he referred me to Mr. Leonard Walters, whom he said was quite familiar with the transfer, much more so than he was himself. I interviewed Mr. Walters and he informed me that himself and brother and Mr. Aicher were in partnership and on the site of this property were running a stockyard and a slaughter house, that at the time they were probably the second largest wholesalers of meat in the City of Denver and had quite a plant. I asked him if he had any idea as to the value of the structures at the time and he stated that he didn't have a very good recollection of them but that they certainly were worth more than \$5,000 and probably up to \$10,000; that at the time the property was sold he and his partners understood, that Pitkin represented the Stock Yard Company (they were informed and he so felt) were anxious to buy them out for the reason that they did not want to have any competitors in the immediate neighborhood, and for that reason they got quite a price for the property and a price that they felt they couldn't have gotten any other way; that, as a matter of further information, he told me that each of the partners drew out \$10,000 in cash after the sale and built themselves another packing plant up on the Sand Creek from which they operated up until about eight years ago, I think he said. Now, in view of that statement of Mr. Walters and
2304 the fact that Pitkin transferred the property on the same date to The Denver Union Stock Yard Company and at the same stated consideration in the deed, which was \$55,500 in each of the transactions, I was convinced that Pitkin was in fact acting for The Denver Union Stock Yard Company and that this sale for that reason is no different than the sale from Morse as an officer of the Company to the Stock Yard Company.

Trans.

Legge sale.

Now, as to the Legge sale, which was one of the sales in the Cranberry Place Addition quoted by me in connection with the valuation of Zone 5, at the time of compilation of my report, I sent a questionnaire to Mrs. Legge regarding the sale by her to a Frances Skrabec of lots 31 to 33, inclusive, in block 2 of Cranberry Place. Mrs. Legge replied to our questionnaire and stated that those lots sold for \$50 per lot, and the form of questionnaire which we used has this sentence on the bottom: "Use the reverse side of this sheet for additional details which you may be able to give." When that questionnaire came back, it had this statement on the back of it: "Have 22 lots in Cranberry Place Addition for sale, 4½ acres opposite Blayney-Murphy packing house on west side of Platte River, will sell very reasonable," and signed Adeline Tynon Legge. Of course, I was not in a position to interview Mrs. Legge at the time I received the reply to this questionnaire and since arriving in Denver I had Mr. Snider of our office call on Mrs. Legge to ascertain what she would take for those lots and for that 4½ acres and I am advised that she would sell the 20 lots in Cranberry Place Addition at \$50 a lot, less if for cash, and the five lots on Washington Street, which is the street frontage, for \$100 each. The area of those lots is 25x125. The sale of lots 31 to 33, inclusive, is shown in my Exhibit 23. The curbing of the five lots still has \$350 which is not paid that she is paying for at so much a year, also pays a Moffat Tunnel tax of 50 cents a year on each lot. The 4½ acres to which she makes reference in this questionnaire, she is willing to sell for \$250 per acre and in my opinion that land is the same type of land as the so-called Averich sales and I think far superior even to the Local Beef & Mutton tract.

Trans.

Cross Examination.

I do not know anything about Mrs. Legge's financial condition. Mr. Snider informed me that Mrs. Legge stated that she did not have the property listed with any real estate firm, because I instructed him to make inquiry if it was listed, and in view of the fact that it is not listed, I would assume that she cannot be in very great distress.

306 I have appraised the land of the Stock Yard Company insofar as I was able to do so on the basis of adjoining and adjacent land and that is what I mean by my statement in the letter of transmittal that I have appraised the land in accordance with the Minnesota rate case. That is my interpretation of the Minnesota rate case.

MR. MILES: I just want to make one statement. I have been informed by the field representative of the Department that from the beginning of the field studies, the stockyard officials have extended every courtesy to the Government employees and supplied all possible information. During the trial of this case the learned counsel for the Respondent has extended to the Government employees every courtesy and consideration. In my opinion, no information has been withheld that was pertinent to this inquiry either by the counselor or by any of the respondent's representatives. This 07 attitude has made this one of the most agreeable hearings in our history. In my opinion the case has been fully and fairly presented by the Respondent without friction. For this attitude I want to express my heartfelt appreciation.

Government's case closed.

MR. BOSWORTH: I would like to have it appear on the record that we appreciate the state-

Trans.

ment made. It has been our intention to have this as pleasant a hearing as possible without any undue friction. We may have our differences of opinion, but that is to be understood and expected.

Now, may I ask on the record, Mr. Examiner, with regard to further proceedings, I am hopeful that the Department will, to a certain extent, follow the procedure of the Interstate Commerce Commission. Whether or not that is necessary to do or not is a question under the Packers and Stockyards Act, and perhaps get out a tentative report, for the reason that it serves the very helpful purpose of narrowing the issues when it comes to the oral argument before the Secretary. If no such tentative report is to be made, I would like to be advised sufficiently in advance to prepare for oral argument. I do not believe it serves any useful purpose to prepare and file a brief before the Secretary, but will do so if the Department desires it. I do not wish to foreclose, of course, myself from any rights which, should I differ with the decision of the Secretary, might have an effect upon the appeal to the court. In other words, frankly what it means, that I find nothing in the Packers and Stockyards Act or regulations issued there-
2308 under which require the filing, the preparation and filing of a brief prior to oral argument.

MR. MILES: That is correct, sir.

MR. BOSWORTH: At the same time I am anxious, as we have been here anxious to have the case fully presented to the Secretary in as cogent and logical manner as possible and as briefly as possible. For that reason it is my earnest expression of desire that a tentative report be prepared.
1234 There may be a great many things on which we

Trans.

will agree, whereas if there isn't a tentative report, one feels he has to run the whole gamut of the entire case, which is here some twenty-two or twenty-four hundred pages of testimony, and it makes a difficult thing to do.

THE EXAMINER: Well, the Department, not the Examiner, passes on that, Mr. Bosworth, and you will be advised. According to the records of the Examiner all of the exhibits offered on either side have been received and I think that is correct. If there should be any inadvertency in the record in that respect, they are now received, all that have been offered on either side.

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[fol. 1236] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW—Tendered December 10, 1937

Pursuant to the request of the Court, we herewith tender certain findings of fact which we request the Court to enter in this case. The references are to the pages of the abstract of evidence where the facts stated are substantiated by the evidence of record.

The findings we request are as follows:

Used and Useful Land and Structures: Plaintiff owns 130.570 acres of land. The Secretary found that 83.791 acres of such land is used and useful in the rendition of stockyards services and that 46.779 acres thereof is not used and useful. All structures located on land deemed not used and useful were likewise held to be not used and useful structures. The value of the 46.779 acres of land together with the value of all structures located thereon, was excluded from the rate base. A summary description of the land excluded, follows:

[fol. 1237] Stock show property	2.633 Acres.
Railroad and loading facilities	8.985 "
Vacant land	35.161 "
Total	46.779 Acres.

Railroad and Loading Facilities: The 8.985 acres of land, denominated "railroad and loading facilities" in the above table, lie wholly within the stockyard area¹ and are used by plaintiff for the location of its spur tracks, also owned by it, and includes the land upon which are the loading and unloading docks, the chutes and chute pens and one-half of the alleys adjacent to the docks, all of which land and facilities are owned by plaintiff. These facilities are indispensable to the handling of livestock in commerce.²

The plaintiff neither owns nor operates any locomotives or rolling stock.³ The use of plaintiff's spur on industry tracks is effected for all carriers entering Denver under joint-use contracts between the carriers and the plaintiff.⁴

¹Abs. pp. 25, 32, 491.

²Abs. pp. 11, 21, 48.

³Abs. p. 10.

⁴Abs. pp. 10, 781.

The carriers do not have any contracts for the use of the plaintiff's docks, chutes, pens and adjacent alleys. The carriers pay the plaintiff a charge for unloading and loading livestock from and into cars spotted by the carriers on the spur tracks of plaintiff adjacent to the docks. The loading and unloading charge is absorbed by the carriers only when the local rate is paid to or from Denver⁵ or when the shipment only stops to comply with the 36 hour law. In all other cases these charges are collected by the carrier from the shipper. All money paid by the carriers to plaintiff for the use of the spur tracks and for loading and unloading service was excluded by the Secretary from plaintiff's net income for rate-making purposes.

[fol. 1238] Stock Show Property: The plaintiff owns the land and buildings on and in which the annual livestock show is held. These buildings are leased for three weeks in each year to the National Western Stock Show Association, a non-profit Colorado corporation which operates the annual livestock show. The expenses of the show, which continues for eight days, are borne by admission fees to the show, admission fees to such other events as may be held during the year, and in some measure by public subscription. Plaintiff assumes the carrying charges, such as interest, taxes and the like, and when the show is unable to pay the rental, plaintiff absorbs the deficit. Large quantities of livestock are entered in the show, and much of it is held, exhibited, shown and sold in the so-called stock show property. Large quantities of livestock also entered in the show are sold in the main portion of plaintiff's yards.⁶ The stock show attracts buyers to the stockyards from all parts of the United States and results in a wider outlet for the producer's livestock at all times of the year.⁷ It is responsible for a substantial volume of receipts during the stock show period, has contributed to the improvement of the grade of livestock raised, results in better prices, has educational value, is an excellent advertising medium for the Denver market, and is maintained by plaintiff in good faith and in the belief that it aids and stimulates its busi-

⁵Abs. pp. 620, 622.

⁶Abs. pp. 49, 50, 294, 438, 439, 444, 450.

⁷Abs. pp. 49, 50, 51, 293, 407, 408, 441, 644.

ness and the business of the livestock producer.⁸ The Secretary excluded from the income account of plaintiff only the income received from the stock show buildings proper, and excluded from plaintiff's expense account the taxes and maintenance paid by it.

[fol.1239] The Secretary did not allocate to the stock show and exclude from plaintiff's income account any portion of the substantial income from yardage and feed shown by the evidence to be directly attributable to the stock show.⁹

Valuation of Used and Useful Land: The Secretary found that the total value of plaintiff's used and useful land is \$536,825.00. This does not include any value attributable to the 46.779 acres excluded by the Secretary from the rate base. The values testified to by the witness for the Secretary of Agriculture and by the witnesses for the plaintiff, and the values as found by the Secretary are as follows:

Zone	Government Witness	Value per Acre Plaintiff's Witnesses	Secretary's Order
1	\$8,500	\$17,250*	\$8,500
2	5,000	15,000	5,000
3	3,500	8,000	3,500
4	2,500	11,700*	2,500
5	2,000	3,500	2,000
6	4,000	10,000	4,000
7	3,000	4,500	3,000
8	6,000	10,000	6,000
9	15,246	20,000	15,246
10	1,500	2,500	1,500

*Figures are approximations because lands in these zones were valued in tracts at varying values.

There is involved the usual conflict in the testimony of the land appraisers presented. The plaintiff's appraisers were men of more than twenty-five years experience in the assembling, appraisal and sale of Denver property.¹⁰ The

⁸Abs. See index references in abstract under heading

⁹Abs. pp. 196, 608, 609.

¹⁰Abs. pp. 305, 306, 354, 355, 356, 357, 381-383.

government witness, though a man of wide experience,¹¹ had never appraised or valued any land in Denver or its vicinity.¹²

[fol. 1240] Per Cent Condition: The Secretary found that plaintiff's used and useful structures and equipment are in 80.545 per cent as good as new condition. This finding was based upon the evidence of the government engineer, who testified that that figure represented the condition per cent of plaintiff's property at the valuation date. Plaintiff's engineer testified that the property was in 88.9 per cent as good as new condition. Both engineers arrived at their estimates by the inspection of plaintiff's property. A substantial portion of the plaintiff's property consists of underground structures, such as sewer and water systems, the underground portions of posts and concrete pavements, which the government engineer was unable to inspect.¹³ Plaintiff's engineer had viewed these underground structures during the course of their construction and repair over a period of a number of years and was in a position to know their condition, from actual inspection.¹⁴

Going Concern Value: The Secretary made no separate allowance in the rate base for going concern value. It is admitted that plaintiff has a long history of efficient and economic management; that it has been financially successful, has never defaulted on its bond interest payments, and has paid its dividends regularly. The Secretary found that adequate allowance had been made for the element of going concern value present in plaintiff's business. This allowance, he found, was made in the valuation of plaintiff's structures on the basis of reproduction new cost less depreciation and in the method of valuing plaintiff's land. The record discloses that the government witness, whose values were adopted by the Secretary, valued plaintiff's [fol. 1241] land, not as a stockyard¹⁵ but as land stripped of all surface and subsurface structures,¹⁶ and decreased

¹¹Abs. pp. 78, 79.

¹²Abs. pp. 117, 137.

¹³Abs. p. 138.

¹⁴Abs. pp. 668, 670, 671. See also Examiner's proposed findings, Exhibit A, par. 121, p. 74.

¹⁵Abs. pp. 115, 132.

¹⁶Abs. pp. 83, 103, 133.

the value which he otherwise would have found because when so stripped, there was a lack of dedicated streets and alleys in the resulting large vacant tract ¹⁷ and because packing houses are in the vicinity.¹⁸ The structural property was valued on the basis of unit costs, that is to say, on the basis of the delivered cost per thousand brick, per thousand board feet of lumber, etc.¹⁹ with construction overheads added to the total unit costs thus found. The Secretary then depreciated the grand total thus derived 19.455% in conformity with the 80.545% condition of structural property found by him. The government presented no other evidence of going value. Plaintiff presented evidence of the expenditures of approximately \$325,000 in donations of money, land, buildings and machinery to increase the market outlet.²⁰

It is admitted that a market of wide distributive power does now exist at plaintiff's stock yard.

Surtax on Undistributed Profits: The record discloses without contradiction that plaintiff is required to set aside, in a sinking fund for bond retirement purposes, the sum of \$30,000 annually. Upon this fund plaintiff paid an undistributed profits tax for 1936 in the amount of \$1,078. The Secretary excluded that item from plaintiff's allowable expenses and made no allowance for undistributed profits taxes.

[fol. 1242] **Allowance for Interest on Land During Construction:** The Secretary, as previously mentioned, allowed in his computation of elements of property properly constituting the rate base, interest on land during construction on the basis of a one-year construction period, allowing interest for said period at the rate of seven per cent (7%). That figure amounted to \$37,578.00 which the Secretary depreciated to 80.545 per cent or \$30,267.00 (Order par. 138). There was no evidence in the record that this item was subject to depreciation.

The Charge to Yard Traders: The order of the Secretary requires plaintiff to levy and collect from yard traders, a

¹⁷Abs. pp. 97, 103, 115.

¹⁸Abs. p. 153.

¹⁹Abs. pp. 142, 143.

²⁰Abs. pp. 454-461, 706.

charge of approximately one-half the full marketing charge, as fixed by said order, for like species of livestock "resold or reweighed for purposes of sale". The Secretary grounds this portion of the order upon the thesis that the yard trader receives free service and free use of substantial portions of plaintiff's property which the Secretary concludes is a discriminatory practice. The government introduced no testimony upon the subject. If the finding and conclusion is to be sustained, it must be upon the testimony of plaintiff's witnesses and facts elicited by the government's cross-examination of those witnesses.

The evidence of record establishes that there are four classes of buyers, (a) the packer, who buys only fat animals matured for slaughter; (b) the farmer, who buys feeder type livestock; (c) the order buyer, who buys mostly feed type on orders received from clients but who also buys fat animals on orders from distant packers; and (d) the yard trader, who buys generally for his own account and resells to feeders or fatteners either on this or other markets. It is admitted that no charge is or will be assessed against any [fol. 1243] of the first three classes of buyers.

It is said that the yard trader is in business in the plaintiff's yard. That is a fact but so is the packer and the order buyer. The only evidence of record is that the yard trader's livestock clears the yard and moves out to ultimate destinations more quickly as a general rule than do cattle bought by farmers, and as quickly as those bought by order buyers and packers.²¹

The evidence further establishes that the shipper not only desires but insists upon a market which will absorb his shipments with a minimum of delay.²² The trader supplies a market when other markets fail.²³ He picks up the slack and is an indispensable adjunct to a ready market.²⁴ The plaintiff contends that the cost, if any, of this buying outlet is included in the marketing charge assessed against and collected from the producer.²⁵ Producer wit-

²¹Abs. pp. 599, 600.

²²Abs. pp. 293, 398, 409.

²³Abs. pp. 295, 299, 398.

²⁴Abs. pp. 298, 409.

²⁵Abs. pp. 399, 405, 410.

nesses testified that they desired this outlet and willingly paid for it in the marketing charge.²⁶

The tariffs at the Missouri River markets carry a charge on traders' reweighs of approximately one-half the full yardage charge, but there is no evidence that such a charge has ever been made at any market west of the Missouri River. The evidence does show that the management of plaintiff has never assessed such a charge against yard traders at any time since the commencement of the plaintiff's market in 1886.²⁷

Dues and Donations: The Secretary, in his computation of plaintiff's income and expenses for rate purposes for the years 1930 to 1934, inclusive, excluded, among other [fol. 1244] items, certain other items of expense carried under "Donations", "Subscriptions, Dues and Miscellaneous" accounts of plaintiff, such as contributions to the Chamber of Commerce, Community Chest, relief societies, etc. The test applied by the Secretary was whether or not the expenditures benefited the shippers or directly benefited plaintiff's employees. There was no testimony that the expenditures made were unreasonable or improper, or objected to by any shipper or patron. We find no evidence of record that the amounts of these items are unreasonable.

Packers & Stockyards Administration Expense: The Secretary allowed plaintiff \$1200.00 annually for expense on account of hearings resulting from the enforcement of the Packers and Stockyards Act. The evidence showed that the average yearly expenditure on this account during the years from 1930 to 1934, inclusive, was \$8,786.88. It was stipulated into the record in this court that plaintiff expended the sum of \$24,654.27 in connection with the hearing out of which this cause arises. This expenditure included expenses up to the entry of the Secretary's order. It was also stipulated that \$15,785.00 was the estimated expense of the litigation of this cause in this court. The average expenditure on account of the enforcement of the Packers and Stockyards Act for the years 1924 to 1934, inclusive, was \$6,216.00 annually.

²⁶ Abs: p. 507.

²⁷ Abs. pp. 508, 514.

Conclusions

The plaintiff further requests the following Conclusions of Law be entered upon the Findings set forth above:

Railroad and Loading Facilities: There is no doubt that the railroad trackage is used and useful in the handling [fol. 1245] of livestock in commerce which is the definition of a stockyard facility under the Packers and Stockyards Act, 1921. The trackage is indispensable to the performance of that service and of the duty of the plaintiff toward its patrons.

The loading docks, chutes, chute pens and chute alleys are likewise stockyard facilities, used and useful, in the handling of livestock in commerce. They are necessary to the conduct of the plaintiff's business, irrespective of any question as to whether or not the railroad charges paid by the shipper include delivery at destination. No ground exists for their exclusion or for the exclusion of their value from the rate base.

We accordingly conclude that the Secretary erred in excluding the value of the railroad trackage, and loading and unloading facilities from plaintiff's rate base.

Stock Show Property: It is admitted that livestock in large quantities is handled in commerce at and by reason of the stock show. The fact that the stock show properties as such consisting of the stadium and other buildings in Zone 4, may only be used for a brief period out of the year is of no moment. We conclude that the plaintiff has a right in the conduct of its business and the management of its affairs to own these properties which are for the joint benefit of its patrons and its own business, and that therefore the Secretary erred in excluding their value from the rate base of plaintiff.

Value of Used and Useful Lands: It is not the province of the court to determine the valuation of plaintiff's land as to whether the figure adopted by the Secretary is too [fol. 1246] low or too high. The court's sole function is to determine whether or not the finding of the Secretary is supported by substantial evidence. One who presents himself as an expert on land values in a particular locality must demonstrate his knowledge of conditions in that locality or else his opinion cannot be regarded as substantial evidence

within the meaning of the law. The government witness did not demonstrate his qualifications. We conclude that the Secretary's findings in this regard are not supported by substantial evidence.

Per Cent Condition: The finding of the Secretary as to per cent condition of plaintiff's structural property is not supported by substantial evidence and must be set aside. The evidence of one who has never examined nor who has had no opportunity to examine condition of underground structures can not be regarded as substantial as against the testimony of a competent engineer who has made such examination and has had such opportunity.

Going Concern Value: The determination of the present value of land stripped of improvements, and the determination of the value of structural property upon the unit cost basis depreciated to the figure which the rate-making body deems to be the present percentage of reconstruction new total cost does not include any allowance for going concern value. Going concern value is an element of value which does not depreciate in the absence of proof that the utility is retrogressing. No such proof is to be found in the record and we conclude therefore that the Secretary erred [fol. 1247] in excluding this element of value from the rate base of the plaintiff, and under the circumstances, in failing to make a separate allowance therefor.

Surtax on Undistributed Profits: The findings of the Secretary that no allowance should be made on account of the surtax on undistributed profits is erroneous and contrary to law under the circumstances of this case. We necessarily conclude that the amount of such tax paid to meet Sinking Fund requirements of outstanding bonds is a business expense to be provided for in the return permitted to the utility.

Allowance for Interest on Land During Construction: The finding of the Secretary that the item of interest on land during construction is depreciable is contrary to law and must be set aside.

Yard Traders: The finding of the Secretary that the existing practice at plaintiff's yards in assessing no reweigh charge against yard traders is discriminatory is not supported by substantial evidence and must be set aside.

In the absence of proof of discrimination, the exaction of such a charge is a question of business management confided by the law and the decided cases to the owners of the property.

Dues and Donations: The finding of the Secretary excluding from the expense account of petitioner the items carried under the heading of Dues and Donations such as memberships in Chambers of Commerce, reasonable charitable contributions, etc. is arbitrary in the extreme and must be set aside. There is a complete absence of any proof that [fol. 1248] any of these items or their total is unreasonable in either object or amount. Reasonable expenditures of this class are confided by law to the management.

Packers and Stockyards Administration Expense: The finding of the Secretary allowing \$1200.00 annually for Packers and Stockyards Administration expense is arbitrary and without substantial support in the evidence. Accordingly, we conclude that it must be set aside.

The above findings and conclusions are respectfully submitted to the court and we request that if any thereof be denied or refused, the same be made a part of the record on appeal with appropriate exceptions noted and reserved.

Robert G. Bosworth, Norman A. Hutchinsón, Solicitors for Plaintiff.

[fol. 1249] IN UNITED STATES DISTRICT COURT

[Title omitted]

**DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW—November 15, 1937**

The Court, after full hearing and after examining the pleadings, weighing the evidence and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is a suit in equity brought pursuant to Section 316 of the Packers and Stockyards Act of 1921 (42 Stat. 159; 7 U. S. C. A. Sec. 17), to set aside an order of the

Secretary of Agriculture dated February 17, 1937, prescribing maximum reasonable rates and charges to be collected by petitioner for the rendition of certain services at its stockyard. The order by its terms was effective thirty days after the date of entry.

2. The jurisdiction of this Court is invoked under the provisions of the Packers and Stockyards Act, 1921, and certain other Acts of Congress known and cited as the Commerce Court Act, approved June 17, 1910, (36 Stat. 539); the Act of March 3, 1911 (36 Stat. 1087); and the District [fol. 1250] Court Jurisdiction Act, being part of the Urgent Deficiency Appropriation Act, approved October 22, 1913 (38 Stat. 219), all of which are assembled and restated in 28 U. S. C. A., Secs. 41-48.

3. The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office and place of business in the City of Denver, County of Denver, where it maintains, owns and operates a stockyard which has been designated as a public stockyard by the Secretary of Agriculture under the provisions of Section 302 of the Packers and Stockyards Act (7 U. S. C. A., Sec. 202).

4. The proceedings before the Secretary of Agriculture, which resulted in the entry of the order herein sought to be set aside, were instituted by an order of inquiry and notice of hearing issued by the Secretary of Agriculture on November 8, 1934. In said order of inquiry and notice of hearing it was alleged that the petitioner herein had therefore filed and put into effect schedules of rates and charges for its services as a stockyard owner and that a proceeding under Title III of the Packers and Stockyards Act, 1921, (Sec. 301 et seq. (7 U. S. C. A., Sec. 201 et seq.)) would be had for the purpose of determining the lawfulness of any and all rates and charges of petitioner and of any rules, regulations and practices whereby any stockyards services are rendered by petitioner without making a lawful charge therefor. Accordingly it was ordered that a hearing for such purpose be held at a time and place specified in said order of inquiry and notice. Notice of such hearing was given to petitioner by serving upon it a copy of said order of inquiry and notice of hearing.

[fol.1251] 5. Pursuant to the aforesaid order of inquiry and notice, a hearing was held at Denver, Colorado, before an examiner designated by the Secretary of Agriculture beginning on June 3, 1935, and ending on July 3, 1935. Petitioner was represented by counsel throughout that hearing. At that hearing a record of testimony was made consisting of 2300 pages, and 118 exhibits containing 4000 pages were introduced. This testimony and these exhibits constituted the record before the Secretary upon which the order herein challenged was based. On October 28, 1936, a tentative report was served on petitioner. Petitioner filed exceptions to the tentative report on January 7, 1937, and respective counsel presented oral arguments before the Acting Secretary of Agriculture. At the time of the oral argument, petitioner filed certain additional information for consideration by the Secretary.

6. On February 17, 1937, the Acting Secretary entered the order herein complained of, accompanied by comprehensive findings of fact. By the order the yardage charges imposed by petitioner were changed to the extent shown by the following table:

Species	Rates and Charges in effect		Rates and Charges Prescribed in the Order			
	Rail Receipts per head	Truck Receipts per head	Rail per head	Trucks per head	Re-weighs per head	Direct per head
Cattle.....	.35	.40	.30	.35	.15	...
Calves.....	.25	.27	.20	.25	.10	...
Hogs.....	.12	.14	.12	.14	.06	.06
Sheep & Goats.....	.08	.10	.075	.10	.03	...
Horses & Mules.....	.35	...	.35	...	.35	...
Purebred bulls.....	\$1.00	...	\$1.00	\$1.00	\$1.00	...

[fol.1252] The rates for feed and bedding existing at the date of the inquiry were changed by the order in the manner set out in the following table:

	Rates and Charges in effect	Rates and Charges Prescribed in the Order
	Price per unit	Profit per unit
Hay (on fence).....	\$1.40 per cwt.	.50 per cwt.
Hay (fed out).....	\$1.50 per cwt.	.60 per cwt.
Bedding Straw.....	.65 per bale	.40 per bale
Corn.....	\$1.50 per bushel measure	.45 per bushel measure
Miscellaneous Feed.....	.....	.50 per cwt.

In the Secretary's rates the charges for feed and bedding are always divisible by five and the stockyard company may amend its charges whenever the margin between the cost and the sale price varies five cents from the margin of profit set forth above. The effect of the Secretary's rates on feed and bedding is to make such rates dependent upon the market price of the commodities. With respect to certain minor services performed by the petitioner, such as branding, dipping, disinfecting, testing, and immunizing, etc., the Secretary's order contained the rates already in effect.

7. On March 9, 1937, the present suit was instituted. Among other things petitioner sought a temporary restraining order, an interlocutory injunction, and a permanent injunction. On the same day an interlocutory injunction against the enforcement of the Secretary's order was entered by consent of defendants who appeared by the United States Attorney, and petitioner was required by this Court to execute a bond in the sum of \$50,000 to indemnify the shippers of livestock against amounts paid by them in excess of the rates and charges prescribed by the Secretary's order in the event that the order should be upheld by this Court.

8. Prior to the trial before this Court, petitioner and defendants entered into various stipulations of fact. These [fol. 1253] stipulations, together with the record made before the Secretary of Agriculture, constituted the evidence before this Court.

Land Used and Useful in the Rendition Stockyard Services

9. The petitioner owns 130.57 acres of land. Appraisers for both the petitioner and the Secretary of Agriculture appraised the land. Preparatory to the appraisal, the petitioner's land was divided by agreement into ten zones. All appraisers employed these zones in setting a value upon petitioner's land. The Secretary found that 83.791 acres of land are used and useful in the rendition of stockyard services and that 46.779 acres of land are not used and useful in rendering such services. The area of each zone, the amount of land in each zone found by the Secretary to be

used and useful and the amount of land in each zone found to be not used and useful are shown by the following table:

Zone	Area	Used and Useful	Not Used and Useful
1	38.267	33.360	4.907
2	22.982	22.147	.835
3	19.825	12.117	7.708
4	18.722	10.725	7.997
5	12.640		12.640
6	3.383	.235	3.148
7	4.608		4.608
8	.759	.759	
9	7.081	4.448	2.633
10	2.303		2.303

The value of that land found by the Secretary to be not used and useful in the rendition of stockyard services was excluded from the rate base. The Secretary's specific findings as to the used and useful character of the land in each zone are set out in paragraphs 31-74 of the order.

[fol. 1254] 10. The Secretary excluded from the rate base the value of all structures located on land found by him to be not used and useful in the rendition of stockyard services.

11. 35.161 acres of vacant land excluded as being not used and useful are not being utilized for any purpose. Petitioner's business is not expanding. Its present facilities are ample for its present needs and no showing has been made that additional land is, or will presently be, needed for expansion purposes. Petitioner has no definite plans to utilize its vacant land in the near or distant future. This land is not used and useful in the rendition of stockyard services.

12. 8.985 acres of the land excluded as being not used and useful are occupied by railroad trackage, loading and unloading docks, loading and unloading chutes and pens, and yardmaster's office, and a trackman's tool house. These facilities are owned by petitioner, but are leased to the railroad serving the stockyards under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs of tracks and taxes and assessments. In addition, the railroads pay petitioner on a per car basis for performing loading and unloading services.

The amounts so paid are absorbed by the railroads or are included in the freight rates. The locomotives, transportation equipment, etc., essential to the use of this property are furnished and operated by the several railroads. The loading and unloading docks, chutes and pens which are leased by the railroads from petitioner are used exclusively for handling live stock in the course of transportation to and from petitioner's stockyards. The services in connection with which this property is used are transportation services furnished by the several railroads. This property and the structures thereon are not used and useful in the rendition of stockyard services.

[fol. 1255] 13. 2.633 acres of the land excluded as being not used and useful are occupied by so-called stock show buildings consisting of a stadium, sales pavilion, and certain other buildings used in connection with a stock show. Petitioner does not carry on any of its business in these buildings. Petitioner leases this property to the Western Stock Show Association, a Colorado corporation, which operates an annual livestock show on the premises. The expenses of the show are borne in part by public subscription and in part by the receipts from the sale of tickets. Petitioner pays the taxes upon this property and has, in the past, made substantial contributions to cover deficits resulting from the operation of the show.

14. The so-called stock show property is unused except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show. At that time a very small portion of livestock is housed or exhibited on these premises. The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling of this livestock and the Secretary does not attempt to regulate the charges made in connection with the stock show. The stock show causes more livestock to arrive at petitioner's stockyards during the month of January than would normally arrive in that month in the absence of the stock show.

This livestock is handled in the regular facilities of the stockyard and is charged for at the usual rate.

[fol. 1256] 15. The income from such livestock is not attributable to the stock show but is derived from the use of and services rendered in connection with petitioner's ordinary stockyard facilities. Whatever livestock is attracted to Denver by the stock show would filter through petitioner's stockyards at other seasons of the year. Consequently, there is no substantial increase in the total income received by petitioner. Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole.

16. The evidence in no way warrants the conclusion that the stock show is a stockyard service. The stock show property is not used and useful in rendering stockyard services and its exclusion does not affect the value of petitioner's property as an integrated and established enterprise.

Land Value

17. The evidence as to the value of petitioner's land was submitted in the form of two appraisals. One appraisal was made by an expert land appraiser for the Department of Agriculture. The other appraisal was made by a board of three local realtors whom the petitioner employed. The government land appraiser was a man of high professional standing and of unquestioned integrity and long experience in his profession. In making his appraisal the Government appraiser took into account the nearby location of different packing houses which could take care of the products and by-products of the stockyard, the location with respect to various railroads and public highways, and various sales of adjoining and nearby lands. The Government land appraiser considered petitioner's property as an assembled tract and valued it at its highest and best use, which was for stockyard purposes. Petitioner's board of appraisers [fol. 1257] placed a much higher value on petitioner's land than did the Government appraiser. Their testimony shows that this was the result of giving the land an added increment of value arising from the fact that a successful stockyard was now operating thereon.

18. The Government appraiser appraised all of petitioner's land at \$724,974 and the used and useful portion thereof

at \$536,825. The Secretary adopted this appraisal as representing the true value of petitioner's property. The fair and reasonable value of all of petitioner's land is \$724,974 and the value of petitioner's used and useful land is \$536,825.

Structure and Equipment

19. The Secretary determined the present value of petitioner's structures and equipment by first finding the reproduction cost new of all items included under this heading and then applying a condition per cent to the reproduction cost new in order to make proper allowance for depreciation. The valuation experts for both parties agreed that the reproduction cost new of petitioner's structures and equipment was \$2,118,960. The Government expert testified that the condition per cent of petitioner's property was 80.545% and that consequently the reproduction cost new less depreciation of petitioner's property was \$1,706,717.14. Petitioner's expert testified that the condition per cent of petitioner's property was 88.9% and that consequently the reproduction cost new less depreciation of petitioner's property was \$1,883,756.33. The Secretary adopted the testimony of the Government expert and concluded that the reproduction cost new of petitioner's structures and equipment was \$1,706,717.14.

[fol. 1258] 20. The reproduction cost new of petitioner's structures and equipment is \$2,118.960 and 80.545% of that amount is the reproduction cost new less depreciation. The fair and reasonable present value of petitioner's equipment and structures is \$1,706,717.14.

Going Concern Value

21. No separate allowance is made for going concern value but that value is included in the total rate base upon which petitioner is permitted to earn a reasonable return. The valuation expert for the Government, whose estimates were adopted, based his valuation upon material in place and upon a property ready and able to function as a stockyard and as a business earning an income. As to particular details: He allowed interest during construction on the structural property; considered such items as proximity to highways and railroads; freedom from floods; access to

water supply and other city services; favorable location in regard to related industries; and the effect of the city zoning ordinance. He also testified that he valued the property higher because of its availability for a stockyard and as an assembled tract as distinguished from several tracts in separate ownership. He also included construction overheads, general overheads, and added 5% in addition for omissions and contingencies, omitting, however, organization expenses. Consideration was given to the peculiar climatic conditions of Denver as affecting rot, rust, and decay. The Secretary added to the Government expert's figures \$30,267 to cover interest on used and useful land during the construction period and added \$139,300 for working capital. The result arrived at by the Secretary was a rate base of \$2,792,700 on which petitioner was to be permitted to earn a fair rate.

[fol. 1259] 22. Petitioner's valuation expert testified that not less than \$350,000 should be allowed as going concern value. This figure was arrived at by multiplying the yearly average of 35,000 cars of livestock by \$10.00. This formula is arbitrary and has no support in the evidence. An attempt was made to justify the formula by evidence that petitioner had made donations to packing plants and railroad companies for so-called development of business in the amount of \$325,000. The benefits, if any, from such donations are speculative and have not been identified. Petitioner's success is not the result of such artificial stimuli but due rather to efficient management and financing and the advantage that the locality offers to an enterprise of this kind.

23. \$2,792,700 is the fair rate base upon which petitioner is entitled to earn a fair return. Inextricably interwoven in this figure is an adequate allowance for going concern value.

Rate of Return

24. The Secretary's finding that 6½% is a fair rate of return is based upon expert testimony that a return of from six to seven per cent on the fair value of petitioner's property would be reasonable in the light of money costs in the general and local money market. Petitioner's stocks and bonds are unquestionably sound investments of high quality. Furthermore, petitioner's business, as well as stockyard enterprises generally, has proved remarkably stable dur-

ing the past ten years. It appears from the record that relatively low money rates may be expected to continue for the next few years. In view of these circumstances $6\frac{1}{2}\%$ represents a reasonable rate of return on the fair value of petitioner's business.

[fol. 1260]

Trader Yardage Charge

25. The structure of petitioner's existing schedule of rates and charges is such that, with the exception of livestock resold through commission merchants, all yardage charges are assessed and collected from those who cause the livestock to come to the stockyards. Those who purchase livestock within the stockyard fall into two general classes, namely, (1) those who purchase to remove it from the stockyard and (2) those who purchase to resell and otherwise trade in it within the stockyard. Buyers of the latter class are usually called traders or speculators. Petitioner has permitted traders or speculators to set up their places of business within the stockyard without charge except insofar as petitioner may benefit from profit on feed sold to such traders or speculators and from the income which may be realized from the yardage charge on resales through Commission firms by such traders or speculators. It is unjustly discriminatory and unreasonable for petitioner to maintain a large section of its valuable property for the use of such traders or speculators and to incur numerous expenses in the rendition of this service to one class of its patrons and then renumerate itself for the use of such facilities and for the rendition of such services through a charge on another class of patrons.

26. The Secretary found that the traders or speculators ought to pay for services rendered to them substantially one-half of the rates and charges imposed upon those who send their livestock to market for sale. This is a reasonable charge for the services rendered and facilities furnished to the traders or speculators.

27. The schedule of maximum reasonable rates prescribed by the Secretary was computed and ascertained upon the basis that petitioner would either impose upon all its patrons selling livestock in its stockyard the maximum rates pre-[fol. 1261] scribed or that it would content itself to bear the losses occasioned by charging less than the maximum

to any class of its patrons. Stated otherwise, the maximum reasonable rates on resales found by the Secretary are computed upon the assumption that upon all livestock sold a second successive time or reweighed in the stockyards for purposes of resale, there will be imposed a service and/or weighing charge which is substantially one-half of the yardage charge upon the same species and class of livestock when received by rail.

28. There is no dispute as to the volume of livestock handled by traders or speculators. Consequently, it is possible to determine the amount of income which might reasonably be expected from a charge upon traders or speculators, amounting to one-half the rates and charges imposed upon those who send their livestock to market for sale. The record contains a full description of the services made available by petitioner to traders or speculators, including a detailed description of petitioner's facilities and services and the manner in which traders or speculators carry on their activities. While there is considerable similarity in the services and facilities afforded to traders or speculators and those afforded to the shippers of livestock, yet there is sufficient difference in the service rendered, inasmuch as traders or speculators performed some of their own labor, to warrant the imposition of a lower rate or charge upon the traders or speculators than is imposed upon shippers.

Certain Expenses

29. An analysis of the detailed audit of contributions, donations, etc. made by petitioner in the past reveals that slightly over \$300 is contributed annually to activities which benefit petitioner's employees or patrons. On this basis [fol. 1262], \$325 was covered into the rates for this item of expense.

30. \$1200 annually is a sufficient amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act. It is unlikely that petitioner's future expenditures for this purpose will represent any substantial amount.

31. Petitioner has complained of the exclusion of certain amounts from the \$336,545 covered into rates for expenses. The action of the Secretary in this regard was not arbitrary.

The amounts which petitioner seeks to have included are too trivial to affect the validity of the Secretary's order. The exclusion of such amounts does not affect the sufficiency of the return which petitioner is permitted to earn on the fair value of its property.

32. In order for petitioner to pay its reasonable expenses in rendering stockyard services and earn a return of $6\frac{1}{2}\%$ on the fair value of its property which is used and useful in rendering stockyard services, the rates charged must produce \$528,071. On the basis of the test period 1930-1934, inclusive, the Secretary of Agriculture estimated that the prescribed rates would yield \$530,117. Applying these rates to the actual volume of business handled by petitioner in the year 1935, the rates would have yielded \$528,587.75. Applying the rates prescribed by the Secretary to the volume of business actually handled by petitioner in the year 1936, the rates would have yielded \$558,760.44.

33. The volume of business handled at petitioner's stockyards was smaller during 1935 and 1936 than may reasonably be expected in the future. A general upward trend of livestock receipts may reasonably be expected during the next few years.

[fol. 1263] 34. Over a period of time in the future the rates will yield an amount sufficient to pay all reasonable costs incurred in rendering stockyard services plus a return of more than $6\frac{1}{2}\%$ on the fair value of petitioner's property which is used and useful in rendering stockyard services.

35. The findings of the Secretary are not arbitrary or unreasonable and are supported by the weight of the evidence.

36. In addition to the foregoing findings of fact this court adopts the findings made by the Secretary as its own and makes them a part hereof as though specifically incorporated herein.

Conclusions of Law

1. This Court has jurisdiction of the matters set forth in the petition herein by reason of certain acts of Congress known and cited as the Packers and Stockyards Act, 1921 (42 Stat. 159); the Commerce Court Act of June 18, 1910 (36 Stat. 539); the Act of March 3, 1911 (36 Stat. 1087); and the District Court Jurisdiction Act being part of the

Urgent Deficiencies Appropriations Act (238 Stat. 219), approved October 22, 1913, and amendments thereto.

2. Under the provisions of the Packers and Stockyards Act, 1921, the Secretary of Agriculture had jurisdiction under the notice served on petitioner to enter into an inquiry on his own motion as to the reasonableness and lawfulness of all the rates and charges for stockyard services in effect at petitioner's stockyard.

3. Under the provisions of the Packers and Stockyard Act, 1921, the Secretary of Agriculture in determining whether the rates and charges imposed by a stockyard are unreasonable or unlawful and in the prescribing and fixing of lawful rates and charges for the future has the power [fol. 1264] and authority to value the property of a stockyard owner devoted to stockyard services and to determine upon a fair rate of return as a factor in rate making.

4. Under the provisions of the Packers and Stockyards Act, 1921, the Secretary of Agriculture, in determining whether the rates and charges imposed by the stockyard are unreasonable or unlawful and in the prescribing and fixing of reasonable and lawful rates and charges for the future, has the power and authority to investigate the actual expenses incurred by a stockyard owner in the operation of the stockyard and to cover into rates only such expenses as are reasonably necessary for the performance of the stockyard services rendered by the stockyard owner.

5. Under the provisions of the Packers and Stockyards Act, 1921, the Secretary of Agriculture, in determining whether the rates and charges imposed by a stockyard are unreasonable or unlawful and in the prescribing and fixing of reasonable and lawful rates and charges for the future, has the power and authority to investigate all available sources of revenue for the stockyard and to include in an estimate of future revenues all sums which should be received by the stockyard for services rendered regardless of whether or not any charge has been made for such services in the past.

6. Petitioner was accorded a full and fair hearing by the Secretary of Agriculture. The Secretary's order does not confiscate petitioner's property but is fair, reasonable and lawful.

7. The method used by the Secretary in determining that petitioner's rates and charges were unreasonable and unlawful and in prescribing and fixing reasonable and lawful rates and charges for the future, was not arbitrary or unreasonable but was the lawful method which has been approved by the Courts.

[fol. 1265] 8. The railroad trackage, loading and unloading docks, chutes and pens, the yardmaster's office, the trackman's tool house and the 8.985 acres of land upon which these structures are situated are not used and useful in rendering stockyard services because as a matter of law the services in connection with which this property is used are transportation services.

9. The stock show property, including the stadium, sales pavilion, etc., and the 2.633 acres of land upon which these buildings are situated, is not used and useful in rendering stockyard services as defined in the Packers and Stockyards Act of 1921.

10. The Secretary was not required to adopt the proposed findings in the tentative report which was submitted to the petitioner, but was required as a matter of law to consider the evidence and exercise his independent judgment thereon.

11. The rate schedule prescribed in the order of the Secretary is not unfair and the rates for the various services are not unfair in their relation to each other, and the yardage charges are not unfair as applied to the several species of livestock. The prescribed rates for the various services as applied to the several species in their relation to each other are supported by the weight of the evidence and as a whole are lawful.

12. The rates prescribed by the Secretary will yield a fair return upon the fair value of all of its property which is used and useful in rendering stockyard services. The rates prescribed by the Secretary do not confiscate petitioner's property and are fair, reasonable and lawful.

13. Petitioner's cause is without equity and the temporary injunction heretofore granted should be dissolved [fol. 1266] and the prayer for a permanent injunction denied and the petition dismissed without prejudice and petitioner should by decree be ordered, within the time to be

fixed by this Court, to refund to the users of petitioner's service such portion of their rates and charges collected by it on and after March 19, 1937, as are in excess of the rates and charges specified as reasonable in the order of the Secretary of Agriculture involved in this suit with interest at 6 per cent per annum from date of payment.

14. The defendants should recover their costs and disbursements.

_____, Circuit Judge. _____, District Judge.
 _____ District Judge.

[fol. 1267] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 20, 1937

This cause coming on to be heard before a statutory court of three judges sitting in and for the District of Colorado on June 22nd and 23rd, 1937, the Honorable Sam G. Bratton, Circuit Judge, presiding, and with him the Honorable J. Foster Symes and the Honorable Alfred P. Murrah, District Judges, the parties being represented by counsel and the evidence and proofs being before the Court, the cause was argued by counsel, and the Court being fully advised, makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is a suit in equity brought pursuant to Sec. 316 of the Packers and Stockyards Act of 1921 (42 Stat. 159; 7 U. S. C. A. Sec. 17), to set aside an order of the Secretary of Agriculture dated February 17, 1937, prescribing maximum reasonable rates and charges to be collected by petitioner for the rendition of certain services at its stockyard.

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Colorado, [fol. 1268] with its principal office and place of business in the City of Denver, County of Denver, where it main-

tains, owns and operates a stockyard which has been designated as a public stockyard by the Secretary of Agriculture under the provisions of Sec. 302 of the Packers and Stockyards Act (7 U. S. C. A. Sec. 202).

2. The proceedings before the Secretary of Agriculture, which resulted in the entry of the order herein sought to be set aside, were instituted by an order of inquiry and notice of hearing issued by the Secretary of Agriculture on November 8, 1934. In said order of inquiry and notice of hearing it was alleged that the petitioner herein had theretofore filed and put into effect schedules of rates and charges for its services as a stockyard owner and that a proceeding under Title III of the Packers and Stockyards Act, 1921 (Sec. 301 et seq.; 7 U. S. C. A. Sec. 201 et seq.); would be had for the purpose of determining the lawfulness of any and all rates and charges of petitioner and of any rules, regulations and practices whereby any stockyard services are rendered by petitioner without making a lawful charge therefor. Accordingly it was ordered that a hearing for such purpose be held at a time and place specified in said order of inquiry and notice. Notice of such hearing was given to petitioner by serving upon it a copy of said order of inquiry and notice of hearing.

3. Pursuant to the aforesaid order of inquiry and notice, a hearing was held at Denver, Colorado, before an examiner designated by the Secretary of Agriculture beginning on June 3, 1935, and ending on July 3, 1935. Petitioner duly appeared and gave evidence at said hearing.

4. On February 17, 1937, the Acting Secretary entered the order herein complained of, accompanied by comprehensive findings of fact. By the order, among other things, the yardage charges imposed by petitioner were changed to the extent shown by the following table:

Species	Rates and Charges in effect		Rates and Charges Prescribed in the Order			
	Rail Receipts per head	Truck Receipts per head	Rail per head	Trucks per head	Re-weighs per head	Direct per head
Cattle.....	.35	.40	.30	.35	.15	...
Calves.....	.25	.27	.20	.25	.10	...
Hogs.....	.12	.14	.12	.14	.06	.06
Sheep & Goats.....	.08	.10	.075	.10	.03	...
Horses & Mules.....	.35	...	.35	...	.35 ^p	...
Purebred bulls.....	\$1.00	...	\$1.00	\$1.00	\$1.00	...

The rates for feed and bedding existing at the date of the inquiry were changed by the order in the manner set out in the following table:

	Rates and Charges in effect	Rates and Charges Pre- scribed in the Order
	Price per unit	Profit per unit
Hay (on fence).....	\$1.40 per cwt.	.50 per cwt.
Hay (fed out).....	\$1.50 per cwt.	.60 per cwt.
Bedding Straw.....	.65 per bale	.40 per bale
Corn.....	\$1.50 per bushel measure	.45 per bushel measure
Miscellaneous Feed.....		.50 per cwt.

In the rates the charges for feed and bedding are always divisible by five *the* the stockyard company may amend its charges whenever the margin between the cost and the sale price varies five cents from the margin of profit set forth above.

5. Prior to the trial before this Court, petitioner and defendants entered into various stipulations of fact. These stipulations, together with the pleadings and the record made before the Secretary of Agriculture, constituted the evidence before this Court.

Land Used and Useful in the Rendition of Stockyard Services

6. The petitioner owns 130.57 acres of land. 83.791 acres of land are used and useful in the rendition of stockyard [fol. 1270] services and 46.779 acres of land are not used and useful in rendering such services. The area of each zone, the amount of land in each zone used and useful, and the amount of land in each zone not used and useful are shown by the following table:

Zone	Area	Used and Useful	Not Used and Useful
1	38.267	33.360	4.907
2	22.982	22.147	.835
3	19.825	12.117	7.708
4	18.722	10.725	7.997
5	12.640		12.640
6	3.383	.235	3.148
7	4.608		4.608
8	.759	.759	
9	7.081	4.448	2.633
10	2.303		2.303

The value of that land not used and useful in the rendition of stockyard services is excluded from the rate base.

7. 35.161 acres of vacant land excluded as being not used and useful are not being utilized for any purpose. Petitioner's present facilities are ample for its present needs and no showing has been made that additional land is, or will presently be, needed for expansion purposes. This land is not used and useful in the rendition of stockyard services.

8. 8.985 acres of the land excluded by the order as being not used and useful are occupied by railroad trackage, alley ways, loading and unloading docks, loading and unloading chutes and pens, and yardmaster's office, and a trackman's tool house. These facilities are owned by petitioner, but are leased to the railroads serving the stockyards under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs of tracks and taxes and assessments. In addition, the railroads pay petitioner on a per car basis for performing loading and unloading services. The amounts so paid [fol. 1271] are absorbed by the railroads or are included in the freight rates. The locomotives, transportation equipment, etc., essential to the use of this property, are furnished and operated by the several railroads. The loading and unloading docks, chutes and pens which are leased by the railroads from petitioner are used exclusively for handling livestock in the course of transportation to and from petitioner's stockyards. This property and the structures thereon are not used and useful in the rendition of stockyard services.

9. 2.633 acres of the land excluded as being not used and useful are occupied by so-called stock show buildings consisting of a stadium, sales pavilion, and certain other buildings used in connection with a stock show. Petitioner does not carry on any of its business in these buildings. Petitioner leases this property to the Western Stock Show Association, a Colorado corporation, which operates an annual livestock show on the premises. The expenses of the show are borne in part by public subscription and in part by the receipts from the sale of tickets. Petitioner pays the taxes upon this property and has, in the past, made substantial contributions to cover deficits resulting from the operation of the show.

10. The so-called stock show property is unused except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show. The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling of this livestock, and the Secretary does not attempt to regulate the charges made in connection with the stock show.

11. Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole.

12. The stock show property is not used and useful in rendering stockyard services and its exclusion does not affect the value of petitioner's property as an integrated and established enterprise.

Land Value

13. The fair and reasonable value of all of petitioner's land is \$724,974 and the value of petitioner's used and useful land is \$536,825.

Structure and Equipment

14. The reproduction cost new of petitioner's structures and equipment is \$2,118,960 and 80.545% of that amount is the reproduction cost new less depreciation. The fair and reasonable value of petitioner's equipment and structures is \$1,706,717.14.

Going Concern Value

15. No separate allowance is made for going concern value, but an allowance for going concern value is included in the total rate base upon which petitioner is permitted to earn a reasonable return. In addition the rate base includes among others such items as allowances for proximity to highways and railroads; freedom from floods; access to water supply and other city services; favorable loca-

[fol. 1273] tion in regard to related industries; and the effect of the city zoning ordinance; its availability for a stockyard and as an assembled tract as distinguished from several tracts in separate ownership. Also included is construction overheads, general overheads, and 5% in addition for omissions and contingencies, omitting, however, organization expenses. Consideration was given to the peculiar climatic conditions of Denver as affecting rot, rust, and decay. \$30,267 was added to cover interest on used and useful land during the construction period and \$139,300 added for working capital. The result arrived at is the sum of \$2,792,700 as a fair rate base upon which petitioner is entitled to earn a fair return.

Rate of Return

16. $6\frac{1}{2}\%$ is a fair rate of return on said rate base or valuation.

Trader Yardage Charge

17. The structure of petitioner's existing schedule of rates and charges is such that, with the exception of livestock resold through commission merchants, all yardage charges are assessed and collected from those patrons who cause the livestock to come to the stockyards. It is unjust, discriminatory and unreasonable for petitioner to maintain and set aside a large section of its valuable property for the use of yard traders or speculators and to incur numerous expenses in the rendition of stockyards services to this class of patrons without charge and then remunerate itself for the use of such facilities and for the rendition of such services by increased charges on other patrons.

18. The traders or speculators ought to pay for services rendered to them substantially one-half of the rates and [fol. 1274] charges imposed upon those who send their livestock to market for sale. This is a reasonable charge for the services rendered and facilities furnished to yard traders or speculators.

19. While there is considerable similarity in the services and facilities afforded to traders or speculators and those afforded to the shippers of livestock, yet there is sufficient difference in the service rendered, inasmuch as traders or speculators performed some of their own labor, to warrant

the imposition of a lower rate or charge upon the traders or speculators than is imposed upon shippers.

Certain Expenses

20. An analysis of the detailed audit of contributions, donations, etc., made by petitioner in the past reveals that slightly over \$300 is contributed annually to charities and community activities which benefit petitioner's employees or patrons. \$325 annually is a proper sum to cover into the rates for this item of expense.

21. \$1200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act.

22. In order for petitioner to pay its reasonable expenses in rendering stockyard services and earn a return of $6\frac{1}{2}\%$ on the fair value of its property used and useful in rendering stockyard services, the rates charges must produce \$528,071. On the basis of the test period, 1930-1934, inclusive, the prescribed rates will yield \$530,117. Applying these rates to the actual volume of business handled by petitioner in the year 1935, the rates would have yielded \$528,587.75. Applying the rates prescribed by the Secretary [fol. 1275] to the volume of business actually handled by petitioner in the year 1936, the rates would have yielded \$558,760.44.

23. Over a period of time in the future the rates prescribed by the Secretary's order will yield an amount sufficient to pay all reasonable costs incurred in rendering stockyard services plus a return of $6\frac{1}{2}\%$, or more, on the fair value of petitioner's property used and useful in rendering stockyard services.

Conclusions of Law

1. This Court has jurisdiction of the parties and the matters set forth in the petition herein and all questions of law and fact raised by the pleadings and record, by reason of certain acts of Congress known and cited as the Packers and Stockyards Act, 1921, (42 Stat. 159); the Commerce Court Act of June 18, 1910 (36 Stat. 539); the Act of March 3, 1911 (36 Stat. 1087); and the District Court Jurisdiction Act being part of the Urgent Deficiencies Ap-

appropriations Act (238 Stat. 219), approved October 22, 1913, and amendments thereto.

2. Under the provisions of the Packers and Stockyards Act, 1921, the Secretary of Agriculture had jurisdiction under the notice served on petitioner to enter into an inquiry on his own motion as to the reasonableness and lawfulness of all the rates and charges for stockyard services in effect at petitioner's stockyard.

3. Petitioner was accorded a full and fair hearing by the Secretary of Agriculture. The Secretary's order does not confiscate petitioner's property but is fair, reasonable and lawful.

4. The method used by the Secretary in determining that petitioner's rates and charges were unreasonable and unlawful [fol. 1276] and in prescribing and fixing reasonable and lawful rates and charges for the future, was not arbitrary or unreasonable, but was lawful.

5. The railroad trackage, loading and unloading docks, chutes and pens, the yardmaster's office, the trackman's tool house and the land upon which these structures are situated are not used and useful in rendering stockyard services because as a matter of law the services in connection with which this property is used are transportation services.

6. The stock show property, including the stadium, sales pavilion, etc., and the 2.633 acres of land upon which these buildings are situated, is not used and useful in rendering stockyard services as defined in the Packers and Stockyards Act of 1921.

7. The Secretary was not required to adopt the proposed findings in the tentative report which was submitted to the petitioner, but was required as a matter of law to consider the evidence and exercise his independent judgment thereon.

8. The rate schedule prescribed in the order of the Secretary is fair and reasonable and the rates for the various services are fair in their relation to each other, and the yardage charges are fair as applied to the several species of livestock. The prescribed rates and findings of the Secretary are not arbitrary or unreasonable for the various services as applied to the several species and in their rela-

tion to each other and are supported by the weight of the evidence and as a whole are lawful.

9. The rates prescribed by the Secretary will yield a fair return upon the fair value of all of its property which is used and useful in rendering stockyard services, and do [fol. 1277] not confiscate petitioner's property.

10. Petitioner's cause is without equity, the temporary injunction heretofore granted should be dissolved, a permanent injunction denied and the petition be dismissed, with costs to the defendants. The petitioner be ordered, within the time to be fixed by this Court, to refund to the users of petitioner's service such portion of their rates and charges collected by it on and after March 19, 1937, as are in excess of the rates and charges specified as reasonable in the order of the Secretary of Agriculture involved in this suit with interest at 6 per cent per annum from date of payment.

Sam G. Bratton, Circuit Judge. J. Foster Symes,
District Judge. Alfred P. Murrah, District Judge.

[fol. 1278] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, -DISTRICT OF COLORADO

In Equity. N. 10913

THE DENVER UNION STOCK YARD COMPANY, a Corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE,
Defendants

DECREE—Filed December 20, 1937

This cause came on for final hearing on June 22nd and 23rd, 1937, before a statutory three-judge court, sitting as the District Court of the United States, in and for the District of Colorado, and duly convened pursuant to the provisions of the Act of Congress of October 22, 1913 (28 U. S. C. A. § 47), and all parties being represented by counsel, the matter was fully argued and the Court being fully advised, and

having filed this day its findings of fact and conclusions of law, it is—

Ordered, Adjudged and Decreed:

(1) That the findings of fact and conclusions of law requested by the parties are denied, save and except as the findings and conclusions requested are incorporated in the [fols. 1279-1291] findings and conclusions this day made.

(2) That the interlocutory injunction granted herein on March 11, 1937 be, and the same is hereby dissolved, and the petitioner be and is hereby ordered within 30 days of this date to refund to the users of petitioner's services such portion of their rates and charges collected by it on and after March 19, 1937, as are in excess of the rates and charges specified as reasonable in the order of the Secretary of Agriculture involved in this case, dated February 17, 1937, with interest at six per cent per annum from date of payment.

(3) That the petition of the petitioner filed herein be, and hereby is, dismissed.

(4) That the defendants recover their costs and disbursements.

Denver, Colorado, December 20, 1937.

Sam G. Bratton, Circuit Judge. J. Foster Symes,
District Judge. Alfred P. Murrah, District Judge.

[fol. 1292] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE CONTINUATION OF TEMPORARY INJUNCTION—
Filed January 20, 1938

Whereas, The plaintiff in this cause is taking an appeal to the Supreme Court of the United States from the decree of the District Court herein and desires to have the interlocutory injunction heretofore entered herein continued in effect until the determination of such appeal, and

Whereas, The defendants herein are willing that an order enter continuing the interlocutory injunction in effect until the determination of said appeal upon the posting of a bond in the sum of \$90,000.00, conditioned as in the original bond [fol. 1293] herein, and with the added condition that appellant shall prosecute its appeal to effect, and, if it fails to make its plea good, shall answer all damages and costs (said bond to be filed in lieu of the present \$50,000.00 bond now on file herein), and

Whereas, It is the desire of the parties that such appeal shall operate as a supersedeas, and said bond as a supersedeas bond, and that all further proceedings in this court shall be stayed pending determination of said appeal,

It is Hereby Stipulated and Agreed, By and between the parties to this cause:

That the Court may make and enter its order continuing in effect the interlocutory injunction heretofore granted herein until this cause is finally determined by the Supreme Court of the United States, upon condition that plaintiff file with this Court a bond of \$90,000.00 conditioned as in the original bond herein, and with the added condition that appellant shall prosecute its appeal to effect, and, if it fail to make its plea good, shall answer all damages and costs; and may order that such appeal shall operate as a supersedeas and all proceedings in this court shall be stayed pending determination of said appeal;

And it is Further Agreed:

That upon plaintiff filing with this court the \$90,000.00 [fols. 1294-1300] bond mentioned above, the present \$50,000.00 bond herein may be canceled.

Dated January 18th, 1938.

Robert G. Bosworth, Norman A. Hutchinson, Attorneys for Plaintiff. Thomas J. Morrissey, Attorneys for Defendants.

[fol. 1301] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 20, 1938

The petition of the plaintiff in this cause for an appeal from the findings of fact, conclusions of law and final decree herein is hereby granted and the appeal is allowed; and plaintiff, having filed a bond in the sum of ninety thousand (\$90,000.00) Dollars conditioned as by law required, and with sufficient sureties in lieu of the fifty thousand (\$50,000.00) Dollar bond heretofore filed herein,

It is Ordered:

That said bond be, and the same is hereby approved, [fol. 1302] and said appeal shall operate as a supersedeas of the decree made and entered in the above cause, and all further proceedings of this Court herein shall be suspended and stayed and the interlocutory injunction heretofore entered in this cause shall continue in full force and effect, until the final determination of said appeal by the Supreme Court of the United States.

Dated Jan. 20th, 1938.

By the Court.

Sam G. Bratton, Circuit, Judge. J. Foster Symes,
District Judge. Alfred P. Murrah, District Judge.

[fol. 1303] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE INCORPORATION OF NARRATIVE STATEMENT IN
RECORD—Filed January 27, 1938

Whereas the plaintiff has caused to be printed and has filed with the trial court an abstract of the evidence taken by the Secretary of Agriculture in the administrative hearing before him, and the plaintiff now desires to submit copies of the aforesaid printed abstract of evidence to the Clerk

of the Supreme Court in accordance with Rule 38, paragraph 7, of the Revised Rules of the Supreme Court of the United States,

It is Hereby Stipulated and Agreed by and between the parties to this cause:

1. That the printed abstract of evidence filed by plaintiff at the trial of this suit is an agreed narrative statement of the pertinent evidence taken by the Secretary of Agriculture in the administrative hearing before him, except the indices printed at pages i to xi in Volume I and pages i to xi in Volume II and the marginal notes contained in Volume I and Volume II of the aforesaid abstract.

[fols. 1304-1305] 2. That the aforesaid indices and marginal notes contained in Volume I and Volume II of the abstract of evidence were objected to by counsel for the defendants at the trial of this suit on the grounds that the said indices and marginal notes were erroneous, misleading, and not a part of the evidence.

3. That the indices printed on pages i to xi of Volume I and pages i to xi of Volume II and the marginal notes contained in Volume I and Volume II of the abstract of evidence are not to be considered as a part of the record before the Supreme Court of the United States.

4. That the printed abstract of evidence filed in the trial court may be furnished to the Clerk of the Supreme Court of the United States for incorporation in the record in accordance with Rule 38, paragraph 7, of the Revised Rules of the Supreme Court of the United States.

Robert G. Bosworth, Norman A. Hutchinson, Attorneys for the Plaintiffs. Robert H. Jackson, Wendell Berge, Attorneys for the Defendants.

[fol. 1306] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSMISSION OF ORIGINAL EXHIBITS—Filed
February 7, 1938

Whereas, the plaintiff in this cause is taking an appeal to the Supreme Court of the United States from the decree of the District Court herein, and desires to submit the original exhibits in the case and the stipulations entered into at the trial for examination by the Supreme Court as part of the record on appeal; and

Whereas, it is desired that either plaintiff or defendants may reproduce such of the exhibits herein as it or they may desire and have the same made a part of the record on appeal.

It is Hereby Stipulated and Agreed by and between the parties to this cause:

1. That all of the original exhibits herein, together with the stipulations entered into at the trial of this cause, may be sent up to the Supreme Court of the United States as [fols. 1307-1316] part of the record on appeal, and an order to that effect may enter.

2. That either party shall have the right to reproduce such of the exhibits or stipulations as it or they may elect, and have the same made a part of the transcript on appeal.

Dated February 2nd, 1938.

Robert G. Bosworth, Norman A. Hutchinson, Attorneys for Plaintiff. Thomas J. Morrissey, Attorneys for Defendants.

[fol. 1317] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF PROCEEDINGS OF DECEMBER 20, 1937, AND ORDER
CONTINUING INJUNCTION—Filed February 11, 1938

Be it Remembered that on, to wit, the 20th day of December, A. D. 1937, the same being one of the regular juridical days of the November Term, A. D. 1937, of said court, this cause came on for trial before the Honorable Sam G. Bratton, Alfred P. Murrah and J. Foster Symes, the plaintiff appearing by Robert G. Bosworth, Esq., its attorney, and the defendants appearing by James C. Wilson, Esq., Special Assistant to the Attorney General.

Judge Symes: Let the record show that in open court the Court makes these findings of fact and conclusions of law.

Mr. Bosworth: Plaintiff, The Denver Union Stock Yard Company, petitioner herein, excepts to the findings of fact and the entry thereof by this court in this cause, and particularly excepts to the findings numbered 8, 9, 11 to 21, inclusive, and finding numbered 23, for the reason said findings and each thereof are contrary to the evidence and to [fol. 1318] the weight of the evidence, and are contrary to law. Plaintiff further excepts to findings 17, 18 and 19 for the reason that the charge against yard traders there found proper creates discrimination and its discriminatory against shippers and other buyers on the market of plaintiff, is unwarranted, unjust, and cannot be collected. Plaintiff excepts to certain conclusions of law and their entry by the court, namely, conclusions Nos. 3, 4, 5, 6, 8, 9 and 10, for the reason that such conclusions of law and each thereof are and is contrary to law. The plaintiff desires to give notice of appeal to the Supreme Court of the United States, and prays that the preliminary injunction heretofore issued in this cause be continued for such time as to the court may seem proper, pending filing a petition for appeal and petition fixing terms of appeal as required by the judicial code. I may say I desire also to advise the court that I have received word from the Department of Justice, and they have no objection to the entry of the stay order pending the decision of the appeal upon posting an

additional bond to the extent of \$40,000.00. Mr. Wilson of the Department is here, and can verify that.

Mr. Wilson: That is agreeable to the Department.

Judge Bratton: The exceptions of the plaintiff are allowed, and the provision in the decree dissolving the temporary injunction is stayed for a period of thirty days from this date.

[fols. 1319-1322] Reporter's certificate to foregoing transcript omitted in printing.

Approved.

_____, District Judge.

[fol. 1323] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

In Equity, No. 10913.

THE DENVER UNION STOCK YARD COMPANY, a Corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE,
Defendants

Before BRATTON, Circuit Judge, and SYMES and MURRAH,
District Judges.

OPINION—Filed October 8, 1937

SYMES, District Judge, delivered the opinion of the Court:

The Secretary of Agriculture, pursuant to the so-called Packers and Stockyards Act of 1921 (42 Stat. 159, 7 U. S. C. A., §§ 201-17 inclusive), entered an order February 17, 1937 prescribing maximum reasonable rates and charges to be collected by the plaintiff, The Denver Union Stock Yard Company, for services rendered at its stockyards in Denver. The plaintiff brought this action (authorized by § 217 of the same Act), to restrain the enforcement of said order. By agreement of parties an interlocutory injunction was

granted by this court on March 9, 1937, enjoining the enforcement of said order pending final hearing.

The constitutionality of the Act (*supra*) has been sustained. See *Stafford v. Wallace*, 258 U. S. 495. And § 217 grants us jurisdiction to test the fairness, etc., of an order of the Secretary such as is here involved. It provides that all provisions of law that have to do with the suspension, or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part of the orders of the Interstate Commerce Commission are made a part of, and applicable to, the so-called Packers and Stockyards Act. [fol. 1324] See § 24 of the Jud. Code (Tit. 28 U. S. C. A., § 41, subd. 27 and 28), as amended.

A previous order of the Secretary prescribing maximum reasonable rates and charges to be collected by the same stock yards company, dated July 28, 1931, was held invalid by this court. *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735. The order now before us follows an order of inquiry and notice of hearing, dated November 8, 1934. The taking of evidence by the examiner was concluded July 3, 1935. The oral testimony covers 2300 pages and 118 exhibits containing 4000 pages were introduced. It indicates that the Secretary's findings were made only after a full and fair hearing. The procedure has been approved by this and other courts. *American Commission Co. v. United States*, 11, Fed. Supp. 965.

The Supreme Court has construed the Act in question in the *St. Joseph Stock Yards Co.* case, 298 U. S. 38 and defined the scope and limits of the judicial review permitted, holding that rate fixing is a legislative act, in the exercise of which there is broad discretion; that the Federal courts do not sit as boards of revision to substitute their judgment for that of the Congress or its agents as to matters within the province of either; that when, as in the Act in question, the Congress appoints an agent—i. e., the Secretary of Agriculture—to act within the sphere of legislative authority, it may endow the latter with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according the parties a fair hearing and acting upon evidence and not arbitrarily; that (p. 51):

“ * * * the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to sup-

port the findings, and the question of the weight of the evidence in determining the issues of fact lies with the legislative agency acting within its statutory authority."

The Court points out, however, the constitutional limitations on rate-making power that prohibit the deprivation of property without due process of law, or the taking of [fol. 1325] private property for public use without just compensation, both of which questions are subject to an independent judicial review. See also Judge McDermott's discussion in *Denver Union Stock Yard Co. v. United States*, 57 Ftd. (2d) 735.

With this in mind we consider seriatim the particular errors charged by the plaintiff.

1: That the Secretary excluded from the rate base the value of the railroad trackage of the plaintiff, the loading and unloading docks, pens and alleys adjacent thereto, together with the 8.985 acres of land whereon the said facilities are situated.

These facilities are owned by the plaintiff, but leased to the railroads serving the stockyards, under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs and renewals of tracks, and taxes and assessments.

Sec. 201 of the Packers and Stockyards Act, *supra*, defines a stockyard service as

"Services or facilities furnished at a stockyard in connection with the receiving . . . , marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce of livestock."

It may be assumed that railroad facilities are indispensable, or at least highly desirable and convenient for the operation of a modern stockyards; for this reason it is claimed that the value of the above property belonging to the Stock Yard Company, should be included in the rate base. The Secretary excluded these items, because according to subsection 5 of § 15 of the Interstate Commerce Act, the carrier is obliged to deliver livestock at destination free off cars in a suitable place where the consignee can take delivery, all without extra charge, and accordingly hold them to be transportation and not yard facilities.

The locomotives and transportation equipment, etc., essential to the performance of this service are furnished by

the several railroads, yet plaintiff claims the right to [fol. 1326] charge for it. If this is a stockyard service, the inquiry naturally arises—where does it begin? By a parity of reasoning it could be extended to include the transportation of livestock from the farm or range to the stockyard.

In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, it was held that a railroad company is required to provide all facilities for the discharging of livestock after it reaches the place to which it is consigned and that the full performance of this public duty requires the aid of enclosed yards, into which the stock can be safely and effectively delivered. And furthermore that a special charge cannot be made in addition to the transportation charge for merely receiving or delivering such stock in and through yards provided for that purpose.

— This case was affirmed in *United States v. Union Stock Yard*, 226 U. S. 286, which calls attention to the provisions of the Interstate Commerce Commission Act that all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of persons or property * * * and grounds used or necessary in the transportation or delivery of any of said property, are transportation facilities; the test being the character of the service rendered.

In *Allied Packers v. Atchison, Topeka & Santa Fe Railroad*, 161 I. C. C. 641, the Commission held (p. 643), the unloading of stock into the unloading chutes at a stockyard even though performed by stockyard employees to be subject to the jurisdiction of the Commission and (p. 644), that the assessment of a charge for the use of stockyard facilities cannot deprive the Commission of its jurisdiction. Likewise in *Livestock, Southern Territory Rates*, 171 I. C. C. 721, at p. 725, it said:

“The law requires carriers to bear the expense of loading and unloading livestock destined or received at public stockyards * * * whereas practically all other carload freight is loaded and unloaded by the shipper at his expense.”

See also *A. T. & S. F. v. U. S.*, 295 U. S. 193.

The fact that the railroads run into the plaintiff's yards [fol. 1327] and discharge cattle directly into these pens,

from where consignees take them, lends no weight to plaintiff's argument. It offers many services to its customers, but it is not, and cannot be claimed, that they thereby become a stockyard facility as defined in § 201 (supra); nor does any part of the transportation to and from the plaintiff's plant come within the definition of a "stockyard", which is a public market

"consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules or goats are received, held, or kept for sale or shipment in commerce." § 202, Tit. 7, U. S. C. A.

Furthermore there is no escape from the proposition that the transportation the shipper pays for includes what the statute says it must; the delivery at public stockyards into suitable pens. That service is covered by the rate paid to the railroad and to permit the plaintiff to charge for it would constitute a double impost. The railroads pay the plaintiff for loading and unloading livestock, which they would hardly do were it a stockyards service and we take notice that the Commission include in the rate base of a railroad tracks and lands leased and used and useful in the transportation service. *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330.

We think the Secretary is correct in this matter.

2: That the exclusion of the so-called stock show property, consisting of the Stadium, sales pavilion, etc., from the rate base is arbitrary, contrary to the law and the evidence, and confiscatory.

These structures and the 2.633 acres of land upon which they are situated are leased to and operated by a separate corporation which holds an annual livestock show. The expenses of the show are borne in part by public subscription and the Stockyards Company pays the taxes. At the annual show held in January large quantities of purebred livestock are received, sold and handled at the yards by reason thereof. The facilities offered are no more than needed for the purpose.

There is considerable evidence that the show is a benefit [fol. 1328] to the industry as a whole, as distinguished from the Denver yards in particular, and tends to improve herds and to advertise Denver as a good cattle market.

The Government, admitting that some livestock may be attracted to the Denver yards by the show, says it would all filter through this market at other times and does not increase the total income of the plaintiff. Attention is also called to the fact that the show lasts for a week only and the lessee, the Western Stock Show Association, does not pretend to furnish any stockyard facilities. But even if it is a stock show facility, it is not available to patrons during the remaining 51 weeks of the year, and a very small proportion of the livestock handled uses these buildings even during the week of the show. Were we charged with the determination of this factual question, we might, because of the indirect benefits to the industry as a whole resulting from the stock show, feel the question to be a debatable one. But there is substantial evidence pro and con on this issue; hence we are not justified in overruling the Secretary, especially where, as in this instance, a stock show is not an indispensable facility and its exclusion does not affect the value of the property as an integrated and established enterprise. *Los Angeles Gas Co. v. R. R. Comm'n*, 289 U. S. 287.

3: That the Secretary erred in not including in plaintiff's rate base an allowance of not less than \$325,000 for going concern value of plaintiff's business and property and that his findings to this extent are arbitrary, contrary to the law and the evidence, and confiscatory.

The Secretary recognized that the respondent stockyard was a going concern with a long history of efficient and economical management and financial success. Likewise he calls attention to the fact that it has never defaulted on its bonds and has paid dividends on the preferred stock continuously since 1917 and on the common stock since 1913, [fol. 1329] with the exception of three years.

No separate allowance for going concern value was made by the Secretary, nor is one necessary provided it is included in valuing the property upon which the owner has a right to a fair return. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153.

The *Los Angeles Gas Company* case, 289 U. S. (supra), is the latest expression of the Supreme Court on this valuation item. Beginning at p. 313, the Court affirms the *Des Moines Gas Company* case (supra), and makes a distinction between so-called "good-will" and going concern value, saying good-will is an

“‘element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business.’”

Which,

“as the Court has repeatedly said, is not to be considered in determining whether rates fixed for public service corporations are confiscatory.”

Nor are past losses or profits to be considered.

The opinion codifies the authorities on this subject, saying: That it is the appropriate task of the commission to determine the value of the property affected by the rates it fixes, as that of an integrated operating enterprise and it is the function of the court in deciding whether rates are confiscatory, not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use. And referring to the Cedar Rapids Gas Company case, 223 U. S. 655, the opinion says, the fact “that the plant was in successful operation,” had expressly been taken into account and a value fixed, which “considerably exceeded its cost” and hence the Court found no warrant for changing the result. And finally that the inquiry must be whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation.

[fol. 1330] See also *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, where after questioning the propriety of the master's treatment of going value, but noting compensatory errors in favor of the complainant, the Court said it could not conclude that the master was wrong in holding that the ordinance was not shown to be confiscatory.

The Government's case on valuation is made principally by the witness Zelinski, an employee of the Department and charged with that work since 1934. His qualifications are recited at length in the record and include similar duties performed in other stockyard cases. His valuation is based upon material in place and upon a property able and willing to function as a stockyard and a business earning an income. As to particular details; he allowed interest during construction on the structural property, considered such items as proximity to highways, railroads, freedom from

floods, access to water supply and other city services, its favorable location in regard to related industries, the effect of the city zoning ordinance, and that the highest and best use of the particular area in question is for stockyards. He likewise testified that he valued it higher because of its availability for a stockyard and as an assembled tract as distinguished from the several tracts in separate ownership. He also included construction overhead, general overhead, and added five per cent in addition for omissions and contingencies, omitting, however, organization expense. He gave consideration to the peculiar climatic conditions of Denver as affecting rot, rust and decay. The Secretary added to Mr. Zelinski's figures \$30,267 to cover one year's interest on the used and useful land during the construction period and added \$139,300 for working capital. In conclusion the Secretary arrived at \$2,792,700 as the rate base upon which the respondent is entitled to earn a fair return.

We think the record does not support the respondent's contention that Mr. Zelinski valued the land as naked land, [fol. 1331] merely because he says he considered it "stripped of all improvements." He, like the respondent's experts, used several tests of valuation, such as previous sales, assessed valuation and the other formulas. His staff listed every bit of structural property, even down to the number of two by fours in the pens, squares of paving, etc. An honest attempt was made to determine labor, material and business costs as of the date of the inventory, January 1, 1935, which was checked against a wealth of cost and price data maintained by the Department at its Kansas City office. Nor were such items as engineer and architect's fees, one year's taxes, legal fees, general salaries, expense during construction overlooked.

It is apparent from Mr. Hyder's interesting dissertation on going concern value that unconsciously perhaps as plaintiff's expert, he included certain intangible elements that we may not consider, such for instance as good-will, etc. He allowed \$350,000 as a minimum going concern value, computing it at \$10.00 per car for an admitted yearly average of 35,000 cars of livestock. A formula of this nature has no support in the record. He says it is similar in principle to one used occasionally for measuring the going concern or good-will value of an established business for

the purposes of sale. When applied to the situation here presented, we think it arbitrary and condemned by the Los Angeles case (*supra*).

The authorities do not justify the inclusion in the rate base the cost of land donated by the plaintiff to packing plants and railroad companies for so-called development of business, the cost of which, with carrying charges to the date of the hearing, is over \$325,000. The benefits, if any, of such largesse are speculative and have not been identified. Nor are they part of that element of value that pertains to an assembled and established plant doing business and earning money as defined in the Des Moines Gas Company case, 238 U. S. (*supra*). The well-deserved success that plaintiff has enjoyed is not the result of such artificial [fol. 1332] stimuli, but rather to efficient management and financing and the advantages that Denver and the surrounding territory offer to an enterprise of this kind.

Had the Secretary seen fit to value going concern value as a separate item it would have been more accurate and simplified our task. A careful examination of the record, however, discloses that it was fully considered and that the figure the Secretary finds the respondent is entitled to earn a fair return on is larger as a result thereof. The plaintiff has not made the convincing showing of error required by the St. Joseph case, 298 U. S. 38, at p. 53.

4. The plaintiff charges that the Secretary's findings on value of plaintiff's land are unlawful in that the finding of \$536,825 for used and useful land is not supported by substantial evidence and is therefore arbitrary and confiscatory.

The Secretary adopted the land valuations of his own witness Zelinski, who valued all the plaintiff's lands at \$724,924, whereas the witnesses for the company—Messrs. Epich, Newcomb and Ivins—arrived at \$1,645,552 for the same property.

In their brief counsel for plaintiff concede the experts on both sides are well qualified and argue that this large discrepancy in their figures must be upon the basis of difference in qualifications or in method pursued. Also that the method followed by their board of appraisal and the elements of value considered are identical with those of the Government witness Zelinski. The argument is grounded on the alleged lack of experience of the Government wit-

ness. Zelinski's previous lack of familiarity with land valuations in and about Denver is as immaterial to this discussion as is the fact that the three experts on the other side never valued any other stockyards before, either in Denver or elsewhere. It is apparent that the company's three experts took into consideration the so-called "stockyards value" of the property, instead of the fair average market value of similar land without considering the anticipated use. This is contrary to the rule in the Minnesota Rate [fol. 1333] Cases, 230 U. S. 352. Mr. Zelinski's experience and qualifications as a land appraiser and the methods pursued in this matter, are detailed in the record and lead us to the same conclusion in respect thereto as the court came to in *Union Stock Yards Co. of Omaha v. U. S.*, 9 Fed. Supp. 864. He was also accepted as an expert in *St. Joseph Stock Yards Co. v. U. S.*, 11 Fed. Supp. 322. Our experience in valuation cases might justify us in taking judicial notice of the tendency of local appraisers to give a higher value to lands than others. The most we can say is that the Secretary adopted the lowest valuation of a qualified expert. As it was within his discretion so to do, we cannot interfere.

Likewise the discussion of the valuation of structures is simplified by the plaintiff's admission that Mr. Zelinski followed the same methods as their experts and the statement of Mr. Hyder that the inventory upon which the cost of reproduction new is fixed and the resulting figures developing total cost of reproduction new as established by Mr. Zelinski, was substantially correct and that the variations from his figures are no more than would be anticipated from equally competent engineers.

5. That the order of the Secretary requires the plaintiff to charge and collect from yard traders a rate of one-half the specified yardage charge on cattle, calves and hogs, slightly less than one-half on sheep and goats, and the full charge on horses, mules and pure-bred bulls.

The petitioner asserts this is arbitrary and unsupported by the evidence, an invasion of the function of management, and therefore confiscatory and void.

The Secretary's action is based upon the finding that the failure to assess a proper charge against yard traders is a discriminatory practice forbidden by the Act and unless such charge is made the balance of the rate schedule will

not produce the return to which the Stock Yard Company is entitled.

The Secretary finds that livestock purchased and disposed [fol. 1334] of by yard traders occupies a considerable portion of respondent's yards—approximately 160 pens—together with adjacent alleys. It is undisputed that under present conditions trader livestock makes no contribution to the support of the yards, other than the profit it may pay on the hay and grain purchased. The Secretary in his five-year recapitulation of the volume of business 1930-34 inclusive, shows that 55,405 head of cattle out of a total of 367,822 were sold and reweighed for the purposes of sale. And that during this five-year period yardage was paid on 89% of cattle arrivals and 82% of calf arrivals. Manifestly livestock using the yards but not paying therefor casts a burden upon those that do pay, irrespective of the reason. Yard traders purchase livestock—mostly cattle—from commission men and either sell in this market or reship to other outlets. On stock shipped away from this market they pay no yardage, the charges under discussion being applicable only to stock sold here. So under the practice that now obtains a considerable part of the stockyards property is used, maintained, and numerous expenses incurred in rendering free service to this class of patrons. Necessarily the charge to the other patrons must be that much greater if plaintiff is to earn a reasonable return. The present income of the Stock Yards Company represents, almost entirely, commissions upon sales at the yards paid by shippers; that is to say by ranchers and farmers scattered throughout the West who use the yards only occasionally. They have an investment in a ranch or in a herd, while the yard trader has no capital investment, as he makes free use of the respondent's plant for and as his place of business.

Respondent's own witnesses testified that the producer; that is the shipper, has paid for this service in the marketing charge assessed against him by the Stock Yard Company. It follows, therefore, that this is a discriminatory practice and results in the yard trader getting for nothing [fol. 1335] a service that all other patrons of the yard pay for. And to say that this discrimination is justified because the trader is a desirable part of the market machin-

ery, helps maintain prices, and brings about a prompt absorption of offerings on the market, is no reason why he should not pay his proportionate share of the cost of conducting the market.

Public utilities should occupy a disinterested position, charging all alike for the same service. A similar charge was upheld in the Omaha and St. Joseph Stock Yards cases (Union Stock Yards Co. of Omaha (*supra*), at pp. 879-81, and St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, at p. 70). In the Omaha case the Court declined to follow the opinion in Denver Union Stock Yard Co. v. U. S. (*supra*), on this question.

6. The scope of the Judicial Review in this Case.

Under this heading we can dispose of the remaining questions. Plaintiff, in support of its several objections to the Secretary's order, charges generally, confiscation, the deprivation of its property without due process of law; that the decision of the Secretary is not conclusive, and the court must determine the issues upon its own independent judgment, both as to the law and the facts.

It's axiomatic of course that due process means the Secretary's finding must be based upon substantial evidence. He must not act arbitrarily and the respondent must have a fair hearing. To properly raise constitutional objections, however, it is not sufficient to plead them simply as legal conclusions. The facts pleaded in the bill must disclose a serious question of unconstitutionality. *Ex Parte Poresky*, 290 U. S. 30.

Spielman Motor Co. v. Dodge, District Attorney, 295 U. S. 89, holds that general allegations of irreparable damage, due process of law, etc., are not sufficient in the absence of a statement of facts sufficient to warrant such conclusion. One relying upon the 14th Amendment, must point out specifically what specific right of property is affected and why its use and enjoyment may not be regulated. *Hall v. [fol. 1336] Geiger-Jones Co.*, 242 U. S. 539. And

"Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury." *United Gas Co. v. R. R. Comm'n.*, 278 U. S. 300.

See also *American Commission Co. v. United States* (supra), p. 968, and cases cited.

Likewise we must bear in mind the statement in *Northern Pac. Ry. v. North Dakota*, 236 U. S. 585, at p. 598, that:

"The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges," and

P. 599:

"Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible."

This, together with the rule of the *Los Angeles Gas case*, 289 U. S. heretofore stated and this language, p. 305, of that case, that

"The judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory."

Forces the conclusion that we may not interfere with the order of the Secretary unless we are convinced that the valuation and rates prescribed as a whole result in an inadequate return.

We cannot take seriously the plaintiff's allegation that its property has been confiscated simply because the Secretary eliminated from the expense account "dues, donations and subscriptions" that during the past five years averaged from three to four thousand dollars a year, and limited this item to \$300.00 a year, the amount of the contributions thought to be actually beneficial to the Stock Yard Company employees and patrons.

Next; having found the fair value of plaintiff's property used and useful in rendering stockyard's services to be \$2,792,681, the Secretary determined that a return of 6½% upon that amount to be reasonable. This rate has been upheld in *Dayton Power & Light Co. v. Public Utilities Comm'n of Ohio*, 292 U. S. 290, and *Los Angeles Gas case* (supra), p. 319. The Secretary's findings on this point [fol. 1337] were based upon the evidence of an experienced investigator, Dr. Dozier.

Dr. Dozier has testified in a great many rate cases before the Department as an expert on the rate of return and his exhaustive studies on this question are to be found in Govt. Ex. 45. The plaintiff's only witness was Mr. Arthur Bosworth, a local investment banker of high standing, and a stockholder and member of petitioner's board of directors. We take judicial notice that the plaintiff enjoys a monopoly with no prospect of competition. Also we may note the fall in the rate of return on conservative investments over the past five or six years. *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 284 U. S. 248, at p. 260.

The Supreme Court in *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, said at p. 443:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary * * * must be determined upon the record of the proceedings before him, —save as there may be an exception of issues presenting claims of constitutional right."

A careful review of the record convinces us that the Secretary has not exceeded his discretion; that each finding is well within the limits established by substantial evidence. So it necessarily follows that the order inflicts no irreparable injury. The plaintiff had a full hearing before the Secretary and this court as well. As stated in the previous case, *Denver Union Stock Yard Co. v. U. S.* 57 Fed. (2d) (supra), the legal presumption that the findings of the Secretary are correct

"is strengthened in this case by the fact that the report of the Secretary bears internal evidence of the careful investigation made by him, and his disposition to be fair."

The same question is involved in these two cases and have been litigated for over seven years. Being of the opinion that the Secretary's order is valid, we see no reason for further delay in its enforcement. It may of course upon good cause being shown, be modified by the Secretary. [fols. 1338-1339] It follows that the bill should be dismissed and defendant have its costs.

J. Foster Symes, District Judge.

September 23, 1937.

[fol. 1339a] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING THE TIME WITHIN WHICH TO FILE RECORD
ON APPEAL IN SUPREME COURT OF THE UNITED STATES—
Filed February 2, 1938

It appearing that the record in this case is voluminous and that additional time is necessary to afford all parties opportunity to check the record and agree on the final form thereof,

It is ordered that the time be and the same is hereby extended to and including February 15, 1938, within which the record in this case may be filed and the cause docketed in the Supreme Court of the United States.

Sam G. Bratton, U. S. Circuit Judge. J. Foster Symes, U. S. D. J. Alfred P. Murrah, U. S. District Judge.

Dated January —, 1938.

All parties consent to the entry of the above order by the United States District Court for the District of Colorado, January 25, 1938.

Robert G. Bosworth, Counsel for Plaintiff. Robert H. Jackson, Assistant Attorney General Counsel for Defendants. Wendell Berge, Special Assistant to the Attorney General Counsel for Defendants.

[fol. 1340] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF
THE PARTS OF THE RECORD TO BE PRINTED—Filed February
16, 1938

Comes now The Denver Union Stock Yard Company, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

That the Court erred:

1. In finding in paragraph 6 of the Findings of Fact herein that of the 130.57 acres of land owned by the peti-

tioner, appellant herein, 46.779 acres thereof are not used and useful in the rendition of stockyards services, and in excluding the value of said land from petitioner's rate base, said findings being contrary to the evidence, unsupported by substantial evidence, contrary to law, confiscate the property of petitioner and deprive petitioner of its property [fol. 1341] without due process of law in violation of the fifth amendment to the Constitution of the United States, in that 8.985 acres and the value thereof thus excluded are utilized by petitioner for the location of its switch tracks, its loading and unloading docks and chutes, its holding pens and a portion of the alley bordering such pens, and 2.633 acres and the value thereof thus excluded are devoted to and utilized for stock show purposes, all said 11.618 acres thus erroneously excluded being used in the handling of livestock in commerce and as such defined to be a stockyard service or facility by section 301 of the Packers & Stockyards Act, 1921 (7 U.S.C.A. S 201).

2. In finding in paragraph 8 of the Findings of Fact herein that the 8.985 acres and the structures thereon and enumerated in said Findings, are not used and useful in the rendition of stockyard services for the reason that said finding is contrary to the evidence, unsupported by substantial evidence and contrary to law, confiscate the property of petitioner and deprive petitioner of its property without due process of law in violation of the fifth amendment to the Constitution of the United States, in that each and all of said lands and facilities are owned by petitioner and used in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivering, shipment, weighing or handling in commerce of livestock.

3. In determining in paragraph 8 of the Findings of Fact that "The loading and unloading docks, chutes and pens which are leased by the railroads from petitioner are used [fol. 1342] exclusively for handling livestock in the course of transportation to and from petitioner's stockyards" for the reason that there is no evidence of record to the effect that such facilities are leased by the railroads, or that all of them are used exclusively for handling livestock in the course of transportation from petitioner's stockyards.

4. In said Finding No. 8 in determining and finding that the amounts of money paid by the carriers to petitioner on the per car basis for performing loading and unloading services are absorbed by the railroads or are included in the freight rates, for the reason that said finding is contrary to the evidence and contrary to law.

5. In failing and refusing to enter suggested finding entitled "Stock Show Property" requested by petitioner and on the contrary making and entering Findings numbers 10, 11 and 12. In finding in paragraphs 9 to 12, inclusive, of the Findings of Fact herein, that the 2.633 acres whereon are situated the stadium, sales pavilion and certain other buildings used in connection with the stock show are not used and useful in rendering stockyard services, that the exclusion of said lands and structures does not affect the value of petitioner's property as an integrated and established enterprise, that whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole, and that petitioner does not carry on any of its business in the said buildings, said Findings and the assigned grounds therefor being contrary to the evidence, un-[fol. 1343] supported by substantial evidence and contrary to law and resulting in confiscation of petitioner's property without due process of law contrary to the fifth amendment to the Constitution of the United States.

6. In finding, in paragraph 13 of the Findings of Fact herein, that "The fair and reasonable value of all of petitioner's land is \$724,974.00 and the value of petitioner's used and useful land is \$536,825", said findings being unsupported by substantial evidence.

7. In finding in paragraph 14 of the Findings of Fact herein, that 80.545% is the condition per cent of petitioner's structures and equipment and that \$1,706,717.14 is the fair and reasonable value of said structures and equipment, said Findings being contrary to the evidence, unsupported by substantial evidence and arbitrary.

8. In failing and refusing to enter the suggested Finding of Fact entitled "Going Concern Value" requested by petitioner, and on the contrary making and entering the Finding contained in paragraph 15. In finding in paragraph 15 of the Findings of Fact that, "an allowance for going concern value is included in the total rate base upon

which petitioner is permitted to earn a reasonable return", for the reason that said Finding is contrary to the evidence and contrary to law.

9. In finding in paragraph 15 that \$2,792,700.00 is a fair rate base upon which petitioner is entitled to earn a fair return, for the reason that said Finding is unsupported by substantial evidence, is contrary to the evidence and is contrary to law.

[fol. 1344] 10. In finding in paragraph 16 that 6½% is a fair rate of return on the rate base and valuation of \$2,792,700. for the reason that said Finding is not supported by substantial evidence, is discriminatory and is contrary to law.

11. In failing and refusing to enter suggested Finding entitled "The Charge to Yard Traders" requested by petitioner, and on the contrary, making and entering the Findings contained in paragraphs 17 to 19, inclusive, that substantially one-half the rates and charges imposed upon those who sent their livestock to market for sale is a fair and reasonable charge for the services rendered and facilities furnished to yard traders or speculators, and in particular the Findings:

(a) That petitioner maintains and sets aside a large section of its valuable property for use of yard traders or speculators;

(b) That it is unjust, discriminatory and unreasonable so to do;

(c) That petitioner incurs numerous expenses in rendering of stockyard services to this class of patrons without charge, and then remunerates itself by increase in charges on other patrons;

(d) That traders or speculators ought to pay a charge;

all of said Findings being contrary to the evidence, wholly unsupported by any substantial evidence, authorize an unwarranted interference with the right of management and are contrary to law.

[fol. 1345] 12. In failing and refusing to enter suggested Finding entitled "Dues and Donations" requested by petitioner and on the contrary making and entering the Finding

contained in paragraph 20 that \$300.00 is shown to be the annual amount contributed by petitioner to charities and community activities which benefit petitioner's employees or patrons, and that \$325.00 is a proper sum to cover into rates for this item, said refusal and said Finding being contrary to the evidence, contrary to law, arbitrary, confiscatory and depriving petitioner of its property without due process of law in that said Findings as entered by the Court excludes items of business expense, prevents petitioner from bearing its fair share of community obligations and constitutes an unwarranted invasion and interference with the lawful functions of management.

13. In failing and refusing to enter a Finding substantially in accord with suggested Finding entitled "Packers' and Stockyards' Administration Expense" requested by petitioner and on the contrary, finding in paragraph 21 of the Findings of Fact herein that "\$1200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act", for the reason that said Finding as entered fails to amortize over a reasonable future period or at all the costs and expenses of the present litigation, fails to recognize and take into account the fact that rate investigations are of necessity recurrent, is contrary to the evidence, unsupported by the evidence, arbitrary, contrary to law and operates to confiscate petitioner's property.

[fol. 1346] 14. In finding in paragraph 23 of the Findings of Fact herein that "Over a period of time in the future the rates prescribed by the Secretary's order will yield an amount sufficient to pay all reasonable costs incurred in rendering stockyard services plus a return of $6\frac{1}{2}\%$, or more, on the fair value of petitioner's property used and useful in rendering stockyard services," for the reason that said finding is contrary to the evidence, unsupported by substantial evidence, contrary to law and results in confiscation of petitioner's property without due process of law in violation of the fifth amendment to the Constitution of the United States, and for the further reason that the basic findings as to valuation, rate of return and proper expense upon which the general Finding herein complained of is grounded are erroneous as hereinbefore set forth, and the general Finding is for the same reasons erroneous.

15. In concluding, as a matter of law, in paragraph 3 of the Conclusions of Law entered herein, that "The Secretary's order does not confiscate petitioner's property but is fair, reasonable and lawful," for the reason that said conclusion is contrary to the law and to the evidence.

16. In concluding, as a matter of law, in paragraph 4 of the Conclusions of Law entered by the Court herein that "The method used by the Secretary in determining that petitioner's rates and charges were unreasonable and unlawful and in prescribing and fixing reasonable and lawful rates and charges for the future, was not arbitrary or unreasonable but was lawful", for the reason that said conclusion is contrary to law and to the evidence.

[fol. 1347] 17. In failing and refusing to enter suggested Conclusion of Law entitled "Railroad and Loading Facilities" requested by petitioner, and on the contrary making and entering the conclusion of law as paragraph 5 thereof that the railroad trackage and other enumerated structures, together with the land whereon the same are situated, are not used and useful in rendering stockyard services because the services in connection with which this property is used are transportation services, because said conclusion is contrary to the law and to the evidence.

18. In failing and refusing to enter suggested Conclusion of Law entitled "Stock Show Property" requested by petitioner, but on the contrary making and entering the conclusion of law in paragraph 6 thereof concluding that the stock show property and land is not used and useful in rendering stockyard services as defined in the Act, for the reason that said conclusion is contrary to the law and to the evidence.

19. In concluding as a matter of law, in paragraph 8 of the Conclusions of Law herein, that the order of the Secretary is fair and reasonable, that the yardage charges (otherwise and properly known as marketing charges) are fair as applied to the several species of livestock, and that the prescribed rates and findings of the Secretary are not arbitrary or unreasonable, are supported by the weight of the evidence and as a whole are lawful, for the reason that said conclusion is contrary to the law and to the evidence.

[fol. 1348] 20. In concluding as a matter of law, in paragraph 9 of the Conclusions of Law herein, that "The rates prescribed by the Secretary will yield a fair return upon the fair value of all of its property which is used and useful in rendering stockyard services, and do not confiscate petitioner's property" for the reason that said Conclusion is contrary to the law and to the evidence.

21. In determining in paragraph 10 of the Conclusions of Law that petitioner's cause is without equity, the temporary injunction heretofore granted should be dissolved, a permanent injunction denied and the petition be dismissed with costs to the defendants.

22. In denying the petition of the petitioner for a permanent injunction herein.

23. In entering final judgment and decree dismissing petitioner's petition.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of Paper	Record Page
Petition	1
Exhibit "A" attached to Petition	23
Exhibit "B" attached to Petition	149
Exhibit "C" attached to Petition	227
Interlocutory injunction	358
[fol. 1349] Answer	360
Stipulations entered into at the trial pertaining to:	
(a) Results of the application of Secretary's rate order to 1935 and 1936 business	368
(b) Expenses incurred by plaintiff in this rate matter	375
(c) Comparison of income during stock show with weeks immediately prior and subsequent thereto	377
Abstract of evidence, Volumes I and II	382
Opinion of the Court	1323
Suggested findings of fact and conclusions of law tendered by plaintiff	1236
Suggested findings of fact and conclusions of law tendered by defendants	1249

Title of Paper	Record Page
Findings of fact and conclusions of law entered by the Court	1267
Decree	1278
Transcript of proceedings of December 20, 1937, and order continuing injunction	1317
Robert G. Bosworth, Norman A. Hutchinson, Winston S. Howard, Counsel for Appellant.	
Service acknowledged this 14 day of February, 1938.	
Thomas J. Morrissey, Counsel for Appellees.	
[fol. 1350] [File endorsement omitted.]	

[fol. 1351] IN SUPREME COURT OF THE UNITED STATES
 STATEMENT BY APPELLEES OF ADDITIONAL PARTS OF THE
 RECORD TO BE PRINTED—Filed February 23, 1938

The United States of America and the Secretary of Agriculture, the appellees, in the above entitled cause, hereby designate the following parts of the record which they think material in addition to the parts of the record set forth in the statement filed by appellant herein pursuant to Paragraph 9 of Supreme Court Rule 13, viz.:

Title of Paper	Record Page
Stipulation pertaining to continuation of the temporary injunction pending appeal	1292
Stipulation pertaining to incorporation of the printed narrative statement before the District Court in the record presented to the Supreme Court	1303
Stipulation pertaining to transmission of original exhibits to the Supreme Court	1306

Golden W. Bell, Acting Solicitor General.

Endorsed on cover: Enter Robert G. Bosworth. File No. 42,279. Colorado D. C. U. S. Term No. 798. The Denver Union Stock Yard Company, appellant, vs. The United States of America and Secretary of Agriculture. Filed February 14, 1938. Term No. 798, O. T., 1937.

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FILED

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 798

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

**THE UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.**

STATEMENT AS TO JURISDICTION.

ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
Counsel for Appellant.

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Statutory provisions	2
Date of the petition for appeal and allowance thereof	3
Cases believed to sustain jurisdiction	3
Exhibit "A"—Opinion of the District Court of the United States for the District of Colorado	4

TABLE OF CASES CITED.

<i>St. Joseph Stockyards Co. v. U. S.</i> , 298 U. S. 38	3
<i>Stafford v. Wallace</i> , 258 U. S. 495, 66 L. Ed. 735	3
<i>Tagg Bros. & Moorehead v. United States</i> , 282 U. S. 420, 50 Sup. Ct. Rep. 220	3

STATUTES CITED.

Packers and Stockyards Act, 1921, 7 U. S. C. A. 217 ..	2, 3
United States Code Annotated, Title 28, Section 44	3
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United States Code Annotated, Title 28, Section 47(a)	3

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IN THE
DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLORADO

IN EQUITY
No. 10913

THE DENVER UNION STOCK YARD COMPANY, A
CORPORATION,

vs.

Plaintiff,

UNITED STATES OF AMERICA AND SECRETARY OF
AGRICULTURE,

Defendants.

**STATEMENT OF GROUNDS OF APPELLATE
JURISDICTION.**

This is an appeal from a decree of the District Court of the United States for the District of Colorado, a three-judge court constituted as provided in 28 U. S. C. A. Section 47 (38 Stat. 220). The plaintiff filed its bill permanently to enjoin and set aside an order of the Secretary of Agriculture purporting to fix a schedule of maximum rates to be charged by the plaintiff in its conduct of a public stockyards at Denver, Colorado.

The suit was filed against the United States of America and the Secretary of Agriculture. An interlocutory in-

junction was granted by the Court, conditioned upon plaintiff posting bond in the amount of \$50,000.00. After a hearing, at which evidence was introduced, the Court on December 20, 1937 made and entered its final decree, which dissolved the interlocutory injunction, dismissed the plaintiff's appeal, and ordered plaintiff to refund to its customers such portion of its rates and charges collected by it after March 19, 1937, as are in excess of the rates and charges prescribed by the order of the Secretary of Agriculture.

Statutory Provisions.

The statutes believed to sustain the jurisdiction of the United States Supreme Court on this appeal are:

Packers and Stockyards Act, 1921, 7 U. S. C. A., Section 217, which provides:

"For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title"—

and 28 U. S. C. A., Section 47, which provides:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220)"—

and also 28 U. S. C. A., Section 47(a), which provides:

"A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in Section 44 of this title."

Section 44 referred to includes suits to set aside orders of the Interstate Commerce Commission which are applicable because of 7 U. S. C. A., Section 217, set forth above.

Petition for appeal was filed January 18, 1938, and allowed by the District Court January 20, 1938.

Case Law.

The cases believed to sustain the jurisdiction are as follows:

Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735;

Tagg Bros. & Moorehead v. United States, 282 U. S. 420, 50 Sup. Ct. Rep. 220;

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38.

In view of the provisions of the Packers and Stockyards Act, 1921, above cited, which adopts the procedure relative to appeals from decrees granting or refusing injunctions against orders of the Interstate Commerce Commission, the long line of authorities sustaining the jurisdiction of the Supreme Court on direct appeals from the decisions of the statutory three-judge court are applicable and sustain the jurisdiction of the Court in this proceeding.

ROBERT G. BOSWORTH,

NORMAN A. HUTCHINSON,

Solicitors for Plaintiff.

EXHIBIT "A".**UNITED STATES DISTRICT COURT, DISTRICT OF
COLORADO.****IN EQUITY, No. 10913.****THE DENVER UNION STOCK YARD COMPANY, a Corporation,
*Plaintiff,*****v.****UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE,
*Defendants.*****Before BRATTON, Circuit Judge, and SYMES and MURRAH,
District Judges.****SYMES, District Judge, delivered the opinion of the Court:**

The Secretary of Agriculture, pursuant to the so-called Packers and Stockyards Act of 1921 (42 Stat. 159, 7 U. S. C. A., §§ 201-17 inclusive); entered an order February 17, 1937 prescribing maximum reasonable rates and charges to be collected by the plaintiff, The Denver Union Stock Yard Company, for services rendered at its stockyards in Denver. The plaintiff brought this action (authorized by § 217 of the same Act), to restrain the enforcement of said order. By agreement of parties an interlocutory injunction was granted by this court on March 9, 1937, enjoining the enforcement of said order pending final hearing.

The constitutionality of the Act (*supra*) has been sustained. See *Stafford v. Wallace*, 258 U. S. 495. And § 217 grants us jurisdiction to test the fairness, etc., of an order of the Secretary such as is here involved. It provides that all provisions of law that have to do with the suspension, or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part of the orders of the Interstate Commerce Commission are made a part of, and applicable to, the so-called Packers and Stockyards Act. See § 24 of the Jud. Code (Tit. 28 U. S. C. A., § 41, subd. 27 and 28), as amended.

A previous order of the Secretary prescribing maximum reasonable rates and charges to be collected by the same stock yards company, dated July 28, 1931, was held invalid by this court. *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735. The order now before us follows an order of inquiry and notice of hearing, dated November 8, 1934. The taking of evidence by the examiner was concluded July 3, 1935. The oral testimony covers 2300 pages and 118 exhibits containing 4000 pages were introduced. It indicates that the Secretary's findings were made only after a full and fair hearing. The procedure has been approved by this and other courts. *American Commission Co. v. United States*, 11, Fed. Supp. 965.

The Supreme Court has construed the Act in question in the *St. Joseph Stock Yards Co.* case, 298 U. S. 38 and defined the scope and limits of the judicial review permitted, holding that rate fixing is a legislative act, in the exercise of which there is broad discretion; that the Federal courts do not sit as boards of revision to substitute their judgment for that of the Congress or its agents as to matters within the province of either; that when, as in the Act in question, the Congress appoints an agent—i. e., the Secretary of Agriculture—to act within the sphere of legislative authority, it may endow the latter with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according the parties a fair hearing and acting upon evidence and not arbitrarily; that (p. 51):

“ . . . the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining the issues of fact lies with the legislative agency acting within its statutory authority.”

The Court points out, however, the constitutional limitations on rate-making power that prohibit the deprivation of property without due process of law, or the taking of private property for public use without just compensation, both of which questions are subject to an independent judicial review. See also Judge McDermott's discussion in

Denver Union Stock Yard Co. v. United States, 57 Fed. (2d) 735.

With this in mind we consider seriatim the particular errors charged by the plaintiff.

1: That the Secretary excluded from the rate base the value of the railroad trackage of the plaintiff, the loading and unloading docks, pens and alleys adjacent thereto, together with the 8.985 acres of land whereon the said facilities are situated.

These facilities are owned by the plaintiff, but leased to the railroads serving the stockyards, under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs and renewals of tracks, and taxes and assessments.

Sec. 201 of the Packers and Stockyards Act, supra, defines a stockyard service as

"Services or facilities furnished at a stockyard in connection with the receiving * * *, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce of livestock."

It may be assumed that railroad facilities are indispensable, or at least highly desirable and convenient for the operation of a modern stockyard; for this reason it is claimed that the value of the above property belonging to the Stock Yard Company, should be included in the rate base. The Secretary excluded these items, because according to subsection 5 of § 15 of the Interstate Commerce Act, the carrier is obliged to deliver livestock at destination free off cars in a suitable place where the consignee can take delivery, all without extra charge, and accordingly held them to be transportation and not yard facilities.

The locomotives and transportation equipment, etc., essential to the performance of this service are furnished by the several railroads, yet plaintiff claims the right to charge for it. If this is a stockyard service, the inquiry naturally arises—where does it begin? By a parity of reasoning it could be extended to include the transportation of livestock from the farm or range to the stockyard.

In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, it was held that a railroad company is required to provide all facilities for the discharging of livestock after it reaches the place to which it is consigned and that the full performance of this public duty requires the aid of enclosed yards, into which the stock can be safely and effectively delivered. And furthermore that a special charge cannot be made in addition to the transportation charge for merely receiving or delivering such stock in and through yards provided for that purpose.

This case was affirmed in *United States v. Union Stock Yard*, 226 U. S. 286, which calls attention to the provisions of the Interstate Commerce Commission Act that all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of persons or property . . . and grounds used or necessary in the transportation or delivery of any of said property, are transportation facilities; the test being the character of the service rendered.

In *Allied Packers v. Atchison, Topeka & Santa Fe Railroad*, 161 I. C. C. 641, the Commission held (p. 643), the unloading of stock into the unloading chutes at a stockyard even though performed by stockyard employees to be subject to the jurisdiction of the Commission and (p. 644), that the assessment of a charge for the use of stockyard facilities cannot deprive the Commission of its jurisdiction. Likewise in *Livestock, Southern Territory Rates*, 171 I. C. C. 721, at p. 725, it said:

"The law requires carriers to bear the expense of loading and unloading livestock destined or received at public stockyards . . . whereas practically all other carload freight is loaded and unloaded by the shipper at his expense."

See also *A. T. & S. F. v. U. S.*, 295 U. S. 193.

The fact that the railroads run into the plaintiff's yards and discharge cattle directly into these pens, from where consignees take them, lends no weight to plaintiff's argument. It offers many services to its customers, but it is not, and cannot be claimed, that they thereby become a

stockyard facility as defined in § 201 (supra); nor does any part of the transportation to and from the plaintiff's plant come within the definition of a "stockyard," which is a public market.

"consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules or goats are received, held, or kept for sale or shipment in commerce." § 202, Tit. 7, U. S. C. A.

Furthermore there is no escape from the proposition that the transportation the shipper pays for includes what the statute says it must; the delivery at public stockyards into suitable pens. That service is covered by the rate paid to the railroad and to permit the plaintiff to charge for it would constitute a double impost. The railroads pay the plaintiff for loading and unloading livestock, which they would hardly do were it a stockyards service and we take notice that the Commission include in the rate base of a railroad tracks and lands leased and used and useful in the transportation service. *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330.

We think the Secretary is correct in this matter.

2: That the exclusion of the so-called stock show property, consisting of the Stadium, sales pavilion, etc., from the rate base is arbitrary, contrary to the law and the evidence, and confiscatory.

These structures and the 2.633 acres of land upon which they are situated are leased to and operated by a separate corporation which holds an annual livestock show. The expenses of the show are borne in part by public subscription and the Stockyards Company pays the taxes. At the annual show held in January large quantities of purebred livestock are received, sold and handled at the yards by reason thereof. The facilities offered are no more than needed for the purpose.

There is considerable evidence that the show is a benefit to the industry as a whole, as distinguished from the Denver yards in particular, and tends to improve herds and to advertise Denver as a good cattle market.

The Government, admitting that some livestock may be attracted to the Denver yards by the show, says it would all filter through this market at other times and does not increase the total income of the plaintiff. Attention is also called to the fact that the show lasts for a week only and the lessee, the Western Stock Show Association, does not pretend to furnish any stockyard facilities. But even if it is a stock show facility, it is not available to patrons during the remaining 51 weeks of the year, and a very small proportion of the livestock handled uses these buildings even during the week of the show. Were we charged with the determination of this factual question, we might, because of the indirect benefits to the industry as a whole resulting from the stock-show, feel the question to be a debatable one. But there is substantial evidence pro and con on this issue; hence we are not justified in overruling the Secretary, especially where, as in this instance, a stock show is not an indispensable facility and its exclusion does not affect the value of the property as an integrated and established enterprise. *Los Angeles Gas Co. v. R. R. Comm'n*, 289 U. S. 287.

3: That the Secretary erred in not including in plaintiff's rate base an allowance of not less than \$325,000 for going concern value of plaintiff's business and property and that his findings to this extent are arbitrary, contrary to the law and the evidence, and confiscatory.

The Secretary recognized that the respondent stockyard was a going concern with a long history of efficient and economical management and financial success. Likewise he calls attention to the fact that it has never defaulted on its bonds and has paid dividends on the preferred stock continuously since 1917 and on the common stock since 1913, with the exception of three years.

No separate allowance for going concern value was made by the Secretary, nor is one necessary provided it is included in valuing the property upon which the owner has a right to a fair return. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153.

The *Los Angeles Gas Company* case, 289 U. S. (supra), is the latest expression of the Supreme Court on this valuation item. Beginning at p. 313, the Court affirms the *Des*

Moines Gas Company case (supra), and makes a distinction between so-called "good-will" and going concern value, saying good-will is an

"element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business.' "

Which,

"as the Court has repeatedly said, is not to be considered in determining whether rates fixed for public service corporations are confiscatory."

Nor are past losses or profits to be considered.

The opinion codifies the authorities on this subject, saying: That it is the appropriate task of the commission to determine the value of the property affected by the rates it fixes, as that of an integrated operating enterprise and it is the function of the court in deciding whether rates are confiscatory, not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use. And referring to the Cedar Rapids Gas Company case, 223 U. S. 655, the opinion says, the fact "that the plant was in successful operation," had expressly been taken into account and a value fixed, which "considerably exceeded its cost" and hence the Court found no warrant for changing the result. And finally that the inquiry must be whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation.

See also Lincoln Gas Co. v. Lincoln, 250 U. S. 256, where after questioning the propriety of the master's treatment of going value, but noting compensatory errors in favor of the complainant, the Court said it could not conclude that the master was wrong in holding that the ordinance was not shown to be confiscatory.

The Government's case on valuation is made principally by the witness Zelinski, an employee of the Department and charged with that work since 1934. His qualifications are

recited at length in the record and include similar duties performed in other stockyard cases. His valuation is based upon material in place and upon a property able and willing to function as a stockyard and a business earning an income. As to particular details; he allowed interest during construction on the structural property, considered such items as proximity to highways, railroads, freedom from floods, access to water supply and other city services, its favorable location in regard to related industries, the effect of the city zoning ordinance, and that the highest and best use of the particular area in question is for stockyards. He likewise testified that he valued it higher because of its availability for a stockyard and as an assembled tract as distinguished from the several tracts in separate ownership. He also included construction overhead, general overhead, and added five per cent in addition for omissions and contingencies, omitting, however, organization expense. He gave consideration to the peculiar climatic conditions of Denver as affecting rot, rust and decay. The Secretary added to Mr. Zelinski's figures \$30,267 to cover one year's interest on the used and useful land during the construction period and added \$139,300 for working capital. In conclusion the Secretary arrived at \$2,792,700 as the rate base upon which the respondent is entitled to earn a fair return.

We think the record does not support the respondent's contention that Mr. Zelinski valued the land as naked land, merely because he says he considered it "stripped of all improvements." He, like the respondent's experts, used several tests of valuation, such as previous sales, assessed valuation and the other formulas. His staff listed every bit of structural property, even down to the number of two by fours in the pens, squares of paving, etc. An honest attempt was made to determine labor, material and business costs as of the date of the inventory, January 1, 1935, which was checked against a wealth of cost and price data maintained by the Department at its Kansas City office. Nor were such items as engineer and architect's fees, one year's taxes, legal fees, general salaries, expense during construction overlooked.

It is apparent from Mr. Hyder's interesting dissertation on going concern value that unconsciously perhaps as plaintiff's expert, he included certain intangible elements that we may not consider, such for instance as good-will, etc. He allowed \$350,000 as a minimum going concern value, computing it at \$10.00 per car for an admitted yearly average of 35,000 cars of livestock. A formula of this nature has no support in the record. He says it is similar in principle to one used occasionally for measuring the going concern or good-will value of an established business for the purposes of sale. When applied to the situation here presented, we think it arbitrary and condemned by the Los Angeles case (*supra*).

The authorities do not justify the inclusion in the rate base the cost of land donated by the plaintiff to packing plants and railroad companies for so-called development of business, the cost of which, with carrying charges to the date of the hearing, is over \$325,000. The benefits, if any, of such largesse are speculative and have not been identified. Nor are they part of that element of value that pertains to an assembled and established plant doing business and earning money as defined in the Des Moines Gas Company case, 238 U. S. (*supra*). The well-deserved success that plaintiff has enjoyed is not the result of such artificial stimuli, but rather to efficient management and financing and the advantages that Denver and the surrounding territory offer to an enterprise of this kind.

Had the Secretary seen fit to value going concern value as a separate item it would have been more accurate and simplified our task. A careful examination of the record, however, discloses that it was fully considered and that the figure the Secretary finds the respondent is entitled to earn a fair return on is larger as a result thereof. The plaintiff has not made the convincing showing of error required by the St. Joseph case, 298 U. S. 38, at p. 53.

4. The plaintiff charges that the Secretary's findings on value of plaintiff's land are unlawful in that the finding of \$536,825 for used and useful land is not supported by substantial evidence and is therefore arbitrary and confiscatory.

The Secretary adopted the land valuations of his own witness Zelinski, who valued all the plaintiff's lands at \$724,924, whereas the witnesses for the company—Messrs. Epich, Newcomb and Ivins—arrived at \$1,645,552 for the same property.

In their brief counsel for plaintiff concede the experts on both sides are well qualified and argue that this large discrepancy in their figures must be upon the basis of difference in qualifications or in method pursued. Also that the method followed by their board of appraisal and the elements of value considered are identical with those of the Government witness Zelinski. The argument is grounded on the alleged lack of experience of the Government witness. Zelinski's previous lack of familiarity with land valuations in and about Denver is as immaterial to this discussion as is the fact that the three experts on the other side never valued any other stockyards before, either in Denver or elsewhere. It is apparent that the company's three experts took into consideration the so-called "stockyards value" of the property, instead of the fair average market value of similar land without considering the anticipated use. This is contrary to the rule in the Minnesota Rate Cases, 230 U. S. 352. Mr. Zelinski's experience and qualifications as a land appraiser and the methods pursued in this matter, are detailed in the record and lead us to the same conclusion in respect thereto as the court came to in Union Stock Yards Co. of Omaha v. U. S., 9 Fed. Supp. 864. He was also accepted as an expert in St. Joseph Stock Yards Co. v. U. S., 11 Fed. Supp. 322. Our experience in valuation cases might justify us in taking judicial notice of the tendency of local appraisers to give a higher value to lands than others. The most we can say is that the Secretary adopted the lowest valuation of a qualified expert. As it was within his discretion so to do, we cannot interfere.

Likewise the discussion of the valuation of structures is simplified by the plaintiff's admission that Mr. Zelinski followed the same methods as their experts and the statement of Mr. Hyder that the inventory upon which the cost of reproduction new is fixed and the resulting figures developing total cost of reproduction new as established by Mr.

Zelinski, was substantially correct and that the variations from his figures are no more than would be anticipated from equally competent engineers.

5. That the order of the Secretary requires the plaintiff to charge and collect from yard traders a rate of one-half the specified yardage charge on cattle, calves and hogs, slightly less than one-half on sheep and goats, and the full charge on horses, mules and pure-bred bulls.

The petitioner asserts this is arbitrary and unsupported by the evidence, an invasion of the function of management, and therefore confiscatory and void.

The Secretary's action is based upon the finding that the failure to assess a proper charge against yard traders is a discriminatory practice forbidden by the Act and unless such charge is made the balance of the rate schedule will not produce the return to which the Stock Yard Company is entitled.

The Secretary finds that livestock purchased and disposed of by yard traders occupies a considerable portion of respondent's yards—approximately 160 pens—together with adjacent alleys. It is undisputed that under present conditions trader livestock makes no contribution to the support of the yards, other than the profit it may pay on the hay and grain purchased. The Secretary in his five-year recapitulation of the volume of business 1930-34 inclusive, shows that 55,405 head of cattle out of a total of 367,822 were sold and reweighed for the purposes of sale. And that during this five-year period yardage was paid on 89% of cattle arrivals and 82% of calf arrivals. Manifestly livestock using the yards but not paying therefor casts a burden upon those that do pay, irrespective of the reason. Yard traders purchase livestock—mostly cattle—from commission men and either sell in this market or reship to other outlets. On stock shipped away from this market they pay no yardage, the charges under discussion being applicable only to stock sold here. So under the practice that now obtains a considerable part of the stockyards property is used, maintained, and numerous expenses incurred in rendering free service to this class of patrons. Necessarily the charge to the other patrons must be that much

greater if plaintiff is to earn a reasonable return. The present income of the Stock Yards Company represents, almost entirely, commissions upon sales at the yards paid by shippers; that is to say by ranchers and farmers scattered throughout the West who use the yards only occasionally. They have an investment in a ranch or in a herd, while the yard trader has no capital investment, as he makes free use of the respondent's plant for and as his place of business.

Respondent's own witnesses testified that the producer; that is the shipper, has paid for this service in the marketing charge assessed against him by the Stock Yard Company. It follows, therefore, that this is a discriminatory practice and results in the yard trader getting for nothing a service that all other patrons of the yard pay for. And to say that this discrimination is justified because the trader is a desirable part of the market machinery, helps maintain prices, and brings about a prompt absorption of offerings on the market, is no reason why he should not pay his proportionate share of the cost of conducting the market.

Public utilities should occupy a disinterested position, charging all alike for the same service. A similar charge was upheld in the Omaha and St. Joseph Stock Yards cases (Union Stock Yards Co. of Omaha (*supra*), at pp. 879-81, and St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, at p. 70). In the Omaha case the Court declined to follow the opinion in Denver Union Stock Yard Co. v. U. S. (*supra*), on this question.

6. The scope of the Judicial Review in this Case.

Under this heading we can dispose of the remaining questions. Plaintiff, in support of its several objections to the Secretary's order, charges generally, confiscation, the deprivation of its property without due process of law; that the decision of the Secretary is not conclusive, and the court must determine the issues upon its own independent judgment, both as to the law and the facts.

It's axiomatic of course that due process means the Secretary's finding must be based upon substantial evidence. He must not act arbitrarily and the respondent must have a fair hearing. To properly raise constitutional

objections, however, it is not sufficient to plead them simply as legal conclusions. The facts pleaded in the bill must disclose a serious question of unconstitutionality. *Ex Parte Poresky*, 290 U. S. 30.

Spielman Motor Co. v. Dodge, District Attorney, 295 U. S. 89, holds that general allegations of irreparable damage, due process of law, etc., are not sufficient in the absence of a statement of facts sufficient to warrant such conclusion. One relying upon the 14th Amendment, must point out specifically what specific right of property is affected and why its use and enjoyment may not be regulated. *Hall v. Geiger-Jones Co.*, 242 U. S. 539. And

"Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury." *United Gas Co. v. R. R. Comm'n.*, 278 U. S. 300.

See also *American Commission Co. v. United States* (supra), p. 968, and cases cited.

Likewise we must bear in mind the statement in *Northern Pac. Ry. v. North Dakota*, 236 U. S. 585, at p. 598, that:

"The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges," and

P. 599:

"Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible."

This, together with the rule of the *Los Angeles Gas* case, 289 U. S. heretofore stated and this language, p. 305, of that case, that

"The judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory."

Forces the conclusion that we may not interfere with the order of the Secretary unless we are convinced that the

valuation and rates prescribed as a whole result in an inadequate return.

We cannot take seriously the plaintiff's allegation that its property has been confiscated simply because the Secretary eliminated from the expense account "dues, donations and subscriptions" that during the past five years averaged from three to four thousand dollars a year, and limited this item to \$300.00 a year, the amount of the contributions thought to be actually beneficial to the Stock Yard Company employees and patrons.

Next; having found the fair value of plaintiff's property used and useful in rendering stockyard's services to be \$2,792,681, the Secretary determined that a return of 6½% upon that amount to be reasonable. This rate has been upheld in *Dayton Power & Light Co. v. Public Utilities Comm'n of Ohio*, 292 U. S. 290, and *Los Angeles Gas case* (supra), p. 319. The Secretary's findings on this point were based upon the evidence of an experienced investigator, Dr. Dozier.

Dr. Dozier has testified in a great many rate cases before the Department as an expert on the rate of return and his exhaustive studies on this question are to be found in Govt. Ex. 45. The plaintiff's only witness was Mr. Arthur Bosworth, a local investment banker of high standing, and a stockholder and member of petitioner's board of directors. We take judicial notice that the plaintiff enjoys a monopoly with no prospect of competition. Also we may note the fall in the rate of return on conservative investments over the past five or six years. *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 284 U. S. 248, at p. 260.

The Supreme Court in *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, said at p. 443:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary * * * must be determined upon the record of the proceedings before him, —save as there may be an exception of issues presenting claims of constitutional right."

A careful review of the record convinces us that the Secretary has not exceeded his discretion; that each finding is well within the limits established by substantial evidence. So it necessarily follows that the order inflicts no irreparable injury. The plaintiff had a full hearing before the Secretary and this court as well. As stated in the previous case, *Denver Union Stock Yard Co. v. U. S.* 57 Fed. (2d) (supra), the legal presumption that the findings of the Secretary are correct

"is strengthened in this case by the fact that the report of the Secretary bears internal evidence of the careful investigation made by him, and his disposition to be fair."

The same question is involved in these two cases and have been litigated for over seven years. Being of the opinion that the Secretary's order is valid, we see no reason for further delay in its enforcement. It may of course upon good cause being shown, be modified by the Secretary.

It follows that the bill should be dismissed and defendant have its costs.

J. FOSTER SYMES,
District Judge.

September 23, 1937.

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No. 798

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1937

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

**THE UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE.**

APPELLEES.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.**

BRIEF OF APPELLANT.

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Wigmore on Evidence, Vol. 1, Secs. 718-719	94, 95

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1937

No. 798

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE.

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

BRIEF OF APPELLANT.

OPINION OF THE TRIAL COURT.

The opinion of the trial Court (R 1263) is reported in 21 Federal Supplement at page 83 (advance sheets of December 27, 1937). It is also reprinted in the Statement on Jurisdiction on file herein.

STATEMENT OF THE CASE*

The case arises on direct appeal from the final decree of the specially constituted district court of three judges, which decree (R 1256) was entered December 20, 1937, dissolving the interlocutory injunction theretofore entered by consent (R 353) and dismissing plaintiff's bill of complaint. Petition for appeal was filed January 18, 1938; order allowing appeal entered January 20, 1938 (R 1259); service

* The statement as to Jurisdiction required by paragraph 1 of Rule 12 of this Court, was filed February 15, 1938 and probable jurisdiction noted on March 7, 1938.

of appeal, citation on appeal and all other appellate steps were duly taken.

(a) Statutes Involved.

The pertinent provisions of the Packers & Stockyards Act, 1921; being C. 64, 42 Stats. 159, 163-168, as amended May 5, 1926, C. 240, 44 Stats. 397 (U.S.C.A. Title 7 Secs. 201 et seq) are printed in the appendix to this brief at pp. 102 to 106.

By Sec. 316 of that Act (U.S.C.A. Title 7 Sec. 217) the provisions of laws relating to the enjoining and setting aside of orders of the Interstate Commerce Commission are made applicable to similar proceedings concerning orders of the Secretary of Agriculture. These laws are contained in the District Court Jurisdiction Act being part of The Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stats. 219, 220 (U.S.C.A. Title 7, Secs. 41 (28) 44, 47, 47(a), 345 (4) and 345 (5)). Since the material portions of these latter laws are printed in the Statement as to Jurisdiction and probable jurisdiction has been noted, it is not believed necessary to reprint them here.

(b) Designation of Parties.

The Denver Union Stock Yard Company, petitioner below, appellant herein, will generally be designated in this brief as appellant but may sometimes be called "the company". The appellees are generally referred to jointly as the Secretary or the Government.

(c) Brief Statement of Facts.

The appellant is a corporation organized in 1886. It has continuously since that time conducted at Denver, Colorado, and still conducts there, a stockyard as a public market for livestock, within the definition of Sec. 302 (a) of the Packers & Stockyards Act, 1921. Under the authority of that Act, the Secretary, on February 3, 1930, on his own motion and not on complaint, held a hearing and rate investigation culminating in an order dated July 28, 1931 reducing the rates and charges for stockyard services then

rendered by the company and directing the company to assess and collect a yardage charge against yard traders at one-half the full yardage charge. The company moved to enjoin this order in the District Court of the United States, alleging that the rates were arbitrary and confiscatory. They were so held and a permanent injunction issued. *Denver Union Stock Yard Co. v. United States and the Secretary of Agriculture*, 57 Fed. (2d) 735. The Government did not take an appeal from this decision which thereby became final. That decision was entered April 4, 1932.

The present proceeding was initiated by notice of the Secretary, again on his own motion, and without complaint, dated November 8, 1934 (R 4). Hearing was held thereunder commencing June 3, 1935 and ending July 3, 1935. The evidence introduced at that hearing has been abstracted and is part of the record in this court (R 369 et seq.). On October 28, 1936, the Examiner filed his tentative findings and order (R 22 et seq.), to which appellant, on December 2, 1936, filed exceptions (R 150 et seq.). Oral argument was had before the then Acting Secretary on January 7, 1937 and on February 17, 1937 the Acting Secretary made and entered the findings and order complained of (R 229 et seq.).

In that order, the Secretary classified the properties of appellant as used and useful or non-used and non-useful, made a finding as to the value of the used and useful property, established 6½% as a fair rate of return, reconstructed the income and expense accounts of appellant, and in that manner found that existing rates were unreasonable. By adding his determined reasonable expenses to the fair net return as determined by him, a figure was obtained which he then spread into rates, including in those rates a required half yardage charge to yard traders.

The rate base as fixed by the Secretary is \$2,792,700. (R 312), 6½% of which is \$181,525.50 (R 319). The amount of expenses found reasonable by the Secretary is \$346,545.00 which added to the permissible return gives a total of \$528,071.00 (R 333) to be spread into rates. This resulted in a rate reduction. So far as the marketing charges of

appellant are concerned, a comparison of the existing tariff with that prescribed by the Secretary is as follows:

Species	Rates and Charges in effect		Rates and Charges Prescribed in the Order		
	Rail Receipts per head	Truck Receipts per head	Rail per head	Truck-ins per head	Trader Yardage per head
Cattle	\$.35	\$.40	\$.30	\$.35	\$.15
Calves	.25	.27	.20	.25	.10
Hogs	.12	.14	.12	.14	.06
Sheep and goats	.08	.10	.075	.10	.03
Horses and mules	.35	—	.35	—	.35
Purebred bulls	1.00	—	1.00	1.00	1.00

The rates prescribed by the Secretary are computed at a rate-level such that the product of these rates less reasonable estimated expenses will return to appellant over a four or five year period (R 613), an average net amount equal to 6½% upon the rate base as determined by the Secretary. There is an excess of \$2046.00 over the exact 6½% return, but when dealing with millions of head of livestock and thousands of tons of feed annually, this excess is negligible and from a practical standpoint, too small to be spread into rates. We mention this excess because, if Government counsel follow their usual practice, they will urge this as an evidence of the great liberality of the Secretary.

On March 9, 1937, appellant filed its bill (R 1 et seq.) in the District Court alleging that the findings and order of the Secretary in specified particulars is unsupported by the evidence, is arbitrary, confiscatory and deprives appellant, petitioner below, of its property without due process of law in violation of the Fifth amendment to the Constitution of the United States. The three-judge court sustained the findings and order and on December 20, 1937, entered its Findings of Fact and Conclusions of Law to which this appeal is taken.

From the commencement of the proceedings in the District Court and until final determination of this cause, all differences between existing rates and the Secretary's prescribed rates have been and will be impounded, the impounded fund being further secured by a \$90,000.00 surety bond.

(d) *The Questions Presented.* The general question presented, therefore, is whether or not the rates prescribed by the Secretary are confiscatory and deprive appellant of its property without due process of law. The specific questions are:

(1) Does the rate base include a proper allowance for the going concern value of the property?

(2) Is the exclusion from the rate base of the value of the stock show properties within the power and authority of the Secretary? Are his findings supported by evidence?

(3) Is the exclusion from the rate base of the value of the loading and unloading facilities and a portion of the adjoining alleys sustained either by the law or the evidence?

(4) Is the yardage charge to yard traders prescribed by the Secretary at one-half the charge made to other buyers sustained by either the law or the evidence? Does it create discrimination?

(5) Is the exclusion of certain expense items, designated as "Dues, Donations and Subscriptions" sustained either by the law or the evidence?

(6) Is the admitted failure to make any allowance for the amortization of the expenses of the pending rate litigation contrary to law?

(7) Is the land valuation as fixed by the Secretary supported by substantial evidence?

(8) Is a rate of return of $6\frac{1}{2}\%$ a fair and reasonable rate or is it confiscatory in the instant case?

ASSIGNMENTS OF ERROR TO BE URGED.

The assignments of error are apparently not reprinted in the record but do appear in the Statement of Points to be Relied Upon at page 1277. The errors to be urged may be grouped as follows:

A. Assignments dealing with the exclusion of property or property values from the rate base. These are:

(1) That the Court erred in excluding and failing to make a separate allowance for going concern value. The assignment of error referring to this matter is Assignment No. 8.

(2) That the Court erred in excluding from the rate base the so-called stock show property consisting of the stadium, sales pavilion and other structures together with the land on which these structures are situate. The assignments of error referring to this matter are Assignments No. 5 and 18.

(3) That the Court erred in excluding from the rate base the value of the railroad trackage, loading and unloading docks, chutes, pens and one-half the adjacent alley together with the value of the land on which these structures are situate. The assignments of error referring to this matter are Assignments Nos. 2, 3 and 4.

(4) That the Court erred in finding that the value of appellant's used and useful land is \$536,825.00. The assignment of error referring to this matter is Assignment No. 6.

B. Assignments dealing with the exclusion or inclusion of items of income or expense for rate-making purposes. These are:

(1) That the Court erred in directing and requiring a one-half yardage charge to yard traders. The assignment of error referring to this matter is Assignment No. 11.

(2) That the Court erred in excluding from the expense account computations, an average of \$3,000. of so-called Dues, Donations and Subscriptions expense. The assignment of error referring to this matter is Assignment No. 12.

(3) That the Court erred in failing to make due allowance for the amortization of the expenses of the pending

rate litigation. The assignment of error referring to this matter is Assignment No. 13.

C. Certain assignments which are cumulative in their nature, in which one or more of the above assignments of error are involved. These are:

(1) Assignment of error No. 1 which attacks the exclusion of 11.618 acres as not used and useful, said acreage being the land excluded on account of the stock show use and the loading and unloading use referred to in A (2) and (3) above.

(2) Assignment of error No. 7 insofar as it attacks the reproduction new value less depreciation of appellant's structural property. This involves assignments referred to in A (2) and (3) above. No attack is made upon the condition percent figure.

(3) Assignment of error No. 9—the total value there found by the Secretary is erroneous if any one or more of the items of excluded property be found to have been erroneously excluded from the rate base.

(4) Assignment of error No. 14 which involves each and all of the errors referred to in paragraphs A and B above.

(5) Assignments of error No. 15, 16, 19 and 20 wherein the conclusions of law that the Secretary's order does not confiscate appellant's property; that the rates are fair, just and reasonable and that the yardage charges are fair and reasonable, are asserted to be erroneous. These conclusions of law are grounded upon the alleged erroneous findings above attacked.

D. Certain other assignments of error which are general in their nature. These are:

(1) Assignment of error No. 10 under which it is alleged that the Court erred in finding that $6\frac{1}{2}\%$ is a fair rate of return on the rate base of \$2,792,700.00.

(2) Assignment of error No. 21, namely, that the Court erred in concluding as a matter of law that the plaintiff's

cause is without equity, the temporary injunction heretofore granted should be dissolved, a permanent injunction denied and the petition be dismissed with costs to the defendants.

(3) Assignment of error No. 22, namely, that the Court erred in denying the petition of the appellant for a permanent injunction.

(4) Assignment of error No. 23, namely, that the Court erred in entering final judgment and decree dismissing the petition of the petitioner, appellant herein.

SUMMARY OF ARGUMENT.

I.

The finding of the Secretary and of the trial court that the valuation of appellant's land and structural property upon the basis of the cost of reproduction new less depreciation of structures and present value of land, includes an adequate allowance for the element of going concern value, is not supported by the evidence. The record shows that the land was appraised as bare land, stripped of all improvements and that the structural property was valued upon the basis of unit costs of material and labor plus certain construction overheads. No additional allowance in the total valuation can be pointed to as being the equivalent of the going concern value of appellant's property, the existence of which value the court and the Secretary admit. The evidence of record contains clear and convincing proof that this value is not less than \$325,000.00. The exclusion of this element of value from the rate-base is, therefore, contrary to law and confiscatory.

II.

The stock show is a stockyard facility in that livestock in large volume is handled in commerce at and by reason thereof. The structural facilities plus the land devoted to this use are owned by appellant, are part of its plant and equipment and are admittedly not excessive.

The evidence shows that the stock show is of direct benefit to the entire industry and is undertaken and supervised by appellant. The excluded properties are only part of those devoted to stock show use during the annual period of the show, over half of appellant's entire yard being utilized for that purpose at that time, yet no part of this additional property is excluded. The evidence demonstrates that the show is, furthermore, productive of a large income to appellant, and it is a wrongful invasion of the managerial function to prohibit to appellant the right thus to stimulate its business and to benefit the industry upon which this business is dependent.

Furthermore, even if the property could be held to be not a stockyard facility, the action of the Secretary and of the court is still erroneous because the income derived directly from the show has not been excluded from the income accounts of appellant. When the value of property is excluded from the rate base, income derived from such property must likewise be excluded and disregarded in determining the reasonableness of present or future rates. Failure to do so renders doubtful the jurisdiction of the regulatory body.

We rely upon the fact that the facilities are stockyard facilities within the meaning of the governing Act, but whichever view of the matter may be taken by the Court, the finding is erroneous and cannot stand.

III.

It was error to exclude from the rate base the value of the railroad trackage, loading and unloading facilities and the area upon which these facilities front. It is not the fact that charges for the use of these facilities at the Denver market are, in the majority of instances, included in the freight rate. Section 15(5) of the Interstate Commerce Act, does not change the nature of these facilities which, under the evidence, are essential for the handling of livestock in commerce and therefore a stockyard facility, the value of which should be included in the rate base of appellant.

IV.

The finding of the Secretary and of the court that a large section of appellant's property is set aside free of charge for the use of the yard traders is contrary to the evidence. It is upon this erroneous basis that the Secretary concludes that our existing practice and rate schedule are discriminatory and orders in a charge against yard traders approximately equal to one-half the marketing charge assessed against producers. It is no criterion that such a charge may be in effect at other markets where conditions are entirely different. The management of appellant is opposed to such charge and has not assessed it at any time during the 52 years of its business history. The Secretary's order, in fact, creates a discriminatory situation which does not now exist and in addition, constitutes an interference with the sphere of management entrusted by law to the directors of the company.

V.

Neither the court nor the Secretary is empowered by law to strike from the income account of appellant, items of business expense and charitable donations, which charitable donations the evidence shows were made to organizations, the activities of which are connected with the welfare of appellant's employees. The amount of these donations and miscellaneous business expense is so small as to negative any question of extortion or abuse of discretion. The findings are arbitrary in the extreme.

VI.

The findings and order of the Secretary, approved by the trial court, are erroneous in that no provision is made for amortizing the costs and expenses of the pending rate litigation over any reasonable period in the future. That this is proper and should be allowed is sustained by the decisions of this Court and of other courts.

VII.

There is substantial evidence sufficient to support the Secretary's findings as to land values if one who has never appraised any land in or near the locality, has never as-

sembled an industrial tract, and made no effort to determine the value of other large industrial tracts in the locality, is a qualified witness. The degree of knowledge which qualifies a witness to express his opinion as to value of land is not dependent upon educational qualifications or what might be termed "text book knowledge". A farmer or neighbor is generally permitted to so testify. The basis of the qualification is knowledge of local conditions. This knowledge covering a 25 to 38 year period was possessed by appellant's appraisers whose testimony was disregarded by the Secretary while adopting the appraisal of the government engineer who admitted a lack of this knowledge. This latter evidence is, therefore, not substantial and the findings based thereon are erroneous.

VIII.

The rate of return of $6\frac{1}{2}\%$ under all prior decisions is a confiscatory rate of return. Whether conditions have so changed as to render this non-confiscatory is the question. The government introduced no evidence showing that a similar rate of return was proper in any similar business with like hazards. A 7% return was provided by the Secretary at the St. Joseph yards. The industry is highly competitive and appellant does not have the protection of a franchise or other governmental grant.

ARGUMENT.

In discussing the questions presented, two sections of the Packers and Stockyards Act, 1921, are of particular importance, and, although all of the pertinent sections have been reprinted in the appendix to this brief, we print those two sections here. The italicized portions contain the words to which we direct special attention:

§201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined. When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling on a commission basis or otherwise, *marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce*, of livestock; (Aug. 15, 1921, c. 64, §301, 42 Stat 163.)

§202. "Stockyard" defined; determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, *conducted or operated for compensation or profit as a public market*, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet. (Aug. 15, 1921, c. 64, §302, 42 Stat. 163).

The determination of many of the questions which follow is dependent upon whether or not the excluded properties are stockyard services or facilities within the meaning of the Act. It is likewise important to bear in mind that conducting a public market is made the distinguishing feature of a livestock yard over which the Secretary has jurisdiction under the Act.

I

THE RATE-ORDER OF THE SECRETARY FAILS TO INCLUDE IN THE RATE BASE ANY ALLOWANCE FOR GOING CONCERN VALUE, ALTHOUGH ADMITTING THAT SUCH VALUE DOES EXIST IN APPELLANT'S PROPERTY. THE FINDING OF THE

SECRETARY AND OF THE TRIAL COURT THAT THE VALUATION INCLUDES THIS ELEMENT IS CONTRARY TO FACT.

The assignment of error to which this portion of the brief is chiefly addressed, is assignment No. 8.

The Order of the Secretary states (R 309):

"Respondent's stockyard is a going concern. It has a long history of efficient and economic management which has won for it a reputation of rendering good service. It has been financially successful. . . . There is nothing in the entire testimony which indicates that any witness testifying on any subject had any other thought than that respondent is a going concern."

The trial court, in its opinion uses similar language (R 1268):

"The Secretary recognized that the respondent stockyard was a going concern with a long history of efficient and economical management and financial success. Likewise he calls attention to the fact that it has never defaulted on its bonds and has paid dividends on the preferred stock continuously since 1917 and on the common stock since 1913, with the exception of three years."

Both the Secretary and the trial court adopt this reasoning as the basis for their ultimate finding that the reproduction new value, less depreciation, of appellant's property includes going concern value. This reasoning is specious. The problem presented to a rate-making body is not the valuation of a dead concern nor the valuation of junk. The fact that the utility is operating, i.e. is a "going concern" in the sense used by the Secretary, is the fact which calls into operation the processes of the regulatory body or board. The admitted fact that all witnesses recognized that the company was and is a going concern is beside

the point. The question is whether or not an amount of money equal to the fair present value of this element of property was included in the rate-base of appellant. If it was, then the order of the Secretary, and the decree of the⁽¹⁾ trial court upholding it, are beyond attack on this ground. If not, then the order is confiscatory⁽²⁾ and the decree is erroneous.

In paragraph 137 of the Order of the Secretary (R 311), the following finding is made:

"In adopting the cost of reproduction new less depreciation of structures and the value of land, as heretofore found with respect to structures, equipment and land, consideration has been given to the element of going concern value. Adequate allowance for the element of going concern value has been included, although no separate item on its account has been set forth."

This finding is contrary both to law and to the fact.

The valuation of land on the basis of actual present value as bare land and of structures on the basis of reproduction new cost less observed depreciation, even though the total value thus obtained be in excess of any junk or wreckage value, does not include an allowance for the value of the business as a going concern. In *Denver Union Water Co. v. Denver*, Equity No. 6274, (no reported opinion) the District Court adopted the findings of the Special Master which expressly so held. That decision was subsequently affirmed by this Court. ⁽³⁾

We do not contend that a separate allowance must be made, if an additional value covering this item has in fact been included in the rate-base. It makes no difference by what name such additional value is called so long as it is present. This is the gist of the decision of this case in *Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289

Note 1—*Los Angeles G. & E. Corp. v. RR. Comm.*, 289 U. S. 287.

Note 2—*Denver Union Stock Yard Co. v. United States*, 57 Fed. 2nd 735.

Note 3—*Denver v. Denver Union Water Co.*, 246 U. S. 178.

U.S. 287.⁽⁴⁾ No similar allowance can be found in the valuation of the Secretary in the instant case.

It is admitted, or will not be gainsaid, that the Secretary adopted *in toto* the valuation of land and structures of Government witness Zelinski. The testimony of this witness, therefore, as to the basis of his valuation is important.

A. *Land Values.* The basis of the government valuation of land is that the land involved is stripped of all improvements, is vacant and unimproved, and consists of one unified tract of 130.57 acres in area. ⁽⁵⁾ The following quotations from the evidence are from the testimony of Witness Zelinski, whose valuation was adopted without change by the Secretary. ⁽⁶⁾ The references are to the agreed abstract of evidence, which is part of the record herein. *Italics are ours.*

Note 4—In the Los Angeles Gas case, the Court found that the Railroad Commission had included in the rate base a valuation of \$3,000,000.00 on gas properties and gas facilities no longer used by the company, and had added to the cost figure of the properties \$4,760,000.00. It was also found that the Commission's valuation included original organization costs and franchise values as well, which are items frequently excluded from rate valuations. Further analyzing the evidence, the Supreme Court found that after making certain adjustments in overhead percentages, and making an allowance for working capital, there remained \$5,618,235.00 in excess over historical cost allowed by the Commission as the rate base value. The Court said (289 U. S. 287, 317).

"... this excess amount of over \$5,500,000 can appropriately be assigned to elements of value which may not have been fully covered. The record affords no adequate basis for criticizing the allowance made by the Commission for materials and supplies and working capital, and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. *The fact that this margin in the rate base was not described as going value was unimportant, if the rate base was in fact large enough to embrace that element.*" (Italics ours)

The Supreme Court then goes on to find that the Company had not substantiated by evidence any larger going concern value than this excess amount allowed by the Commission.

Note 5—The appraisal by Government Witness Zelinski was as of January 1, 1935 and covered 131.045 acres. Between the date of that appraisal and the date of the hearing the appellant sold 0.475 acres, leaving a balance of 130.57 acres, which latter is the total figure appearing in various places throughout the Secretary's report.

Note 6—c.f. column 1 of tabulation, (R 297) with Government Exhibit 23, first unnumbered page entitled "Summary of Land Appraisal".

(R 463) "I valued the lands of the Stock Yard Company as *naked, unimproved, vacant lands*, stripped of all improvements which we inventory in our engineering report. I considered the situation of adjoining property unchanged, with all buildings thereon in place."

(R 464) "In general the method used in appraising the lands of the Denver Union Stock Yard of Denver, Colorado, has been that laid down and approved in the Minnesota rate cases, which is a method of valuation applicable to the appraisal of public utility or quasi-public utility properties. *It has been the endeavor of the appraiser to base his values upon the values of similar adjacent and/or adjoining property.*"

(R 477) "It should not be overlooked, however, that for the purpose of comparing the values of the property with the sales of units comparable to the integral portions of which the yards are now comprised, it is necessary to take into consideration the lack of dedicated public streets and alleys to serve so large an area."

(R 483) "Yes, I make the statement on page 13 of my report that it is necessary to take into consideration the lack of dedicated streets and alleys. *I took that fact into consideration because in going on the concept that these lands are stripped of all improvements that are upon them, naturally the roadways which we have inventoried in our engineering report are considered stripped off the property, so that the area becomes a very large area without any access shown.*"

(R 495) "Where I spoke of the absence of highways in the tract, I meant an absence of dedicated public streets. The absence of dedicated streets under certain circumstances can be an advantage in connection with the tract for a large industry but is not always so. *You must remember I am valuing this property not for the special use and not in the special way that the Stock Yard Company is using it, but I am considering its*

availability for a stockyards use and stripped of these improvements I am trying to visualize the effect of the lack of direct access to a large portion of the area, which I think should be considered in the valuation."

Bearing in mind that it was the valuation of this witness of the land of appellant which was adopted by the Secretary, it is manifest that that valuation was on the basis of an appraisal of vacant and naked land stripped of all surface and subsurface improvements, even stripped of roadways and alleys which give access to every portion of the tract and make it a veritable checkerboard. It is likewise manifest that the appraiser, having stripped the land of these roadways and alleys, further discounted the value he otherwise might have found because "the area becomes a very large area without any access shown."

No warrant for such further discounting of values can be found in any case or text book. We are not here discussing the valuation as such. Objection thereto is taken and argued hereafter. ⁽¹⁾ What we do point out is that this method of valuation of the land leaves no excess to be attributed or allocated to going concern value. So far as the land values are concerned, therefore, the findings of the Secretary and the trial court that an excess allowance for going concern value is included in that valuation is manifestly contrary to the evidence.

B. Structural Values. Appellant accepted the figures of the Government witness on the reproduction new cost of the structural property. It did not accept the Government figure on reproduction new cost less observed depreciation, as we point out hereafter. The Secretary adopted both these figures of the Government valuation engineer.

The basis of the valuation of the structural property by the Government witness was the unit cost of the materials and labor entering into the structures plus certain construction overheads, as is apparent from the following extracts from the record:

Note 7—*infra* p. 93.

(R 485) "When we came in January we retained for a temporary period, a group of young men to assist in the so-called manual labor phase of preparing the inventory. I assigned a portion of the inventory to be taken by each one of the engineers from our Kansas City office and my assistant, Mr. Galbreath, collected the price data and labor cost data. While here he interviewed some material men, building contractors, labor union officials and others to secure the necessary information for a proper pricing of the inventory. . . . When all these data had been compiled, it was typed up in a report form and the price extensions, quantities and prices on labor and material are shown in a series of reports which we have prepared for introduction into this hearing."

(R 522) "Taking for example Hay Barn No. 3, which is listed in Government Exhibit 28, page S-6, under item Y-3, with a total reproduction new cost of material and labor of \$13,372, that reproduction new cost was arrived at by taking the inventory which was assembled and pricing out the various classes of material on a basis of unit cost per yard or thousand feet of lumber, per thousand of brick and then priced out separately the labor which it would take to install that quantity of materials. Yes, "CY" means cubic yards and "SF" square feet. The prices for the material are taken from a schedule which we built up, by sending out price lists to local dealers to give us an estimate as to what they would deliver us material for on the site of the job either by truck or rail. In lumber, due to the different sizes, etc., we worked out a weighted average price per thousand feet. The abbreviation "m b m" means thousand board measure.

On page 395 common brick is given at \$18.80 a thousand delivered on the site and that includes some labor of loading and unloading as well. The labor incident to moving the brick, for example, from where it was unloaded to the job, is priced in the labor and is not included in the material cost.

Yes, the labor cost of \$13.95 is the labor cost per thousand brick and is worked out from our formula in the working papers. It does not include superintendence or any of the general overhead or construction overhead. No, my inventory, or detailed inventory is not in the record. Yes, our staff did actually inventory the number of two by fours according to their best judgment, and the number of various sizes of lumber, the squares of brick, etc. When it came to the cattle pens, where a typical pen could be used we figured the lumber in that, the paving and the drains, and then multiplied all that by the number of typical pens in the same area. Where we couldn't do that the special measurements for the particular pen were taken and the quantity of lumber computed for that. We made up a schedule of the lumber or any material to build a typical pen or a typical gate, and then priced out all that we thought were typical on that basis, and then multiplied that by the number of typical pens or typical gates to get the reconstruction new cost. The same applies to the sheep barn and to other units of property."

Government exhibits 29 and 30, being volumes 1 and 2 of the report of the Government witness, show in detail the application of unit prices to the number of units found, under the above method. Typical pages are reprinted in the appendix of this brief, pp. 108 to 110.

To the cost of reproduction new of the materials and labor thus determined, the witness added, and the Secretary adopted, certain general and construction overheads as follows:

Omissions and contingencies	5%
Engineers' and Architects' fees	5%
Legal expenses during	
construction	1%
General salaries and expenses	
during construction	2%
Fire insurance during	
construction	$\frac{1}{2}$ of 1%
Interest during construction	$3\frac{1}{2}\%$ or $\frac{1}{2}$ year at 7%

The application of these percentages to the reproduction new cost of the structures found used and useful by the Secretary resulted in a total cost of reproduction new of the structural property of appellant of \$2,532,484.00 (R 305). To this total, the Secretary then applied his condition percent figure of 80.545%, thus computing the reproduction new cost less depreciation of the used and useful structural property as found by him to be \$2,039,789.00 (R 306).

We submit that where structures are valued on the basis of existing unit costs of so many board feet of lumber, squares of cement, 1000-brick, etc., there is no such extra allowance made for going concern value as was found in the Los Angeles Gas case *supra*.⁽⁸⁾ The trial court erred in finding such an allowance in the construction overheads (R 1253). Engineers' and architects' fees are as much a part of building costs as the foundations of the building itself. No sensible person would commence construction without a reasonable allowance to cover omissions and contingencies which always occur to augment the cost of the structure. Interest lost during the construction period on the money expended in construction, is figured by every business man as part of the cost of doing the work and the same is true of fire insurance premiums paid out to protect the capital outlay.

These items are not tantamount to going concern value. Such items have been allowed in the following cases in each of which a separate allowance was made for the going concern value of the business or plant:⁽⁹⁾

Note 8—see note 4, p. 15.

Note 9—In the Denver Water case, 12½% of the "fair contract cost" was allowed for overheads and in addition \$800,000. for going concern value. See report of Special Master Chinn, approved by this Court. In the Indianapolis case, as appears from the reports in P.U.R. 1923 D 473 and 1924 B 306, 15% was allowed for construction overheads and \$1,416,000. for going concern value. In the Los Angeles case, \$2,117,235. was included for overheads and an excess allowance of \$5,618,235. found in the Commission's rate-base, which this Court held adequate to take care of going concern value.

In both the Dayton Power & Light case, 292 U. S. 290, and the St. Joseph Stock Yards case, 298 U. S. 38; allowances for general construction overheads were included, but going concern value allowance denied because not proved. These cases are, therefore, not contra.

Denver v. Denver Union Water Co. 246 U.S. 178.

Bluefield Waterworks Co. v. P. U. C. 262 U.S. 679.

McCardle v. Indianapolis Water Co. 272 U.S. 400.

Los Angeles Gas & Elec Corp. v. RR. Commission
289 U.S. 287.

Furthermore, the method followed by the Secretary is inconsistent with the existence of any added sum being included in the appellant's rate-base to cover the going concern value of its business. The Secretary first found the present value of the land deemed used and useful by comparison with sales of adjacent property, then he determined the structural value on the basis of unit costs of material and labor plus construction overheads. This total he then discounted 19.455% upon the finding that the structural property of appellant was 80.545% as good as new (R 304). If the valuation of the land and structural property includes the going concern value of appellant's plant, then this value has been depreciated approximately 20%. *Going concern value is not a depreciable or wasting asset in the absence of proof, in the present case, that the market is retrogressing.* The record is devoid of any such proof. ♦

The only evidence of record upon which Government counsel rely to sustain the Secretary's finding in this matter is the answer of Witness Zelinski, the Government valuation engineer, toward the end of his testimony (R 493), but before this answer can be properly interpreted, it must be viewed in the light of his entire testimony. Mr. Zelinski had testified that he had valued the land of appellant as bare land, stripped of all improvements, both surface and subsurface, on the basis of adjacent property sales, and had discounted that value in his mind both because of the absence of dedicated streets and alleys in so large a resulting tract, and because the presence of packing and slaughter houses adjacent thereto prevented consideration of higher values which might adhere to the land if it were available for "an alternate industry, which is of a higher character than the stockyards company" (R 553). The witness, as we have seen, then valued the structural property on the unit cost

basis. Having testified to all this, Government counsel, at the end of the direct examination asked the witness (R 493).

Mr. Miles: Mr. Zelinski, in valuing the stockyard property, did you reach your conclusion based upon material in place, also on a property that is able and willing to function as a stockyard and as a business earning an income?

A. I did.

The only possible interpretation of this answer, consistent with the testimony, is that the witness valued the property as of the present day value of land and structures, and not as junk, and in that sense "able and willing to function as a stockyard." This does not include an allowance for going concern value.

The question is squarely presented in this case as to whether or not, under any circumstances, it is possible for a stockyard to prove going concern value. Digressing slightly for a moment, we admit that there may be a question in the case of a true public utility, in view of the governmental grant of a monopoly, whether or not there is ever in fact a going concern value to be computed in a rate investigation of such monopoly. Take for example, a water company, a gas company, an electric company or even a telephone company. These exercise a governmental function, receive a governmental grant of a franchise right, and before any competition is permitted, a certificate from governmental authority of convenience and necessity must be obtained by the competitor. Hence, any going concern value in such case is attributable to the public or franchise grant and the government perhaps is entitled to disregard such value in fixing the rates its public shall pay. A stockyard company, however, exercises no governmental function, has no monopoly or franchise grant, and is in an extremely competitive industry. It is not a true public utility, but rather, a business so affected with the public interest as to justify regulation. That element of value, known as going concern value, is attributable in a stockyard company, therefore, to the successful functioning of the assembled plant and not to mere readiness to serve.

To put this slightly differently, any one desiring the use of water, gas or electric lighting must go to the water company, the gas company or the lighting company in the community. To a very large extent, its business is attached when it commences to function. That is the result of the monopolistic governmental grant or franchise. The service cannot be obtained elsewhere. Hence, when such a utility is assembled, has the grant and is ready to function, every element necessary to the determination of a fair rate-base is present. That is not true in a competitive industry which exercises no governmental function.

That the business of appellant is highly competitive is amply supported by the record (R 663, 813, 814-819). Appellant is in competition with the markets at St. Joseph, Mo., Omaha, Nebr., Kansas City, Mo., Chicago, Ill., and Los Angeles, Calif. to any one or more of which markets the grower in this territory can and is constantly solicited to ship his livestock. The appellant is in competition with the growing practice of direct buying. It is in severe competition with auction sales. To develop and attach business to its plant, appellant has made capital outlays and successfully acquired "business assets" which are not present in or required of a public utility operating under a franchise and which are not reflected in any valuation of appellant's lands and structures on the basis of reproduction new cost less depreciation. This is not the capitalization of past deficits as criticized by this Court in the Galveston Street Railway case ⁽¹⁰⁾ but rather the recognition of actual values.

In the St. Joseph Stockyards case, ⁽¹¹⁾ this Court did not hold that the valuation of that company's property on the basis of reproduction new cost less depreciation included going concern value, but merely that the company had not

Note 10—Galveston Elec. Co. v. Galveston, 258 U. S. 388, 393-397.

Note 11—St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 at 64.

"The decisive point on this appeal is that in seeking a separate allowance for going concern value, in addition to the value of the physical plant as found, and in maintaining that the property was being confiscated because of the absence of that allowance, it was incumbent upon appellant to furnish convincing proof. That proof we do not find in the record."

given convincing proof that its property was being confiscated by failure to allow it. The St. Joseph Company contented itself chiefly with the hypothetical theory of the reconstruction cost of attaching business, offered by Mr. Howson, and urged that the Secretary was estopped by reason of the separate allowance made in the former hearing of the same cause. The probative value of the Howson theory and the legal effect of the prior allowance were denied by this Court, leaving the record devoid of the requisite proof.

In the case at bar, the proof of record is as follows:

1. *The nature of appellant's business.* This has been misconceived by the trial court. Appellant is not in the business of conducting an hotel for cattle, sheep, hogs and horses. If it were, it would not be before this Court because the Department of Agriculture under the Packers and Stockyards Act, 1921, does not claim and has never exercised jurisdiction over feed yards.⁽¹²⁾ No charge is made to the producer at Denver for the use, as such, of the pens or other facilities. The charge made is a marketing charge collected only in the event of sale of livestock, and the charge is the same whether the livestock has used the pens for five hours or five days. It is a charge for the privilege of the market (R 419, 846, 891). The distinguishing characteristic is the market which appellant has succeeded in establishing and maintains at its yards. The value of this market is not reflected in the reproduction new cost of the physical structures. The comparison is to any security or commodity exchange, with this distinction, that due to inherent differences in our commodity by reason of sex, age, weight, type and species, livestock must be physically present and open to inspection of the purchaser or his agent, when sold, hence the pens, feed and water are necessary. This leads to a larger plant investment than is necessary in other commodity markets, but the value of the market is over and above the value of or investment in that plant. The fact that ap-

Note 12—By Section 202 (a) of the Packers & Stockyards Act, 1921 (see Appendix p. 103) the Secretary has jurisdiction only over such stockyards as are conducted as a public market.

pellant has been successful in creating and establishing a market with a strong buying demand is amply proven of record⁽¹³⁾ and, in fact, is not denied by the government.

2. *Cash outlays and other grants and expenditures in building the market.* These cash outlays, grants and expenditures are scheduled in Respondent's Exhibit No. 15, which has been recopied in the appendix to this brief at p. 111 hereof. The explanation thereof is given in the testimony of Asst. General Manager Pexton (R 847-856). These expenditures and grants of land and cash total \$325,547.10 including interest at 6% on land acquired for the purpose, from date of acquisition to date of gift. By reason of a part of these expenditures (R 855), three of the large packers, namely, Armour, Swift and Cudahy, have large plants at Denver and are a large part of the buying demand on appellant's market.

3. *Sale-in-Transit and Sorting Privileges.* Under the sorting privilege, cattle of various owners arriving by rail for the same market session from different shipping points, may be sorted in such a way as to result in uniform carloads which on sale may move to the new destination on the through rate from point of origin to such destination. This privilege is not open at any Missouri River market or at Chicago.

For example, assume Shipper A, with his shipping point Grand Junction, Colorado; Shipper B, with his shipping point Rifle, Colorado; and Shipper C, with his shipping point Gunnison, Colorado; all those points being on the same carrier's lines. Assume that each ships to Denver, a mixed car of cattle containing $\frac{1}{3}$ grass fat steers, $\frac{1}{3}$ yearling feeders and $\frac{1}{3}$ nondescript old stuff known in the industry as "canner cows". When these shipments arrive at Denver for the same market session, they are speedily sorted, the grass fat steers from each shipment making one carload of slaughter type

Note 13—Witness Pexton (R 809, 856).

cattle and the yearlings making a carload of feeder type. Suppose the fat load is purchased by a packer at Austin, Minnesota, and the feeder load by a fatterer in Missouri. The through rate from Grand Junction, Colorado, to Austin is \$50.24 less per car than the combination of local rates—Grand Junction to Denver and Denver to Austin. In the case of the feeders, the through rate is \$48.00 less per car than the combination of locals. Under the sorting privilege, with sale-in-transit, these two shipments would move out at the through rate. The purchaser, because of this saving in freight rates can afford to pay and does pay more for cattle which can be moved out on the through rate (R 948, 995). and the market is fostered thereby. These sorting and sale-in-transit privileges, and their effect upon the market are in evidence and fully explained (R 947-949). Government witnesses recognized their value (R 470, 1214). It cannot be denied that this sorting privilege is one of the assets of appellant's market which is not reflected in a "reproduction new cost" valuation of appellant's land and structural property. Appellant expended more than \$14,000.00 in 1933 in defending and maintaining these privileges (R 324).⁽¹⁴⁾

4. *Increased percentage of sales to receipts.* Bearing in mind that the marketing charge is made and collected by appellant only when livestock received is sold at Denver, the strength and value of the market is indicated by the percentage of sales to receipts. Respondent's Exhibit 5 gives this information (Appendix p 112). It shows that in the 20 years from 1913 to 1933, the percentage of sales to total receipts had increased in cattle from 51% to 93%, calves from 57% to 76%, sheep from 39% to 71% (R 809). Impressive as these figures are, they are even more impressive when receipts are considered. Receipts of sheep at Denver in 1913 were 620,431 head, and 39% means that 241,968 head were sold on the Denver market that year. In 1933, the receipts of sheep were 2,902,316 of which

Note 14—198 L.C.C. 73.

71% or 2,060,644 head were sold on the Denver market. Receipts and sales for the year 1934 are shown on the Exhibit but are not considered indicative because of the government purchasing program on drought livestock in 1934, pursuant to which the government purchased over 8,000,000 cattle and calves and 3,500,000 ewes (R 820) a considerable amount of which were shipped to packers located at the stockyards for contract slaughter. These were counted in the receipts and made the receipts for that year abnormal. The appraisal of physical property on any reproduction new basis, even though "ready and willing" to function, cannot and does not reflect the going concern value of such a market.

5. *Hyder's estimate.* Mr. Hyder, called as witness by appellant (R 1050), is vice-president of American Appraisal Company, a trained engineer with large experience in the valuation of public utility properties (R 1054) and with 15 years' experience with and knowledge of stockyards (R 1055) and particularly with the appellant's stockyard (R 1056). Mr. Hyder is described by the Secretary as an expert "thoroughly competent and widely experienced" (R 298). After defining and distinguishing between construction overheads and intangible property values (R 1058), Mr. Hyder testified at length upon the subject of the going concern value which in his opinion, should be included in appellant's rate-base (R 1090-1103). He named as elements of going value, over and above the physical properties, and not possessed by a new property, an established market, an established volume of business, a trained, efficient and established management and personnel, developed records essential to successful operation and lastly, established credit (R 1097).

With regard to the value to be placed on these elements, the witness testified (R 1100 et seq) that in his opinion, the elements of going value were worth not less than \$10.00 per car of the normal annual volume of 35,000 cars or \$350,000.00. True, this is only a guess,

but like all other pertinent expert testimony, it is the opinion or guess of a person qualified by special knowledge and experience to hazard an opinion. ⁽¹⁵⁾

The evidence, summarized in paragraphs numbered 1 to 5, inclusive, above, is convincing proof of the going concern value for which a separate allowance of not less than \$325,000.00 should be made in this case. The government offered no evidence of going value either as to its existence or non-existence. The Secretary admits it exists in appellant's plant and business. The testimony establishes beyond the shadow of a doubt that the land was valued as bare land and the structures as the aggregate of so many units of material and labor. That method of valuation cannot include an allowance for going value.

We reiterate that unless the proof in this case constitutes clear and convincing proof within the requirement of this Court in the St. Joseph Stock Yards case, ⁽¹⁶⁾ then no satisfactory proof can be made in a case of this nature. Hence, we submit that the question presented is whether or not in a rate case, as distinguished from a plant-acquisition case, any separate allowance for going concern value, is to be made in the rate base. The Court has never held such an allowance unnecessary. ⁽¹⁷⁾

Note 15—The stockyard experience of this witness is fully set out in the record at pp 1094-1095. The basis for his estimate is clearly stated in his testimony (R 1100-1103).

Note 16—298 U. S. 38 at 64, cited *ubi supra*.

Note 17—Rate cases where separate allowances made—Denver v. Denver Union Water Co., 246 U. S. 178; Georgia Ry. & Power Co. v. Commission, 262 U. S. 625; Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679; S. W. Bell Telephone Co. v. Public Service Commission, 262 U. S. 276; Ft. Smith v. S. W. Bell Telephone Co. 270 U. S. 627; McCardle v. Indianapolis Water Co. 272 U. S. 400; Westinghouse Elec. & Mfg. Co. v. Denver Tramway, 3 Fed. (2d) 285, 298 (certiorari denied 278 U. S. 616.)

Case recognizing an extra allowance as being the equivalent of going concern value, hence no separate allowance made; Des Moines Gas Co. v. Des Moines, 238 U. S. 153; Los Angeles Gas & Elec. Corp. v. RR. Commission, 289 U. S. 287.

Cases where separate allowance was denied for lack of appropriate proof: Galveston Elec. Co. v. Galveston, 258 U. S. 388, proof only of capitalization of past deficits; Cedar Rapids Gas Co. v. Cedar Rapids 223 U. S. 655, only proof was of franchise monopoly value; Dayton Power & Light Co. v. Pub. Util. Comm. 292 U. S. 290, failure of proof to show that recent merger of two reorganized concerns gave rise to going value; St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, complete failure of proof.

In *Westinghouse Electric & Manufacturing Co. v. Denver Tramway Co.*, 3 Fed. (2d) 285 at 298 (certiorari denied 278 U.S. 616) Circuit Judge Robert E. Lewis, then district judge, held:

"There remains to be added an amount for going concern value. On this subject the City declined to offer any proof. The lowest amount named by a witness for the receiver was \$2,900,000, and the highest \$4,500,000. The master allowed \$1,500,000. The receiver says he does not know where the master got this amount, and there is no evidence to support it. . . . I see no escape from accepting the lowest amount named in the testimony. . . ."

This is an evidentiary proceeding and a finding of the regulatory body not based on evidence of record cannot be sustained.⁽¹⁸⁾ Discretion cannot take the place of evidence and where, as in the case at bar, a property having a demonstrated and admitted going value is valued solely on the basis of bare land and unit cost of structures, including construction overheads, it is either an arbitrary exercise of discretion on the part of the Secretary to say that this land and structural value is all the property is worth, or an error of the Secretary in failing to give effect to the evidence of record.

We do not insist that development costs are the measure of going concern value.⁽¹⁹⁾ We do submit that it may be indicative of that value and corroborative of other evidence. We further submit that the fact that exact mathematical computations of going concern value cannot be made is not decisive. The language of the late Judge McDermott in *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 at 744 is pertinent:

"There may be businesses in which it is possible to compute with some degree of accuracy this element

Note 18—*U. S. v. Abilene RR. Co.*, 265 U. S. 274.

Note 19—See Note 10 in dissenting opinion of Butler, J. in *Railroad Commission of California v. Pacific Gas & Elec. Co.* decided Jan. 4, 1933, not yet officially reported.

of value; but, even if accurate computation is not possible, a value which actually exists should not be ignored because of the difficulty of its measurement. There is no rule by which the value of a leg or an arm can be accurately measured in dollars and cents, nor by which pain and suffering can be computed; yet triers of facts do evaluate such things. *By the same token, difficulty of measurement should not amount to a denial or right.*" (Italics ours)

That the failure of the Secretary to make an allowance for going value is confiscatory, is apparent from the record. The rates fixed by the Secretary are designed to produce 6½% net on \$2,792,700. The gross product of the rates upon the average expected volume is \$530,117. (R 351) with gross expenses of \$346,545 (R 333) and the reasonable return is \$181,526.00 (R 319 and 333). Due to the fact that it is impossible to spread rates exactly if complicated fractions of a cent are to be avoided, the rates produce an excess of \$2,046.00 (R 351) or a net average return over the next 4 or 5 years (R 613) of \$183,572.00.

We submit that the evidence clearly demonstrates that no allowance for the going concern value of appellant's plant and business is included in the valuations adopted by the Secretary and approved by the trial court in this case. The findings are, therefore, unsupported by the evidence and contrary to law. If going concern value in the amount of \$325,000., which is the minimum under the evidence of record, be added to the rate-base as found by the Secretary, the rate-base would be \$3,117,700., 6½% of which is \$202,650. It follows that since the net return allowed by the Secretary's proposed rates is \$19,078. short of a 6½% return upon the rate-base including going concern value, the rates are confiscatory and the order cannot stand.

Stock Show Property.

THE FINDINGS OF THE SECRETARY AND OF THE TRIAL COURT THAT THE LAND AND STRUCTURAL PROPERTY COMMONLY CALLED THE STOCK SHOW PROPERTY IS NOT USED AND USEFUL AS A STOCKYARD FACILITY, AND THAT THE VALUE THEREOF SHOULD BE EXCLUDED FROM APPELLANT'S RATE BASE, ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO LAW, RESULTING IN CONFISCATION OF APPELLANT'S PROPERTY.

A. The Properties are Erroneously Excluded from the Rate Base.

The Secretary, with the approval of the trial Court, excluded from the rate base the following property and its value, all of which property is owned by appellant:

Land in Zone 9, Government Valuation

(R 297) \$ 40,143.00

Structures thereon

Reprod. New (R 299)

Stadium \$176,371.

Stadium Heating Plant 6,115.

Stadium Restaurant 6,066.

Wash House 5,942.

Sales Pavilion 12,885.

Hide Storage (Tile barn) 14,845.

Total Reproduction new value \$222,224.

Gov't factor of condition percent 80.545%

Reproduction New Value less depreciation of structures 178,890.00

Total present value excluded \$219,033.00⁽²⁰⁾

Note 20—If the land values and condition percent figure of appellant's experts be adopted, the total would be increased to approximately \$269,000.00.

The findings of the Secretary relative to this property are contained in paragraphs 68-71 of the order (R 264) where it is determined that the land is not used and useful and that the stock show is not a stockyard facility; in paragraph 75 (R 271) where the general finding is made that structures located on land found by him to be non-used and non-useful are themselves found to be non-used and non-useful structures; and in paragraphs 115 and 118-a (R 297 and 299) where the valuation of the excluded property is given.

The trial court summarized the findings of the Secretary and adopted them in findings 9-12, inclusive, (R 1251-2) as follows:

"9. 2.633 acres of the land excluded as being not used and useful are occupied by so-called stock show buildings consisting of a stadium, sales pavilion and certain other buildings used in connection with a stock show. Petitioner does not carry on any of its business in these buildings. Petitioner leases this property to the Western Stock Show Association, a Colorado corporation, which operates an annual live-stock show on the premises. The expenses of the show are borne in part by public subscription and in part by the receipts from the sale of tickets. Petitioner pays the taxes upon this property and has, in the past, made substantial contributions to cover deficits resulting from the operation of the show.

10. The so-called stock show property is un-used except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show. The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling

of this livestock and the Secretary does not attempt to regulate the charges made in connection with the stock show.

11. Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole.

12. The stock show property is not used and useful in rendering stockyard services and its exclusion does not affect the value of petitioner's property as an integrated and established enterprise.

For the purpose of clarifying the issues and at the request of the Court, appellant filed certain suggested findings (R 1226) all of which were overruled. The suggested finding relative to this property is as follows:

Stock Show Property. The plaintiff owns the land and buildings on and in which the annual livestock show is held. These buildings are leased for three weeks in each year to the National Western Stock Show Association, a non-profit Colorado corporation which operates the annual livestock show. The expenses of the show, which continues for eight days, are borne by admission fees to the show, admission fees to such other events as may be held during the year, and in some measure by public subscription. Plaintiff assumes the carrying charges, such as interest, taxes and the like, and when the show is unable to pay the rental, plaintiff absorbs the deficit. Large quantities of livestock are entered in the show, and much of it is held, exhibited, shown and sold in the so-called stock show property. Large quantities of livestock also entered in the show are sold in the main portion of plaintiff's yards. The stock show attracts buyers to the stockyards from all parts of the United States and results in a wider outlet for the producer's livestock at all times of the year. It is responsible for a substantial volume of receipts during the stock show period, has contributed to the improvement of the grade of livestock raised, results in better prices,

has educational value, is an excellent advertising medium for the Denver market, and is maintained by plaintiff in good faith and in the belief that it aids and stimulates its business and the business of the livestock producer. The Secretary excluded from the income account of plaintiff only the income received from the stock show buildings proper, and excluded from plaintiff's expense account the taxes and maintenance paid by it.

The Secretary did not allocate to the stock show and exclude from plaintiff's income account any portion of the substantial income from yardage and feed shown by the evidence to be directly attributable to the stock show.

The assignment of error upon which we here rely is Assignment No. 5 wherein appellant asserts that the findings as well as the assigned grounds therefor, are contrary to the evidence, unsupported by the evidence and confiscatory of appellant's property.

The essential facts are not in dispute, and in this regard the case is similar to the 1930 hearing, the final decision in which is reported in 57 Fed. (2d) 735⁽²¹⁾ and from which we shall quote briefly in a moment. The only difference on this point is that the evidence in the instant case was more in detail and more emphatic in that it was given to a greater extent by men actively engaged in the production of livestock.

It is undisputed that the facilities themselves are not excessive. Government witness Christensen testified that none of the excluded facilities were excessive or not needed for the show (R 429) and that the stadium is necessary properly to house the show (R 430). In this he was corroborated by Witness Pexton (R 840) and by Witness Farr (R 941). No contrary evidence is of record. Hence the size and nature of the structures are not in issue.

Note 21—Denver Union Stock Yard Co. v. U. S., 57 Fed. (2d) 735.

In the Court's findings above quoted, the Court holds that whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole. In the Court's opinion (R 1268)⁽²²⁾ it is stated:

"Were we charged with the determination of this factual question, we might, because of the indirect benefits to the industry as a whole resulting from the stock show, feel the question to be a debatable one. But there is substantial evidence pro and con on this issue."

The record does not support either the assertion that the benefit is indirect or the statement of substantial contrary evidence. We challenge Government counsel to point to any such contrary evidence.

The testimony from all producer witnesses was unanimous as to the beneficial effect of the show upon the industry.

Witness Pace, a producer, testified as follows (R 685):

"As to the Stock Show at Denver, I have not missed a one since it was built. We all think it is a benefit to the industry as a whole. It just seems to get a lot more buyers together and a lot more cattle, and it seems every year that the cattle have been improved and more sales and more buyers, and I have heard it said many times that Denver is the best feeder market of any town or place anywhere, produces more good cattle, more good feeders, sold here in the Stock Show than any other one market. Yes, the same thing refers to bulls. It just looks as though there were buyers here from everywhere and there always seemed to be stock for everybody. Sometimes it might run a little short like anything else, and maybe a little long, but not very much. The buyers come from a great many States and buy the livestock by the carload and maybe more. Yes, I think the Stock Show has been influential in bringing buyers to this part of the country and advertising our livestock, because, as we look at

Note 22—Also reprinted in "Statement as to Jurisdiction", p. 9.

it, we are always waiting for the Show to either buy feeders, if we want them, or have them to sell. The same way with bulls and the same way with horses. It just seems that it is a place to get together and do business. I think it is very valuable. . . ."

This same witness testified that the show had personally put him in contact with buyers several times whom he felt he would not otherwise have reached (R 686); that the prices generally average from \$1.50 to \$2.00 a hundred more than they would on the open market at any other time; and that since the shipper to the market is interested in the outlet for his livestock and sends it there for sale, he is interested in the number of buyers on the market because the more buyers there are the better the prices received. He further testified under cross-examination, (R 695) that the stock men all over the country regard the show as a get-together time and try to have something to sell or that they go there for the purpose of buying; that the stock show has personally been valuable to the witness; that he had always found that he got a good price and generally a better price at the stock show (R 696) because there are more buyers and better sales.

Witnesses Jamison, Mitchell and Farr were three other producer witnesses called by respondent and questioned concerning the stock show.

Witness Jamison is a producer from Arizona with a ranch of 150,000 acres. He testified that he had been familiar with the Denver show for twenty years. His direct testimony on this point appears at (R 794 et seq.) as follows:

Q. In your opinion, is it of benefit to the livestock industry as a whole to have, or to have had this stock show at Denver?

A. I think it is the greatest thing that they have ever had to improve the breeding of cattle and general conditions.

Q. In your opinion, has it had any effect upon the, you might say, the advertisement of the western, you might say, mountain type of cattle?

A. I think it is about the only advertisement we have ever had that has done us any good.

Q. Do you know or can you state whether or not buyers have been attracted to the market which have become permanent buyers, say, of your livestock?

A. They sure have, lots of them.

Q. And have been attracted by reason of the show, you feel?

A. Yes, sir.

Q. Do you think the stock show has had any effect upon prices paid for cattle?

A. It certainly has.

Q. In what way and to what extent do you feel that?

A. Because it has encouraged the people to raise a better grade of cattle and naturally they bring better prices.

Q. Are prices higher here in your experience during the show than they at other seasons of the year?

A. Usually a dollar a hundred or a dollar and a half.

The witness further testified that because livestock in large numbers were held back for the show, it had a tendency to prevent a glutted market in the fall marketing season. The witness further testified (R 795):

Q. Now, does a person in the country who doesn't come to the Show in your estimation get any of the educational benefits, and if so, how?

A. Well, you know the neighbors that come, they go back home and tell them what they have seen at the Show and of course a man that stays home, he never sees no cattle but his own, and he naturally gets to thinking that they are the best there is, and

if he takes a trip, say, to the Denver Stock Show and sees the cattle up here, he is liable to go back home and say, "Our cattle aren't near good enough, we have got to do something to improve our cattle. We thought they were good, but they were not nearly as good as I saw at the Show." That is the general talk of visitors when they go back home.

Q. And also isn't it true that he perhaps sees a neighbor's cattle that have been improved by that neighbor's observations of the Show and he immediately starts in?

A. That is where it does the good.

Witness Mitchell, a large producer raising about 5,000 lambs a year, feeding about 25,000 to 30,000 lambs yearly and either producing or feeding or both, from 1,000 to 1,500 head of cattle per year, testified (R 800) that he has been familiar with the Denver show for sixteen years and further testified as follows:

Q. Will you state whether or not in your opinion the Denver Livestock Show sometimes called the National Western Livestock Show, is and has been a benefit to the livestock industry as a whole?

A. Well, I think it has been the biggest benefit, the biggest advertisement for the western cattle of anything that could happen in this western country.

Q. Well, do you feel that that benefit is limited solely to those who exhibit or attend or patronize the show or does that spread out through the industry as a whole?

A. I think it covers the industry in the western states here.

Q. I mean simply during the show week?

A. Well, it has a tendency to draw people to this country to buy up cattle other than show week.

Q. And has that tendency actually resulted in that increase in the buyer outlet, so to speak?

A. Well, it sure has, yes sir.

Q. As a matter of fact from your own experience do you or do you not have customers now who buy from you direct, contact with whom you first made at the Denver show?

A. Yes sir, we ship cattle to Indiana and we also ship cattle to Ohio and Missouri to people who came here to the Stock Show that we got in contact with.

Q. And do you feel that is fairly general, you are not just one, the only one who has ever had it?

A. Well, I think it is very general, I think it is very general among the traders and producers.

Q. And is it your opinion that it has brought into prominence what we call the Rocky Mountain type of blocky animal?

A. Yes sir, it has.

Q. It has made and created or helped to create a demand for that type, has it not?

A. It sure has, yes sir.

Q. At all times of the year?

A. Yes sir, at all times.

Q. Do you think the show has had any effect upon the prices, we will say, for which livestock moves?

A. Well, I think you take Stock Show week, I think these cattle would bring anywhere from 75 cents a hundred to \$2.00 a hundred more than they would the ordinary week before or three weeks before or possibly three weeks afterward.

Q. And the producer receives that additional price, or the feeder?

A. He sure does, yes sir.

Witness Jamison in his testimony stated that it was generally conceded that Denver was the largest market for bulls in the United States, and witness Mitchell corroborated this (R 801), stating that

"... it is known all through the southwestern and northern cattle country that it (Denver) is the best place to buy bulls in the United States during the Stock Show week because they assemble more good bred bulls at that time and people can come here and see maybe a thousand or 1,500 of them in two or three hours if they wanted to look at that many and if you had to drive over the country it would take 30 days to get what he really wanted."

He testified to the importance of well bred bulls by pointing to the fact that the Government regulation did not permit any one turning a bull loose on the range or on the forest reserve unless he is a registered bull "and a good individual with it."

Witness Farr, a feeder and fatterer of about 35,000 lambs and 1,000 head of cattle per year testified (R 940) that he had been familiar with the Denver show since 1907; that being in the business of feeding as distinguished from producing livestock, he gets out in the territory to watch the livestock and to buy feeders sometimes direct and has therefore had opportunity to observe the effect of the stock show on the industry. He stated that in his opinion the livestock show at Denver is a benefit to the industry as a whole. A portion of his testimony is as follows: (R 940).

A. I think any show is one of the greatest advertisements there is for meat and meat products. It is very educational for people to go there and see the different classes of stock and how they have been bred and improved. I think it is, you might say, it is the top degree for agricultural college or high school students, 4-H Club boys and girls, their aspirations to get to go to some show, Denver or Kansas City, and so forth. The stock judging teams that they send all compete at these shows from the various States and counties and so forth.

Q. Well, do you feel that that benefit spreads out through the industry and touches those who do not even attend the show?

A. Yes, sir.

Q. From your contacts with the industry as a whole, do you know whether or not those who have not attended gain valuable lessons from their contact with those who have attended the show?

A. I have seen that in my own community where probably the parents would never go to the show and their children got interested through 4-H Club boys and girls and exhibited their animals at the show and come back and their parents got pepped up and they soon start to breed better sheep and cattle and hogs from the effects of the show.

Q. In your opinion has the Denver show created an enlarged outlet for livestock which operates beneficially throughout the year?

A. Yes, sir.

Witness Pexton, Vice President and Assistant General Manager of appellant, testified from the background of many years close contact with the Denver market. He outlined briefly the history of the show (R 829) and stated that the show had its inception in an insistent demand from the producers that the general quality of livestock in this territory should first be improved and then should have the advertising of a show to increase its outlet. He described the facilities devoted to the show, agreed with the Government witness that the facilities are not excessive; and stated that the show had three main purposes, namely:

"... The first is to show producers the kind of livestock that can be produced by better breeding and higher quality animals; also, the results that may be obtained on the same amount of feed and time with such animals, compared with the kind formerly produced. Second, to exhibit and have on hand, for purchase if desired, these higher type breeding animals; and third, to advertise, create a premium upon, and provide an outlet for these better type animals after they are produced." (R 832).

He testified positively and gave examples demonstrating that all three of these purposes have been and are being accomplished by the show. He pointed out that it costs just as much to raise and market a poor animal as it does a good animal and that the producer receives a greater net return from a good animal than he can possibly receive from a low grade animal.

Respondent's Exhibit 2 is an article by the Chief of the Bureau of Animal Industry, United States Department of Agriculture, and a portion of that article was read into the record (R 432) from which the following brief quotation is taken:

"In the industrial world a firm which expects to prosper and produce dividends does not use obsolete methods and equipment. Junking old machinery and remodeling old factories takes both courage and capital. But in the end such a course is the wisest and most economical.

"How is the livestock industry meeting the same situation? . . . There is evident need also for a closer relation between our standards for breeding stock and the utility value of the product. If, as now appears to be the case, quality in meat is an inherited character, we may wisely develop, within the breeds, strains of cattle, sheep and swine that will produce meat of assured quality. In any case the industry may wisely cull out, at once, the types that are plainly unfit in the light of present breeding and market standards.

"Naturally we look to the great stock shows as the supreme authority on animal conformation. Hence every means of stimulating entries by the best breeders adds to the value of such shows. And, conversely, any condition that discourages the most able breeders from showing their animals tends to place leadership in less worthy hands. . . ."

The National Western Stock Show, as the show is called, is rated as one of the three largest livestock shows

in the industry (R 831). In some respects it is the largest. As a part of the show and in the yard proper of appellant, there is annually held the largest market for breeding bulls in the United States (R 801 and 833) and the largest auction of feeder cattle in the United States (R 796, 801, 834, 843). The show brings buyers in large numbers to Denver from all over the United States and the distribution is wide spread (R 431, 686). Many of those buyers become permanent buyers (R 800). The show has created a market for Western feeder cattle at all times of the year (R 834).

We submit that the record utterly fails to support the finding that the show is only an indirect benefit either to the industry as a whole or to that part of it which markets at Denver. The fact that it is a powerful advertising medium is not denied by the government.

It is not denied that these structures are leased to the National Western Stock Show Association for the one week period of the show and then "when, as and if" earned, the company receives \$7,000. therefor. At the date of the hearing, the average received for the ten preceding years, was \$3,547.50 (R 839). A more accurate statement would be that these structures, together with most of appellant's other property, is devoted to stock show use during this one week and appellant takes into its treasury \$7,000. or so much thereof as has been earned by the show. The feeder cattle are yarded in the main stockyard up to Alley 22 or 23,⁽²²⁾ with fat cattle in the pens nearest the Exchange Building. The pure-bred bulls are in the pens in the triangle south of the Exchange Building. Carload sheep are exhibited in the sheep barn in the yards, carload hogs in the regular hog barns. Boys and Girls Club livestock (4-H Clubs) with registered pure-bred cattle, calves, sheep, hogs and horses, are exhibited in the structures in controversy (R 967). In short, the excluded properties are only a part of the properties devoted for one week each year to the Stock Show. The bulk of appellant's yard is so used.

Note 23—Alley 22 is approximately the center of the cattle division shown in photograph in the envelope at the end of this brief.

5 The finding of the trial court that the appellant "does not carry on any of its business in these buildings" is contrary to fact. Its business is the livestock business and the development of better livestock, and a better market. Whatever is in furtherance of these ends is its business in the truest sense of the word. The close relationship between the Association and the appellant is admitted by the Government. This is emphasized by the fact that the Association is a corporation not for profit—organized as an educational or public welfare association under the business and administrative control of appellant (R 842).

The fact that there is an ostensible lease or an actual lease does not exclude the property from the rate-base. All income received goes to decrease operating expenses, and if, as the record abundantly proves, the Stock Show benefits all patrons of the market, the appellant and the industry as a whole, this income *pro tanto* lessens the total cost of the service to the industry. This principle was recognized by Mr. Christensen who was called by the government to testify, among other things, as to the property exclusions (R 403, 410). It was recognized in *Brooklyn Gas Co. v. Prendergast*, 16 Fed. (2d) 615 at 627.⁽²⁴⁾ The California Railroad Commission recognized the principle in *Re Southern California Edison Co.*, P.U.R. 1924 C 1 at 12 by including in the Electric Company's rate-base, a railroad property operated by a separate subsidiary corporation but not operated solely in the electrical business, the income from which subsidiary went into the operating revenues of the Edison Company.

The argument by the Secretary that if the Stock Show be held to be a stockyard facility, it would cast upon the Secretary the duty and responsibility to determine the reasonableness of general entrance fees, reserved seat prices, the charges made concessionaires, etc. is without merit (R 267). These are incidental items. The Interstate Commerce Commission does not attempt to regulate the

Note 24—"... that tenants occupy the upper floors of parcel No. 7 is no reason for disallowing that property in the rate-base. The rents collected are used to reduce operating expenses." (Opinion. p. 627).

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prices of or the charges to "news butchers" on the trains, or the rental of news stands in stations, or cab stands, or office space in terminals, etc. The Secretary of Agriculture in this case has included the value of the Exchange Building but has not assumed the responsibility of determining the reasonableness of the rentals charged to commission men, yard traders, serum companies, telegraph companies, the news, soda and cigar stand, or to the Government for the post office. The argument is fallacious.

Equally fallacious and wholly unsupported by the evidence is the conclusion of the Secretary (R 267) that because appellant "underwrites" all deficits, to include the Stock Show properties would be "to pass on to the public in rates an amount which in justice it ought not to pay". Respondent's Exhibit 14 (R 839) shows that during the ten-year period, 1925 to 1934, appellant received an annual average of \$3,547.50. The earnings in the yards proper due directly to the Stock Show are shown by the record to be not less than \$11,592.00 (R 836 and Respondent's Exhibits 13 and J).

Properly viewed, there has been no deficit. But even if there were, the testimony is that it is fair, reasonable and just for all livestock producers, including those who do not attend the Show, to pay their part of the costs thereof through rates because of the benefits received as members of the industry. Two producer witnesses, Mr. Mitchell and Mr. Farr, were questioned directly on this point by government counsel and they so testified (R 804 and 944). There is no contrary testimony.

The fact that appellant's Board of Directors for approximately 38 years have been carrying on this Show in the belief that it was mutually beneficial to the company and the industry, is entitled to some weight.⁽²⁵⁾ In spite of the fact that the stockyard business is charged with a public interest, it is still a private business and the power to regulate does not give the right to manage.⁽²⁶⁾

Note 25—*West Ohio Gas Co. v. P. U. C.* 294 U. S. 63 at 72.

Note 26—*Southwestern Bell Telephone Co. v. Pub. Serv. Comm.*, 262 U. S. 276 at 288. See also, *United Railways v. West*, 280 U. S. 234 at 249.

In the decision of the 1930 rate investigation between these parties, the Court in making the injunction permanent, said (57 Fed. 2nd 735 at 750) :

"The petitioner owns and maintains land and buildings for the purpose of an annual live stock show, the show being operated by the National Western Stock Show Association, a separate corporation; the expenses of the show are borne by public subscriptions, but the stockyards company pays the taxes on the properties. . . .

Here again the evidence is undisputed. The Department of Agriculture is expending considerable sums of money in an effort to induce cattlemen to raise a better grade of cattle. A pickup calf, or a grade steer, will eat as much as a pure bred, but it will not bring as much on the market. The primary object of livestock shows is to convince the cattle raiser of the wisdom of raising the better grade stock.

The business of the petitioner is entirely dependent upon the live stock business in its territory. If that business perishes, the petitioner will perish. If that business flourishes, the petitioner will flourish. It is axiomatic that the live stock business will not flourish unless it is profitable. It will not be profitable unless better live stock are raised. In bending its efforts toward furthering the success of the live stock business in its territory, the petitioner is furthering its own business. Here, again, to deny the petitioner the right to earn a return upon these properties, is to deny it the right to bear a part of the expense of this stock show. Furthermore, the stock show attracts buyers, and, the more buyers that are bidding, the better the prices that are obtainable. . . .

That the directors have maintained the show, in good faith and in the belief that it stimulates the market presently, and insures a more stable and better business for the future, is not questioned. The facts are not in dispute; the question is one of law. We are

of the opinion that the petitioner has a right, in the conduct of its business, to own these properties for this purpose, and that it is not within the power of the Secretary to deny the petitioner the right to stimulate its business and to insure its future stability by denying to it a return upon properties used for that purpose. . . ."

In *St. Joseph Stock Yards Company vs. United States*, 298 U.S. 38 at 56, 57, the question was presented as to the exclusion from the rate base of the value of a certain hotel known as The Transit House, owned by the Yard Company. The value of this hotel and land had been excluded as not used and useful property on the ground that it was maintained on a non-compensatory basis for the special benefit of truck drivers and others who patronized it, and that it was not clearly shown that the business of the yards would be materially affected by its absence. This Court stated that it took the same view of the evidence. The converse of this proposition is that if the hotel had been of general benefit to the industry and its absence would have materially affected the business of the yards, its value would necessarily have been included in the rate base.

That we submit is the situation with regard to the stock show properties at Denver. That these properties and the livestock show held therein is of direct, definite and general benefit to the industry is established by the record as we have above demonstrated. The record also establishes that the business of appellant would be materially affected if the livestock show were not held. Every producer witness as well as officials of the company testified, for example, that the feeder auction at which between 500 and 700 carloads of feeder cattle, or from 20,000 to 30,000 head are received and sold during a two-day session, could not be held at any other time than during stock show weeks because the buyers from all over the country would not be present; that annually the largest market on breeding bulls is held in the Denver yards during stock show week; that sheep and hogs are shipped in during show week in great numbers, and sales in

large volume occur. That the livestock which comes to the Denver market during show week is not all pure bred stock but grade stuff is testified to by Government witness Christensen (R 429). It is further established that if it were not for the increased business due to the show, the month of January, under conditions which exist in the range country tributary to Denver, would be lighter in point of receipts and sales than the December preceding or the February following, instead of which the average January earnings during the six-year period preceding the date of the hearing are \$11,592 greater than the average of the preceding and following months. Citations of the testimony and exhibits establishing the fact of this increased business are given in the portion of the brief immediately following and are not repeated here.

Appellant furthermore introduced evidence that if all of the income which is properly allocable to the stock show, were taken into account and recognized by the Secretary, it could not be said that the show is maintained on a non-compensatory basis (R 838). It is the failure by the Secretary as pointed out in the following portion of this brief, to recognize that the increased earnings of the yard are derived from and on account of this livestock show, that makes it appear that it is so maintained. As stated in the St. Joseph decision, however, if the general benefit to the industry and its business producing effect be proven, it makes no difference whether it is compensatory or non-compensatory, the value of the property must be included in the rate base in either case. We submit that these necessary facts are established of record in the case at bar and that it is error to exclude the value of this property.

The finding that the Stock Show is not a stockyard service (R 268 and 1252) is contrary to law. Sec. 201 (b) of the Packers & Stockyards Act, 1921,⁽²⁷⁾ defines stockyard services to be services or facilities furnished at a stockyard in connection with the marketing, feeding or handling in commerce of livestock. It is not denied that large quantities of pure bred livestock are exhibited in the stadium, fed in the

tile barn and the other adjoining barns and sold in the sales pavilion. It is not denied that large numbers of bulls, fat and feeder cattle and calves, fat and feeder sheep and hogs are exhibited in the pen area, sheep and hog barns in the yard proper, and sold there or at the feeder auction. We submit that the Secretary has no authority to exclude these properties. As in the O'Fallon case,⁽²⁸⁾ the instant case is concerned with the command of Congress addressed to a regulatory agency in relation to its valuation of the property of the regulated utility. We insist that that command has not been obeyed.

B. In any event, the action of the Secretary is arbitrary and confiscatory in that, if the Stock Show properties be excluded, he has failed to exclude income derived directly from the Stock Show. It follows that the decree of the trial court in sustaining the Secretary's Findings is likewise erroneous.

In excluding the value of the Stock Show properties from the rate-base, the Secretary excluded from appellant's income account, the average rent received, and from the expense account, the average taxes paid on those properties.⁽²⁹⁾ The record establishes that this was not and is not all the income derived from or on account of the Stock Show.

Denver is a range market. Unlike the Missouri River markets, it derives its main livestock supply from the ranges and ranches of the mountain and plains country rather than from feeders and feed lots in the corn belt section around the Missouri River markets. The livestock is driven out of the forest ranges and high mountain pastures by climatic conditions. Sheep come first, both because they are a less hardy animal and because they summer in the high pastures, many of which are above timberline or in Idaho, Montana and Wyoming where winter snows are apt to come earlier than in the more southerly states. The sheep run starts generally in late August or early September, reaching

Note 28—*St. Louis & O'Fallon R.R. v. U. S.* 279 U. S. 461. See distinction drawn in *R.R. Comm. v. Pacific Gas & Elec. Co.* U. S., 58 Sup. Ct. Rep. 334, advance sheets.

Note 29—Appendix pp. 115-117.

its peak in October; tapering off in November. The cattle run starts about the middle of September, reaches its peak in late October and November, tapering off in December (R 423, 809, and 950). Sheep from the feed lots of Northern Colorado do not return until late February and then continue through March and April.

The proof of income directly due to the Show consisted in establishing that livestock is held back for the Show; that due to the seasonal conditions, the month of January would be a period of light receipts and light earnings, comparable to December and February but for the influx of livestock and the sales caused by the Show, a comparison of earnings in the comparable months, and the opinion of men in active touch with the market that a large percentage of the livestock shipped to Denver for the Show would not come at any other time.

These facts were definitely established in the record.

Witness Mitchell, a large producer, testified as follows: (R 800)

"Yes, to my knowledge livestock is held off the market for the Show. I hold my stock off year after year waiting for the Stock Show week to come. I think that if it were not for the Stock Show week in Denver, there would be times that your market would be just kind of glutted with cattle and would have more cattle than it could handle. The effect of a glutted market is that the producer would try to find some different market to put his cattle in. No, I do not think that the cattle would come to Denver at other times of the year if you did not have a Show. There would be a certain percentage of them that would come and I think there would be quite a few cattle that would not come here that would go to other markets. . . .

Yes, I am familiar with the feeder auction at Denver. It is the largest auction in the United States by far, I guess. Stock Show week is the most probable time for an eastern man to buy his cattle that he is go-

ing to put to graze in the Spring. He buys a few carloads to finish out on corn and blue grass. Yes, the Stock Show brings the buyers to Denver, and unless there was a concentration of buyers, I do not think that such an auction could be held. In other words, I figure you have got to have the buyers or you couldn't have that kind of an auction, and the buyers have to come from a lot of States to take the cattle in as big runs as they have there at Stock Show week. I don't think the buyers would come here in numbers like they do at Stock Show week unless it was for the Stock Show."

This same witness also described the range movement of mountain grass fed cattle which he said ends in the latter part of November or the first part of December, and testified (R 802):

"If it were not for the show, receipts for January would be very much lighter than they would be in December."

Witness Jamison, also testified to the same effect (R 794) stating that the feeder auction at which very large numbers of feeders are sold, could not be held at any other time than at the Stock Show (R 796) and that there was no reason why the receipts and sales in January should exceed December and February, except the Show.

Witness Farr, a large feeder of both sheep and cattle and one who has been familiar with the Denver market for thirty years, during the last ten years of which he has been a director of the Company, testified as follows: (R 941)

"In my opinion the Denver Show creates an enlarged outlet for livestock which operate beneficially throughout the year. In my opinion a part of the income at the yards is directly traceable to the Show. If they didn't have the Stock Show their income would be very low in January. That is true on account of the immense amount of livestock that the Show draws, especially the large amount of feeder cattle. . . . In January the range run is over and there would be practically no business here if it wasn't for the Show. In

other words, January would, in my opinion, be a greatly lower month than December so far as cattle or sheep are concerned.

"In my opinion, the feeder auction could not be held at any time other than at the Denver Stock Show period."

Witness Pexton, Assistant General Manager of petitioner, testified (R 837) that the livestock marketed at Denver during the show would not come at other times, and gave cogent reasons for that opinion. He further testified (R 969) that from 100 to 125 carloads of cattle compete for prizes at the show and between 20,000 to 30,000 head or from 500 to 700 carloads of feeder cattle are received for sale during show week. It is admitted that these are yarded in the cattle division of the yards proper up to alley 22. The record also shows that the Denver show has as many as 1500 purebred bulls (R 801), all of which are housed in the yards proper (R 1037). These buy and consume a large amount of feed and pay a marketing charge of \$1.00 per head when sold, all of which goes into general revenues of the company and is included by the Secretary in his computations. These bulls would not be shipped to Denver in quantity at any other time of the year because buyers of breeding stock would not be present in sufficiently large numbers to warrant such shipments at any other time (R 801, 1037). Carload sheep and carload hogs are sent in for the show, cared for and sold in the yards proper, that is to say, in the sheep and hog barns, with less than carload lots housed on the "hill," as the show properties are called, but nevertheless these shipments are attracted to Denver by reason of the show and sold because of the show.

Mr. Pexton also introduced in evidence, Respondent's Exhibit 13, which compares the average earnings during the months of December and February preceding and following the show, with the month of January, during which the show was held, for each of the years of the six-year period, 1930-1935 inclusive. The earnings shown in each instance were and are the net earnings for the periods in question after deduction of general overhead, taxes, bond interest, labor

costs and all other expenses, following, for purposes of argument, the theory of the Government auditor in the adjustment of income for rate-making purposes with which theory we do not agree. That exhibit showed that the average earnings of January during that period were greater than the average of December and February for the same period by \$11,592.14 per year.

In conformity with a stipulation of the parties, the comparison of earnings for December 1935 and February 1936 with January 1936, and December 1936 and February 1937 with January 1937, were also made part of the record (Resp. Exs. J and R). These showed an excess in January in the years in question of \$17,071.88 and \$14,241.72 respectively.

There is no contrary testimony. The Secretary exercises his so-called discretion and determines that the livestock would have come to the Denver market at some other time. This is mere prophesy of the sort condemned by the Court in *West Ohio Gas Co. v. Public Utilities Comm.* (2nd case) 294 U.S. 79. It is not only contrary to the evidence above set forth but finds no support in the evidence. We submit that the regulatory agency in a rate hearing cannot supply a lack of evidence by reliance upon its or his "judgment." As stated in *West Ohio Gas Co. v. P. U. C.*, 294 U. S. 63—"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

This question of the failure of the Secretary to exclude the income if he excludes the property, strikes deeper than the mere question of the finding being arbitrary. It strikes at the jurisdiction of the Secretary to modify the existing rates of appellant. The Packers and Stockyards Act, 1921, from which alone the Secretary derives any authority over appellant's rates, permits the Secretary to change existing rates only when found unreasonable.⁽³⁰⁾ He assertedly so finds but without excluding this income. The finding of the Secretary (R 345) is silent as to the unreasonable excess, if any. If that excess, if any, were equal to or less than this non-excluded income, the Secretary is without jurisdiction

Note 30—Secs. 210 (c) and 211, U.S.C.A. Title 7 Chapter 9.

to change appellant's rates. It is immaterial for this point whether the income be left in and the value of the property added to the rate base, or the value of this property omitted and the income likewise excluded. The result is the same but the Secretary must choose either the one or the other route. He chose to exclude the value of the property and under those circumstances, the above jurisdictional finding is not sufficient.

Our major proposition upon which we rely is that the Stock Show property is a stockyard facility and as such the value thereof must be included in the rate-base. The findings of the Secretary and of the trial Court are unsupported by the evidence. In the alternative, however, if the property be excluded, then the income derived therefrom must also be excluded. This the Secretary has not done and his error was continued by the findings and conclusions of the trial court. We submit that they cannot stand. The declarations by the Secretary that the Stock Show is not a stockyard facility, or is only an indirect benefit to the industry, or that existing rates are unreasonable, are not above the scrutiny of this Court.

We are mindful of the following pertinent language from the opinion of the Court in the *St. Joseph Stockyards* case 298 U.S. 38 at 52:

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

III.

**Trackage, Loading & Unloading Docks, Chutes,
Chute Pens & Alleys.**

THE COURT AND THE SECRETARY ERRED IN EXCLUDING FROM THE RATE BASE OF APPELLANT THE VALUE OF THE RAILROAD TRACKAGE, LOADING AND UNLOADING DOCKS, CHUTES, AND CHUTE PENS, TOGETHER WITH THE VALUE OF THE LAND WHEREON THOSE FACILITIES ARE SITUATE AND EXCLUDING ONE-HALF THE VALUE OF THE ADJACENT ALLEYS. THE FINDINGS UNDER WHICH THESE PROPERTIES ARE EXCLUDED ARE CONTRARY TO LAW, UNSUPPORTED BY THE EVIDENCE AND ARBITRARY.

The property thus excluded is

Value of land (Governmental appraisal)⁽³¹⁾ \$ 54,332

Structures

Chutes, including docks and pens. \$ 93,788

Trackage, including tool house &
office 58,644

Total structures, Reproduction

new 152,432⁽³²⁾

Government condition percent 80.545⁽³³⁾

Total, reproduction new less depreciation \$122,776

Total value excluded from Rate base \$177,108

In the land excluded is one-half the area of the adjacent alley (R 245) to give ingress and egress into and out of the holding pens.

The Secretary's findings on this point are contained in paragraphs 40 to 42 inclusive of his order (R 245). Briefly summarized, they are that the railroads do not unload and load the livestock handled by them but employ the company

Note 31—See Record pp. 277-287, 289-90, and 297.

Note 32—Record p. 302.

Note 33—Record p. 304.

to do it at \$1.00 per car; that the Interstate Commerce Commission and this Court has held that this is a transportation service, and if so it is not a stockyard service since the Packers and Stockyards Act, 1921, does not confer concurrent jurisdiction on the Secretary of Agriculture over transportation matters. The Secretary then finds that there would be a double exaction if the loading and unloading facilities were to be included in the rate base since he asserts the service is a railroad service included in the railroad rate. Likewise with regard to the trackage itself, the Secretary argues that "if transportation does not cease until livestock shipped by rail is unloaded into suitable pens . . . transportation has not ended when livestock is being brought to those facilities over tracks owned by railroad companies or leased by them."

The finding of the trial Court is as follows:

"8.985 acres of the land excluded by the order as being not used and useful are occupied by railroad trackage, alley ways, loading and unloading docks, loading and unloading chutes and pens, and yardmaster's office, and a trackman's tool house. These facilities are owned by petitioner, but are leased to the railroads serving the stockyards under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs of tracks and taxes and assessments. In addition, the railroads pay petitioner on a per car basis for performing loading and unloading services. The amounts so paid are absorbed by the railroads or are included in the freight rates. The locomotives, transportation equipment, etc. essential to the use of this property are furnished and operated by the several railroads. The loading and unloading docks, chutes and pens which are leased by the railroads from petitioner are used exclusively for handling livestock in the course of transportation to and from petitioner's stockyards. This property and the structures thereon are not used and useful in the rendition of stockyard services."

The assignments of error upon which appellant relies are assignments numbers 2, 3 and 4, and briefly summarized are that these findings are contrary to law, unsupported by the evidence and confiscatory in that (1st) these facilities, wholly owned by appellant, are stockyard facilities within the definition of Section 201 (b) of the Packers & Stockyards Act, 1921⁽³⁴⁾; (2nd) the loading and unloading docks, chutes and pens are not leased to the railroads and that there is no evidence thereof in the record; and (3rd) that the charges paid the company on the per car basis are not absorbed by the railroads and included in the freight rates in the majority of the cases and that there is no evidence of record to support this statement and finding of the court.

A. The trackage—It is admitted that all of the three and one-third miles of trackage is owned by appellant and is on land of appellant within the stockyards area (R 405, 884). All of this trackage is industry track or spur track, connecting with the carrier owned trackage outside the yard area, as a reference to the photograph in the envelope on the back cover of the brief will show. It is likewise admitted that all of that trackage is necessary in connection with the handling of livestock in commerce. (Government Ex. 5, page 6, Class A Property; see also (R 401, 403).

The government position is based on its interpretation of section 15, subparagraph (5) of the Transportation Act and Sec. 406 of the Packers & Stockyards Act, 1921⁽³⁵⁾, (U.S.C.A. Tit. 7 Sec. 226). The latter section provides that nothing in the Act should be construed to affect the jurisdiction of the Interstate Commerce Commission or confer concurrent jurisdiction on the Secretary. Section 15 (5) of the Interstate Commerce Act provides:

“Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public

Note 34—Appendix p. 102.

Note 35—Appendix p. 106.

stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefore to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such expected services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484; U.S.C.A., Sec. 15 (5))."

There is nothing in this section which deals with title or makes a stockyard facility any less of a stockyard facility merely because a carrier uses it. Properly interpreted all this section means is that the carrier must furnish loading and unloading service at its own expense at terminal markets when such terminal market is either a "feed in transit" point or the final destination of the shipment. The carrier must provide these facilities by either owning or leasing them, but if the carrier elects to lease rather than make the capital outlay to buy or build, there is nothing in this section of the Interstate Commerce Act which changes the character of the facility or which prohibits a stockyard company from owning, furnishing, or including the value thereof in its rate base. The sound interpretation was made by the majority opinion in the 1930 rate hearing—*Denver Union Stock Yard Co. v. United States*, 57 Fed. (2nd) 735 at 749.⁽³⁹⁾

Note 36—"The respondents freely concede that properly located side tracks are indispensable to the operation of petitioner's business; no claim is made that, when these tracks were constructed or now, the railroads could have been required to construct them at their own expense. The sole reliance of the respondents is upon section 15 (5) of the Interstate Commerce Act (49 USCA), and the decisions applying it, which provide that railroad transportation ends only after the live stock is unloaded. *Covington Stock-Yards Co. v. Keith*, 139 U. S.

No one contends that the railroads could be required to build these tracks within the stockyard area. *Schlicher v. Director General*, 62 I.C.C. 181 at 187; *Winters Metallic Paint Co. v. Chicago M. & S. P. Ry. Co.* 16 I.C.C. 587 at 589. But when the industry, as here, has constructed those tracks, it can compel the carrier to grant switching service. *Interstate Commerce Act* Sec. 1 (9). This, however, does not destroy the nature of those tracks as a facility of the industry.

As a practical matter, with the volume of traffic produced by appellant's market, there is no doubt but that any railroad would fight for the chance to build these spur tracks to control the traffic even though appellant could not require it so to do, but this is exactly what appellant does not want and cannot afford to have happen (R 884, 885, 1175). Appellant must be able to require joint use of tracks and yet must be free to move the tracks to different locations as the growth of its market demands (R 408).

The Secretary allowed in the rate base the value of all roadways and the trial court approved this. Government witness Christensen (R 408) stated the truism that there

128, 11 S. Ct. 461, 35 L. Ed. 73. Respondents' brief states the position of the Secretary as follows: 'If the railroad leases property of a stockyards in order to gain access to pens, the transportation service nevertheless ends at the place where the livestock is loaded and unloaded. In other words, it is not the ownership of the land over which the spur track is constructed, or the legal obligation or absence of it to construct a spur track that determines whether such track is employed in stockyards or transportation service. It is rather the nature of the use.'

"There can be no doubt but that this trackage is used by the railroads in the discharge of their public duties. There is likewise no doubt that petitioner owns it, and has a right to own it, as a part of its stockyards facilities. The respondents assume that the same property cannot be used for two purposes—that of transportation and market. We cannot agree with this assumption; the fact is that the proper location of side tracks is a part of the services of marketing. The trackage here is indispensable both to the transportation and the marketing of live stock. It is in fact used and useful for both services. Since it is undisputed that the petitioner rightfully acquired this trackage, in order better to discharge its responsibilities to its patrons, and that such trackage is in actual use, it seems unfair to deny it a return thereon because perforce it must be leased. To relegate it to such return as it may be able to secure by an agreement with its lessee is to deny its right to a fair return. Such return as it does get should be restored to its income account."

is no difference between a highway of steel rails and a paved highway, so far as the handling of livestock in commerce is concerned except the physical makeup of the two "highways" by reason of which a different mode of transportation is required.

It is to be noted that appellant does not own and never has owned any locomotives or rolling stock of any kind. It is not a common carrier and has never held itself out as such. In this lies the distinction between the instant case and *Atchison, Topeka & Santa Fe Ry Co. v. United States*, 295 U.S. 193 and *Livestock Loaded & Unloaded at Chicago*, 213 I.C.C. 330. In the latter case the Commission said (*Italics ours*):

"The Supreme Court, in holding respondent to be a common carrier, referred not alone to *its affiliation with the lessee of its railroad* and to the fact that the services and facilities furnished by it were 'transportation,' but also, emphasized, as above shown, that respondent and the Junction were 'common carriers because they are made such by the terms of their charters, *hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them.* Although respondent's pecuniary interest in its railroad is now in the form of a fixed annual rental, it is very substantial. In the contemplation of its charter it is still engaged in the 'public callings' of operating public stockyards and a railroad as an adjunct thereto."

This is an entirely different situation from that which exists in the case at bar.

The Secretary excluded from income and expense accounts of appellant all income and expense received or incurred in connection with the trackage. This is proper if the facility is to be excluded. As a matter of fact, the question is somewhat academic because that income is sufficient to return a fair rate upon the investment. It is to be noted that we do not in this instance allege that the action of the Secretary is confiscatory. We believe the trackage

is a stockyard facility and hence its exclusion from the rate base in contrary to law. We are dealing with a Congressional mandate as to valuation.⁽³⁷⁾

B. The loading and unloading docks, chutes and Pens. The Secretary did not attempt to exclude these facilities in the 1930 rate case. This extended use of the pruning knife has been reserved for this hearing. So far as we have been able to ascertain the Secretary did not exclude such property in the St. Joseph case ⁽³⁸⁾ or in the valuation of any other stock yard.

The same position is taken by the Secretary, namely that these are transportation facilities and not stockyard facilities due to Section 15 (5) *supra* of the Interstate Commerce Act and hence their value is not to be included in the rate base of appellant.

The docks are long platforms with inclined runways or chutes leading down therefrom into pens. The platform is at the approximate height of a car floor. One dock parallels the Burlington spur track on the east side of the yard; another parallels the Union Pacific tracks on the westerly side of the yard, the C. & S. or quarantine dock is adjacent to the sheep and hog barns and the River dock is back of the sheep barn and adjoining the river tracks. All are owned by appellant.

The Court in its Finding No. 8 makes the erroneous finding that "the loading and unloading docks, chutes and pens are leased by the railroads from petitioner." This is contrary to fact and no evidence thereof is to be found anywhere in the record. This, we believe, will be admitted by Government counsel.

These docks and chutes are used in the loading and unloading of livestock received by rail, which, we submit is part of the "handling" of livestock in commerce. Exactly similar docks, chutes and pens are constructed and in use for the loading and unloading of trucked livestock, no part

Note 37—c.f. St. Louis & O'Fallon R.R. v. U. S. *supra* see Note 28 *ante*.

Note 38—c.f. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 at 56.

of which are excluded by the secretary. That the docks and chutes in question are located in the appellant's stockyard, and were built by it on ground owned by it within the stockyard area cannot be seriously denied. We cannot believe the trial court was serious in its attempted distinction⁽³⁹⁾. Section 202 of the Act does not lend itself to any such strained construction, particularly when read in connection with the definition of stockyard services and facilities contained in Section 201 (b) of that Act. (Appendix p. 102). Furthermore, the docks and chutes are certainly "appurtenances" of the adjacent pens.

It must be remembered that a place is not a "stockyard" within the meaning of the Act unless it is operated for profit as a *public market*. (Sec. 202 (a) of the Packers and Stockyards Act, 1921, U.S.C.A. Title 7). We submit that these pens, chutes and docks are much a part of the market equipment as the other pens in the cattle, hog or sheep divisions, all of which without exception were allowed by the Secretary and the Court. There is no contrary evidence. On the contrary, the evidence is that the use of these holding pens is not limited to loading and unloading operations (R 1177) but that these pens are in frequent general use during peak seasons.

There is no merit in the contention that to include the value of the property in the rate base and allow a return thereon would result in a double exaction from the shipping public. This could only be true if in such case the income derived from the carriers were not included in appellants income. Where the income is included, it operates to reduce *pro tanto* the balance to be spread into rates. For example, suppose with the property included in the rate-base, a fair return would be \$200,000. Suppose a net income of \$20,000 from the carriers for use of the trackage and for loading and unloading services. If this

Note 39—R 1267, where the Court says: "... nor does any part of the transportation to and from the plaintiff's plant come within the definition of a 'stockyard,' which is a public market:

"'consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses; mules or goats are received, held, or kept for sale or shipment in commerce'. 202, Title 7, U.S.C.A."

net income be included in the income for rate-making purposes, as it must be if the property be included in the rate-base, then there is a balance of \$180,000 remaining to be spread into rates. There is no double exaction.

Furthermore the premise of the Secretary and of the trial court that the loading and unloading charges are included in the freight rate is contrary to fact and unsupported by the evidence of record. It may work out that way, or substantially that way, at some of the Missouri River markets and Chicago where by reason of the predominance of fat livestock and a large percentage of slaughter, the particular stockyard is the final destination of the shipment. That is not the situation at appellant's market. At Denver only 20% of the livestock received by rail is slaughtered locally (R 1047). Denver is a transit market, and when transit is granted by the carriers, it falls within the exceptions contained in section 15 (5) of the Interstate Commerce Act. The unloading and loading in such case is deemed to be at the request of the shipper and hence the charges are not absorbed. The undisputed testimony of record, elicited by government counsel on cross-examination of Mr. Pexton, assistant general manager of appellant, is that the railroads pay about 20% and the shippers about 80% of the loading and unloading charges at Denver (R 1046). The findings of the Secretary and the Court, therefore, that these charges are included in the freight rate is contrary to fact.

C. *The so-called chute alleys.* The pens for the holding and care of livestock in a stockyard are arranged in blocks, each pen and each block of pens opening on a passage way or alley of sufficient size to permit the driving of livestock to the scales, or other pens or places in the yard and to permit access for feed wagons and cleaning trucks and to give ready access in case of fire. At the corners of each block of pens are two-way gates which can be so arranged as to shut off other alleys and make a "thorough highway" for the driving of the livestock from any part of the yard to any other part.

The main alleys, running lengthwise of the yard in the cattle division are wider than the normal cross-alley due to the fact that they are the main highways, so to speak, and carry more traffic.

The Secretary excluded from appellant's rate base the value of one-half the land and roadway improvements, i.e. grading, paving, draining and guttering, of those main alleys which border on the loading and unloading chutes, pens and docks. His finding in this matter is not clear but the fact of this exclusion will not be denied by the government. The purported area of the various docks, designated generally by the name of the railroad adjacent thereto, although entirely owned by appellant, is given in paragraph 42 of the Secretary's order (R 248) under the heading "Non-used and Non-useful" and the areas thus given include the area of the half of the alleys upon which these docks and pens front. The reason for this exclusion assigned by the Secretary is that this space is necessary for ingress and egress to and from the loading and unloading facilities and that since the latter are transportation facilities to be excluded from the rate base on that ground, this alley space is also a transportation facility to be likewise excluded. The trial court in Finding No. 8 (R 1251) recognizes that alley ways are included in the 8.985 acres excluded as transportation facilities and makes a similar finding.

These findings are wholly unsupported by the evidence and extremely arbitrary. The record discloses the following:

(R 413) Government witness Christensen, the Field Assistant to the Chief of the Packers and Stockyards Division, Department of Agriculture, called as an expert to testify as to the used and useful or non-used and non-useful status of appellant's properties, testified that the chute alleys are not used solely for the purpose of ingress and egress to the loading facilities, but are used for other purposes, yet in his opinion ingress and egress, was the primary use. He admitted that the fence running down

the center of the wide alley dividing it in two parts is broken all along with gates and that the alley is used "in some instances" like a two-way road. This is the sum total of the government testimony on the subject.

Mr. Shoemaker, the president and general manager of appellant testified (R 1170):

"I heard Mr. Christensen's testimony. He recommended the disallowance as a stockyards facility of certain alleys which he designates as chute alleys, on the grounds that they are transportation facilities used in connection with and almost exclusively for the unloading of livestock. *These chute alleys are so called because they are the alleys nearest the chutes.* There are four of them running lengthwise of the yards, one on each side of the cattle division and one on each side of the hog and sheep division. While naturally these alleys are used for the movement of livestock to and from the unloading chutes, *they are used, I would say, much more for miscellaneous operation of the stockyards.* For example, the truck-in livestock is moved to some of these chute alleys to reach sales pens. Likewise, hogs, sheep, and cattle use these alleys from the stockyards to the packing houses, both those packing houses adjacent to the yard and at some distance. These alleys are frequently used for livestock going out into the country by truck and livestock moving from one end of the yard to another, or from one part of the yard to another. These alleys are used, in addition, in the distribution of hay and bedding and cleaning pens. I would consider them more generally used than any *other alleys in the yards, though all alleys are naturally provided to get around blocks of pens, and no alleys are limited to any specific use and cannot be.* Mr. Christensen attempts to classify the alleys as a specific use, calling some general alleys, and so forth, and as a part of that classification he had this classification of chute alleys. *There is no such thing as a specific use for alleys in stockyard operation. The alleys are like*

streets in the city. They run between blocks in all directions and are used for all purposes of stockyard operation" (Italics ours)

The Secretary has wide powers, but in rate investigation he must act on evidence. *Northern Pacific Ry. Co. v. Department of Public Works*, 268 U.S. 39 at 44, 45. The grant of the power to regulate does not empower the Secretary to restrict the use or determine the proper use of property, yet that is what his order does, in effect, by denying to appellant any return upon its investment in property which the evidence establishes is in general public use.

In this portion of the brief, appellant attacks the findings of the Court and of the Secretary excluding from its rate base the value of its wholly owned spur or industry tracks, its docks, chutes and holding pens and the alley area on the ground that these findings are contrary to law, unsupported by substantial evidence and arbitrary. We are not much concerned about the trackage for the reasons heretofore stated. Yet we firmly believe that it is a stockyard facility within the definition of the act and that its exclusion is contrary to law. But when the regulatory body excludes from the rate base the value of unloading facilities without which the livestock could not be marketed or handled in commerce, excludes pens which are in general use during peak seasons⁽⁴⁰⁾, and alleys which are in constant general use—these facts being established by the undisputed evidence of record—then we insist that the action of the Secretary is arbitrary in the extreme and his findings cannot stand. If this be correct, then it follows that the trial court erred in sustaining these findings.

Note 40—That it is the duty of a utility to be prepared for and have facilities adequate to care for peak demands, see *United Railways v. West*, 280 U. S. 234 at 248.

IV.

Trader Yardage.

THE FINDINGS OF THE COURT AND OF THE SECRETARY PURSUANT TO WHICH APPELLANT IS REQUIRED TO CHARGE YARD TRADERS ON ALL LIVESTOCK RESOLD OR REWEIGHTED FOR PURPOSES OF RESALE BY THEM A RATE EQUIVALENT TO APPROXIMATELY ONE-HALF THE PRESCRIBED CHARGE ON SALES BY PRODUCERS ARE UNSUPPORTED BY THE EVIDENCE, WRONGFULLY INVADE THE PROPER FUNCTIONS OF MANAGEMENT, ARE ARBITRARY, CONFISCATORY AND DISCRIMINATORY, CONTRARY TO LAW.

The findings of the trial court on this point are contained in Findings Nos. 17-19, inclusive, and are as follows:

"17. The structure of petitioner's existing schedule of rates and charges is such that, with the exception of livestock resold through commission merchants, all yardage charges are assessed and collected from those patrons who cause the livestock to come to the stockyards. It is unjust, discriminatory and unreasonable for petitioner to maintain and set aside a large section of its valuable property for the use of yard traders or speculators and to incur numerous expenses in the rendition of stockyards services to this class of patrons without charge and then remunerate itself for the use of such facilities and for the rendition of such services by increased charges on other patrons.

"18. The traders or speculators ought to pay for services rendered to them substantially one-half of the rates and charges imposed upon those who send their livestock to market for sale. This is a reasonable charge for the services rendered and facilities furnished to yard traders or speculators.

"19. While there is considerable similarity in the services and facilities afforded to traders or speculators and those afforded to the shippers of livestock,

yet there is sufficient difference in the services rendered, inasmuch as traders or speculators performed some of their own labor, to warrant the imposition of a lower rate or charge upon the traders or speculators than is imposed upon shippers."

These findings are a brief summary of the findings of the Secretary on the same point (R 338 par. 198). Broad statements are made which if true or if supported by substantial evidence would warrant the Secretary's action and the trial court's approval thereof. The appellant has the task of convincing this Court that there is no such supporting evidence and that the policy is one which lies within the sphere of action intrusted by law to the management of the company. Since confiscation of property and invasion of constitutional rights is alleged, the Court can and will weigh and consider the evidence. *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38 at 50, 52; *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2nd) 735 at 739. The broad statements to which we refer will be hereafter discussed *seriatim*.

It is necessary for the Court to understand more fully the nature of the Denver market in order to determine the questions discussed in this portion of the brief. The Denver Union Stock Yard Company, appellant herein, was organized in 1886 to conduct a public livestock market and has been continuously conducting that market at Denver, Colorado since that time. The sole function of a market—its only reason for existence—is the prompt absorption of the commodity under healthy competitive conditions. It is axiomatic that the more buyers there are on a market bidding for the commodity, the better is the price. Hence to the producer of the commodity, the market outlet and the buyer demand is the all important factor for which he willingly pays.

In the livestock industry, particularly at the Denver market, the *producer* is the farmer, the rancher, and, in the case of sheep, frequently the feeder or fattener. The *buyers* are the packers, the order buyer, the yard trader, who at

Denver also acts as an order buyer, and the feeder. The commission man is the agent of the producer or seller. The packers are only interested in the mature meat animal and the competition for animals of this type is chiefly between the packers. Hence it is important for a healthy active market that the great national packers be represented with adjoining active plants and that local packers be located at or near the market as well. At Denver, there are six packers with successfully operating plants and other packers, large and small, are actively on the market through order buyer representation.

The bulk of the receipts and sales at Denver, however, is of the feeder type of livestock. The Denver market is on the eastern edge of the producing or range section of the country, and on the extreme western edge of the feeding or fattening country. Cattle for the most part are matured for market in the grain belt east of Denver, and could not come back to the Denver market as matured animals without an expensive back-haul at local rates. As hereinbefore stated, Denver is what is known as a transit market due to the fact that most of the livestock, including slaughter type of sheep, of necessity find final destination elsewhere and move out of Denver as live animals rather than as meat products. Hence it is that the sorting and sale-in-transit privileges which have been continually in force at the Denver market are so important. These privileges were obtained and have been zealously guarded by appellants, and it is only recently that the sale-in-transit privilege has been permitted in a restricted form at the Missouri River markets. The sorting privilege is not permitted or in force at any of the more eastern markets.

The sorting privilege at Denver is entirely due to the difference in conditions which exist at Denver as compared with markets in the corn belt and in the East. When cattle are driven in the fall of the year off of the forest ranges, the drive is generally made by several owners, all of whom have been utilizing the range for summer feed. The animals are branded, but the only purpose of the brand, so far as the market is concerned, is to insure proper pay-

ment in the event of sale, and all brands are carefully checked at Denver either by or under the supervision of brand inspectors, who are in the direct employ either of the states tributary to the Denver market or of the livestock associations within those states. When the cattle, for example, of these various owners are rounded up and driven to the railroad they filter down various gulleys and arrive frequently at rather widely separated stations on the same road. Since ownership as evidenced by the brand was only important at the market for the purpose of payment, it early became a custom to sort for type irrespective of ownership, and the railroads permitted this sorting and intermingling if the shipments arrived for the same market session from points on the carrier's line. At first this privilege was limited to points reasonably close together, but was subsequently expanded so as to permit shipments from more distant points on the same line to be sorted together. The privilege connected with this operation is not so much the right to sort but the fact that although sorted and reassembled into different carload lots, the benefit of the through rate is not lost thereby (R 949). A specific example of this sorting privilege has already been given in this brief under the discussion of Going Concern Value⁽⁴¹⁾.

Tied in intimately with this sorting privilege is the sale-in-transit privilege which permits livestock to be sold at Denver and moved to the purchaser's destination at the through rate from point of origin to such destination. Even on points as close as the Missouri River markets are to Denver, the saving in the through rate over the combination of local rates is twenty-two cents per hundred on the average (R 947) or approximately \$50.00 to \$60.00 per car. The purchaser can well afford to and does pay a higher price to the producer for livestock which can be moved out of a transit market such as Denver on through billing, or as it is called in the trade, "with the benefit of the freight" or "on memo" (R 1045). When the destination is farther east than the Missouri River the balance of the through rate is naturally more than twenty-two cents. Whatever

Note 41—See ante p. 25.

the balance is the purchaser at Denver can afford to pay up to the difference between the combination of locals and the through rate, because his delivered cost is no greater than if he were buying from someone who was not in a position to preserve the through rate or were buying livestock which cannot sell in transit, such as truck receipts. That such prices are paid was testified to by witness Pexton (R 948) and by witness Wolf (R 995). No contrary evidence is in the record, nor could it be. It is important, therefore, at the Denver market that the buying outlet include someone or some class of buyers who can sort, assemble and preserve the freight.

The Secretary's order at various places and in the schedule of rates prescribed (R 346) calls the charge assessed by appellant a "yardage" charge. This is perhaps a matter of terminology, but we believe it typifies a fundamental misconception on the part of the Secretary. Appellant does not so designate that charge in its published tariffs. Tariff number 3 of the Denver Union Stock Yard Company (Government Exhibit 2) designates this charge as a charge "*for the privilege of the market service*" (R 419). We insist it is a marketing charge.

That charge is made only when the livestock is sold. It makes no difference how long the livestock may be in the yards, the same charge is made, namely, under the existing rates, for example, 35¢ a head for fat cattle *when sold*. The only difference between the charges to shipments which remain for differing periods of time, is that since livestock is a commodity which must be fed and cared for, the shipment which is in the yards for three or four days pays three or four days feed as against the shipment which is sold the first day, which only pays one day feed. There is, however, no charge to anyone, producer or buyer, for the use of facilities as such. The marketing charge includes the use of necessary facilities to permit the livestock to be marketed. It is recognized by the Government and is the fact, that livestock can stay in the Denver yards indefinitely and if moved out unsold no marketing

charge, or yardage charge, if the Secretary prefers that term, is assessed or collected. The assessment and collection of the charge only when the livestock is sold has been the practice since the establishment of the markets, and is still the practice at Denver, St. Paul, Kansas City, St. Joseph, Oklahoma City, Sioux City, Sioux Falls, Omaha, Fort Worth, Ogden and Los Angeles. As a practical matter, cattle move out for the most part at Denver within twenty-four to forty-eight hours, and in any event within ten days. The producer desires prompt sale, both to avoid extra feeding costs as well as to avoid the risk of market fluctuations. If he does not receive a satisfactory bid for his livestock at the first or second day market session, the owner moves them to some other market, without the payment of any marketing costs at Denver, because the livestock was not in fact marketed at Denver. If livestock remains in the yard over ten days the transportation privilege is lost, hence it is moved out in any event within that time.

In the ordinary marketing of livestock appellant allocates at certain seasons of the year certain pens or pen areas in the cattle and sheep divisions to packers, commission men, order buyers and yard traders. This is not a leasing of the facilities to these members of the buying side of the market, nor does the allocation confer any rights in and to such pens to those agencies (R 416, 993). It is a matter of a business convenience of the Yard Company, just as in a Piggly Wiggly Store soups, condiments and staples are regularly assigned the same position in each store. The fact that this allocation is solely a matter of market convenience is recognized by the Government in the record, (R 416, 419), and is fully explained in the testimony offered on behalf of appellant (R 887).

We now take up *seriatim* the statements made by the trial court and by the Secretary in their respective findings.

(a) *That the Yard Company maintains and sets aside a large section of its valuable property for the use of yard traders or speculators.*

The evidence of record is to the contrary. The undisputed facts are that the allocation of pens is solely for the convenience of the Yard Company and its patrons in the ordinary conduct of its business and confers no right or title to the allottees by way of lease or otherwise (R 416, 887, 993).

The record further establishes that similar allocations for the same reason are made to all other classes of buyers, namely to the packers, to the commission men and to the order buyers (R 416). Neither the Secretary nor the trial court object to these other allocations nor indicate by the slightest word that in their opinion they constitute free service or an unwarranted delegation of the use of facilities. There was no testimony offered by the Government warranting the singling out of the yard trader since all of the buyers on the market are treated alike so far as the allocation of pens is concerned. This allocation in itself cannot be held discriminatory.

The Government recognizes (R 416) that these allocations can be changed at any time. The record establishes so far as the yard trader is concerned that the allocations are changed at least twice, once during the light season the yards traders are moved down closer to the Administration Building, and once during the Stock Show week when they are moved to the far end of the yard out of the way of stock show cattle. They may be changed at any time, as appellant desires. The commission men's allocations are changed at the same stock show period and for the same reason.

The fact of the matter is, as the evidence discloses, this "large section of its valuable property" is maintained by appellant for its own business, which is the prompt and orderly marketing of the shipper's livestock. The finding and statement are without support in the evidence.

B. Petitioner incurs numerous expenses in the rendition of stockyard services to this class of patrons without charge and then remunerates itself for the use of such facilities and for the rendition of such services by increased charges on other patrons.

This is the charge of "free service." It is a product of the Secretary's imagination—a hobby which he has ridden since the 1930 rate investigation at Denver, but which is not supported by the evidence of record.

At the outset it is proper to note that the Government called no yard trader as a witness and called no producer who testified on the point. No yard trader was made a party to this action. The appellant, however, did call a yard trader who happens to be one of the largest, if not the largest dealer on the Denver market, and his testimony appears of record at pages 988 to 1000.

In the preliminary statement in this portion of the brief, we outlined the fact that the buying demand is of primary importance to the producer, and that a market is not a satisfactory market unless it is equipped to absorb the commodity. Livestock happens to be a commodity which differs widely as to weight and flesh condition. Two animals of the same age, on the same range will mature entirely differently. If all shipments which came in were uniform as to type and kind a very different problem would be presented to a market. As stated above it is an important part of the buying demand on the market to have present those who can sort this particular commodity into uniform shipments, preserve the freight and absorb the odd lots. Manifestly the packer cannot do so since he is interested in slaughter livestock. The straight order buyer purchases particular types for which he has orders. The commission man is not equipped to perform this function. It remains for the yard trader to perform it (R 942, 947).

That the yard trader is an indispensable part of the market machinery is clearly established in the record. Government witness Christensen (R 421), testified that it is to the interest of the shipper to have buyers on the market and "it is to the interest of the shipper to have dealers (yard traders) on the market." The producer witnesses were unqualified in their statements to this effect. Witness Pace (R 691) testified that the producer

is interested in the number of buyers on the market "for the more buyers you have the better price you always get." He further testified:

"The traders are a benefit to the producer and shipper because they buy anything that comes in and which the packer wouldn't touch at all. Somebody has got to do that. If you didn't have your trader I wouldn't know where to go sometimes."

Witness Jamison, another producer, testified (R 791):

"Yes, the yard traders or dealers are certainly a part of that buying outlet on the market and are certainly beneficial to the producer. I have had the same experience as the other witness, who testified that the traders sometimes were the only market."

Witness Mitchell, another producer, testified (R 802):

"I think the development of the buyer outlet and the buyer outlet is one of the most important things; it is practically as important, if not more important, to have these order buyers or yard traders as it is to have the packer buyers from the producers' standpoint. It would be a great thing if they could get twice as many buyers on the market as they now have for the man who is producing the livestock. Yes, I heard Mr. Jamison say the more buyers the better off the producer is and you bet I subscribe to that. I like a lot of them when I come to town any time. Yes, the yard trader is very much of a valuable asset to the producer whether he buys as an order buyer or for himself and gambles on the market. In fact I wouldn't want to ship cattle to a market or any place unless I had competition like a yard trader or a speculator or an order buyer with the packers."

Witness Farr, a feeder and fatterer of both sheep and cattle, testified (R 942):

"The producer, and by that I mean of course the feeder and fatterer, is interested in the buying outlet on the market. So, too, in my opinion, is the yard

trader or dealer an important buying outlet on the market. I don't think you could get along without them at all. As I see it, the function of the yard trader on the market is as follows: A range man will ship in his cattle when he rounds them up. He has various grades, sizes and ages. It is impossible for him to grade them at the railroad or at the round-up because he would have to take these back several miles, and it is too expensive, and his practice is to load up,—to just ship them. The commission men are not interested in the mixed lot of stuff, and the average feeder is not. The yard trader can buy these mixed droves of cattle and reshape them and sell them according to grades and classes."

The position of the company, as testified to by Mr. Pexton, the assistant general manager (R 900), which testimony the president of the company stated (R 1169) expressed the considered views of the management of the Denver Union Stock Yard Company, is that the yard trader is an essential part of the demand required upon the market in furtherance of the interest of the producer and that his functions are included in and paid for by the marketing charge; that any charge against the yard trader in the normal exercise of his function would be detrimental to the interests of the producer in that it would lessen competition and weaken the market and that the management is opposed to any such charge.

That the producer knows and understands that as part of his marketing charge he is paying for the buying demand of the yard trader, is abundantly established in the record. There is no contrary testimony.

Under cross examination by Government counsel, witness Jamison, a producer, having testified that if it were not for the yard trader on the market there would be "a lot of days when the producer would fail to sell his cattle" and would be under the necessity of paying the feeding cost, was asked (R 798) whether he thought it right for the producer to pay all of the cost incident to marketing. The witness replied that he did.

This same witness on direct examination testified (R 792) that because the yard trader is a necessary part of the buying outlet on the market he should have whatever is necessary for him to complete the operation without additional charge, and that the producer is already paying, and properly paying, in the marketing charge for whatever service is given to the yard trader. He testified:

"I think that is all taken care of with the producer; he pays his yardage and I do not know why the other fellow should; you should not have to pay to buy, the man who is selling is the one who pays usually."

Witness Farr, also a producer, testified: (R 943)

"My testimony in substance is that when the original shipper ships in here and pays his yardage charges that the trader services and facilities which he receives are included in the original yardage charge."

In other words, the testimony of record is entirely contrary to the findings of the court and of the Secretary in this regard. We submit that where the cost of a service is included in the total charge for marketing the commodity, there is, and cannot be, any free service.

A further proof that there is no free service rendered the yard trader lies in the way appellant handles "plants." A plant, within the meaning of the industry, is livestock which the trader turns over to a commission man on the market to sell—"plants" the livestock with a commission man. The existing schedule of rates at the Denver market charges the yard trader the full marketing charge on all the plants because he is then appearing upon the market and using the market machinery in the same way and to the same extent as the producer. He is not then exercising his normal function of absorbing the commodity supply. He has the same right as any other producer in such case to move his cattle out if unsold by the commission man without payment of a marketing charge, but

if his livestock is sold by reason of the market machinery and the market provided by the appellant, he is required to pay the same marketing charge as any other shipper. The rate schedule of the Secretary, approved by the trial court, grants to the yard trader in such case a concession of one-half the usual marketing charge. There can be no justification for this concession and no evidence to support it in the record. As hereinafter pointed out, we insist that this *creates* a discriminatory rate schedule.

(c) *That the existing rates and practices are unjust and discriminatory.*

The practices referred to are the allocation of pens to the yard trader, coupled with the claim that the yard trader is permitted to use those pens for a long period of time.

We have already discussed the question of allocation of pens, and no further need be said.

On the second practice, there is no limitation imposed at any stockyard upon the length of time any buyer or any feeder can occupy the pens. The Government recognizes that this use by a farmer, for example, can be indefinite if he is willing to pay the feed but there is no charge whatsoever for the use of the facilities. As a matter of fact the great bulk of trader livestock moves out within twenty-four hours (R 992) which is much faster on the average than livestock purchased by farmers and feeders who generally desire some additional services such as de-horning, dipping and branding. The small amount of longer use by the yard trader is incident to his market function of absorbing odd lots, i.e. the longer use is by animals off-size, off-weight or otherwise not readily marketable, which he has taken on in connection with his cleaning-up of the market. The yard trader has been granted no additional right, however, because all patrons of the market may use the pens for an indefinite length of time. The livestock have already paid the marketing charge.

Both as to allocation of pens, and use of facilities, therefore, all buyers are treated exactly alike, and there is no discrimination between them. There is no discrimination between the shipper and any part of the buying outlet, if such were material, because the shipper in effect is allocated pens through his agent, the commission man, who may use and occupy the pens for an indefinite length of time until the livestock is sold or moved out and if moved out prior to sale no charge whatsoever is made. Hence, we submit that there is no discrimination so far as these practices are concerned.

Nor is there any discrimination under the existing rates as to any charge which is made when the producer sells his livestock on the market through the market machinery he pays the marketing charge. When the yard trader sells livestock on the market through the marketing machinery he pays the same yardage charge under the existing rate schedule, but not under the rate schedule required by the Secretary's order. We submit that the Secretary's rate schedule creates a discriminatory situation which has not heretofore existed at the Denver market and therefore is contrary to the express provisions of the Packers and Stockyards Act, 1921, which prohibits discriminatory rates, charges and practices.

Circuit Judge McDermott in the 1930 rate investigation saw this matter very clearly⁽⁴²⁾. In speaking for the majority of the court, he said:

"A cattleman ships his cattle to a commission man for sale; upon the day of their arrival, the packers are supplied and are not in the market; the demands of the feeders (those who buy to fatten) are presently supplied. The cost of feed at the yards is high; the cattleman requires an immediate market, for he wants to get home. Here is where the trader steps in. He offers a cash market; he either holds the cattle for a few days and sells in the yards or ships to another market.

Note 42—Denver Union Stock Yard Company v. United States, 57 Federal (2nd) 735 at 751, 752.

"Under the present rate structure, the petitioner treats the two classes of buyers alike, that is, no yardage charge is imposed on either, but both pay a handsome price for feed. Under the present structure, the petitioner treats all shippers alike, that is, imposes but one yardage charge, whether the shipper is able to sell to a packer or whether he must sell to a trader. . . . There is no basis for a finding of such discrimination, for the Secretary finds that the trader is one of the two classes of purchasers; and the existing rate structure treats both classes alike.

"Has the Secretary exceeded his power, or invaded the managerial field, by requiring that petitioner exact a charge from yard traders and not of other buyers? The trader operates on a small margin of profit; this charge, if exacted, must necessarily be reflected in the price he pays to the shipper. Has the Secretary the power, therefore, to require petitioner to exact a higher toll from a shipper who must sell to a trader than from a shipper who sells to a packer?

" The evidence is abundant and undisputed that the trader is a vital cog in the machinery of marketing; the record discloses no complaint from any shipper as to the present practice

"When cattle are shipped to the Denver stockyards, they are destined either for the packing house or the feeding pens. It is a matter of no importance that, in the course of that journey, the title passes through a trader. The exaction of this charge against traders would simply mean that the shipper who is fortunate enough to have his cattle arrive on a day when feeders are at the yards, would pay less for the same service than another shipper whose cattle arrived the day after the feeders have left. In any event, it seems to us to be well within the power of the petitioner to exact but one yardage charge for the service rendered the shipper, whether or not the title to his cattle passes through the hands of a trader. It should always be re-

membered that the stockholders who have risked their means in this enterprise are entitled to some voice in its management. The business has its problems; the stockholders have selected trained and experienced men to solve them; if the directors have honestly adopted a reasonable business policy that is not unfair or discriminatory, we do not feel that the statute vests the Secretary with the power to require them to adopt an experimental policy that he should like to see tried out. It occurs to us that the settled and existing policy of the petitioner is sound; but that is not for us to decide. Neither is it for the Secretary; it is a question of business management, confided by the law and the decided cases, to the owners of the property. We conclude that the Secretary erred in charging against the income of the petitioner a toll which it does not exact, and which the Secretary has no power to require it to exact."

The statement by Judge Symes in his dissent, (page 755) that "it is undisputed that they received services from petitioner, used its property and facilities offered" was as erroneous then as it is now. We deny that it is a matter of discretion for the Secretary to allocate the rates and charges of appellant between various services in the absence of proof that the existing rates are discriminatory. As stated by Judge McDermott the proposed practice of charging one-half rates to traders creates a discriminatory situation.

To enlarge upon this subject a little further, let us suppose two shippers, both with uniform car loads of the same type and class of cattle. Suppose further that the half-yardage charge against traders is in effect. One shipper is fortunate, through his agent the commission man, in finding a country feeder who buys the livestock at the first market session. The other through his agent the commission man sells to a trader. The trader knows under the Secretary's schedule, that he must pay an additional charge on his livestock and this is reflected in the net price to the producer. The cattle of one farmer will pay 30c

while those of the other farmer will pay, in effect, 45c to be absorbed and taken off the market. This was commented upon by Judge McDermott and is the testimony of the producer witnesses in this case (R 693, 793). Or suppose two shippers, one of whom sends in two uniform loads and the other sends in two mixed loads, out of which one load can be sorted equal in every way to either load of the first shipper. The first shipper's livestock find a ready market with country feeders and can move out and do-move out on the through rate. No one but a yard trader will purchase the second man's mixed shipments because, as the testimony of record demonstrates, the trader can sort and preserve the benefit of the freight as to the one uniform load at least while the other market agencies cannot and do not do so. Yet his purchase price to the producer will of necessity be lessened if an additional charge is to be assessed against him (R 693, 793). All that either producer wants is the prompt sale of his livestock. Yet one pays less for the service than the other under the Secretary's ruling.

There is no escape from the proposition that this is discriminatory. Government counsel will emphasize the fact that a yardage charge against traders is assessed and has always been assessed in Chicago. The evidence is that Chicago is not a criterion (R 803, 901). Government counsel will say that the propriety of the charge has been recognized by this court in the *St. Joseph Stockyard* case⁽⁴⁾, but we submit that that is not the fact. A reference to that decision shows that the *St. Joseph* yard had been imposing a half yardage charge on "plants," i.e. re-sales through commission men, which we would admit would itself be discriminatory. The exact question presented in the *St. Joseph* case was whether or not the estimated income properly reflected the revenues to be received from the trader yardage charge and not whether that charge was or was not proper or created a discriminatory situation. We quote from page 70 of the reported opinion in the *St. Joseph* case:

Note 43—*St. Joseph Stockyard v. United States*, 298 U. S. 33 at 70.

"The controversy is over the number of livestock to which the charges would apply. Appellant challenges the correctness of the computation The Government insists that the criticism is unjustified and points to evidence which is said to demonstrate conclusively that the Secretary's figures as to re-sales and re-weights are correct It is unnecessary to recite the evidence. We think the Government substantiates its point."

Government counsel will also point to the District Court decision in *Union Stock Yards Company of Omaha v. United States*, 9 Fed. Supp. 864. A half yardage charge was directed and upheld in that case, which, however, has been abandoned for the most part with the knowledge of the Secretary of Agriculture both at Omaha and at the St. Joseph and Sioux City markets, as demonstrated by the published tariffs, which are a public record on file in the office of the Secretary of Agriculture.

However that may be, the fact remains as demonstrated above that conditions at the Denver market are entirely different from those at the Missouri River markets and Chicago, the Denver market being a transit market. This was the basis of the Interstate Commerce Commission decision in *St. Louis Livestock Exchange v. Alton R. R. et al* 198 I.C.C. 73, known as the sale-in-transit case, wherein the privilege of sale-in-transit and sorting was permitted to remain in at Denver, Ogden and Salt Lake, while being refused at the Missouri River markets, Kansas City and Chicago. Each rate investigation must be determined upon its own facts.⁽⁴⁴⁾ For this reason property which may be used or useful at one market may be not used and useful and properly excluded from the rate base at another market. It is no criterion that because a half yardage charge may be imposed at one market it is proper and does not create discrimination if imposed at another market.

The record is devoid of any showing of any complaint by any shipper or producer concerning the existing rate

Note 44—*Tagg Bros. and Moorhead v. United States*, 280 U. S. 420.

schedule of appellant or attacking the fact that the marketing charge is only assessed against the yard trader when he utilizes the machinery of the market for a resale. Policies of business management so long as they are not clearly unlawful are intrusted by law to the directors of the corporation, and this is as true in the case of a public utility or of a business charged with a public interest as it is in the case of a private concern. The existing practice has been in effect at the Denver market for over fifty years. As stated by witness Pexton (R 900), the management "has ever been awake to ways to increase revenue and long ago would have made a charge had they felt it was in the interest of the yards and its patrons the producer", and yet throughout this entire fifty-two year period no such charge has been made. The management has gone on record in this proceeding that it opposes such a charge as being discriminatory and detrimental to the industry of which it is a part (R 901). We submit that it should require strong proof on the part of the Secretary or a clear case of violation of law to authorize him to disturb or prohibit the continuance of this established practice. As hereinbefore stated, the power to regulate is not the power to manage. In the absence of a showing of inefficiency or improvidence a court will not substitute its judgment for that of the management.

West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63 at 72.

Banton v. Belt Line Ry. Corp. 268 U. S. 413, 421.

Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276 at 288, 289.

Denver Union Stock Yard Co. v. United States 57 Fed. (2nd) 735, 748.

Brooklyn Gas Co. v. Prendergast, 16 Fed. (2nd) 615, 623.

The regulatory body should not be permitted so to do. The Congressional grant of power under the Packers and Stockyards Act, 1921, does not permit the Secretary's "judgment or discretion" to supply a lack of positive evidence in such case.

Dues, Donations and Subscriptions.

THE FINDINGS OF THE SECRETARY APPROVED BY THE TRIAL COURT, EXCLUDING FROM THE EXPENSE ACCOUNTS OF APPELLANT FOR RATE-MAKING PURPOSES, AN AVERAGE OF \$3,000.00 FROM THE "DUES, DONATIONS AND SUBSCRIPTIONS" ACCOUNT OF APPELLANT, IS ARBITRARY, CONFISCATORY AND AN UNWARRANTED INVASION OF THE FUNCTIONS OF MANAGEMENT, CONTRARY TO LAW.

The finding of the Secretary in this connection is contained in paragraph 164 of the Order (R 324). He finds that of the total contributions which "have ranged between \$3,000.00 and \$4,000.00 a year, an analysis of these items shows that slightly over \$300 annually was contributed to activities which benefit Respondent's employees or patrons."

The Court's finding is contained in Finding No. 20 and is almost a verbatim repetition of the Secretary's finding above cited.

The assignment of error upon which we rely is assignment No. 12 (R 1280).

The amount here involved is, in a certain sense trivial, yet it illustrates the arbitrary nature of the Secretary's findings and order. Also, the gross product of the rates is only \$2,046.00 in excess of the *allowed* expenses (R 351). If, therefore, these expenses were and are erroneously excluded, the rates fail by \$1,000 even under the government computation, to return the minimum fair rate testified to by any witness.

The items eliminated are shown on sheets 4, 5, 6 and 7 of Exhibit 41 (appendix pp 118 to 121). The direct testimony on this subject was given by Assistant General Manager Pexton (R 929) who analyzed the expenditures and stated that no charitable contributions were made to organizations which did not carry on their work, or a large

portion thereof, in the stockyards area among stockyard employees, that the contributions to employee activities were beneficial and that all other expenditures, with the exception of two or three hereafter mentioned, were business or advertising expenses.

The Government particularly criticized the items for Veteran Volunteer Firemen \$5.00, Policemen's Protective Association \$50, Police & Sheriffs' Association \$25 and Letter Carriers \$5.00 on the high ground that these public officers are presumed to do their duty and should not be the recipients of gratuities, no matter how small (R 585). The Secretary, with a great show of fairness, also excludes "President's Ball tickets, \$18" although we believe that project is primarily for the worthy Hot Springs Foundation to combat infantile paralysis (Gov't Ex. 41, Sheet 6). These particular items are decidedly trivial but the interference with management is irritating.

Perhaps it is the heading of this account which calls it into question. It should be entitled "Miscellaneous Business Expenses and Employee Welfare Donations".

The following brief statement of the evidence of record demonstrates that this finding of the Secretary and of the court is without support in the evidence:

As to the donations, the Government auditor admitted that the president of the company stated to him that the church donations were to churches in the stockyard community attended by employees and exerting a moral influence in the community (R 579). The auditor said he did not check up on this statement but assumed that the donations on account of the employees was "a very small proportion, however, I know nothing about it".

As to the Denver Chamber of Commerce, the Junior Chamber of Commerce (Denver branch), the United States Chamber of Commerce and the Colorado Association, memberships in these organizations were excluded because they were community enterprises. He neither knew nor took the trouble to find out that the local Chambers of Com-

merce have livestock committees interested in the entire state-wide industry (R 578) and the Colorado Association, likewise (R 585). The auditor eliminated the membership expense in the Denver Livestock Exchange (appendix p 118) which is the association of the agencies on the Denver Market handling patrons' livestock, membership in which is considered essential by the management (R 933).

The basis for exclusion by the Government auditor as stated was "Whenever I could not see that the patrons were receiving any benefit, I disallowed the amount". (R 557). The Secretary's basis is given in paragraph 164 of the order (R 324) as follows:

"... the guide has been that those contributions which are of *peculiar* benefit to respondent's employees and patrons *should* be covered into rates and the remainder of them should not be." (Italics ours).

Witness Collins, the only producer called by the Government, testified that in his opinion, the appellant, like any other business, should have the right to make donations as a business expense so long as the right was not abused (R 538) and that the regulatory power should go to the question of abuse rather than to the particular item (R 544).

The excluded items are in total, about 3/10 of 1% of the gross product of the rates (R 936), which belies any question of abuse.

All of these expenditures were analyzed in detail by the management (R 929-937) and their propriety established. We submit that memberships in the business organizations dealing directly with the livestock industry, traffic problems and business practice are legitimate. These total \$1,268.91. All such expenditures are recognized as proper items of business expense by the Bureau of Internal Revenue (Reg. 94 Art 24 (a)1).

We submit that the annual donations to welfare organizations, working for the benefit of our employees is an expenditure, even though narrowly viewed, which bene-

fits the patrons of the market. Employer-employee relations necessarily affect the interests of the patrons. The evidence that the charitable contributions are of this nature is not only direct and undisputed but the government auditor, whose audit is taken as the sole basis of analysis by the Secretary, as shown by his finding, said that he had not bothered to investigate and knew nothing about it. The positive testimony concerning the Community Chest donation is that

"its agencies spend a substantial amount of its income in and around the stockyards district. Nurses and others representing organizations of the Chest call on and are of assistance to our employes or ex-employes and generally contribute to their general welfare" (R 929).

Certainly the amount of the contribution is not excessive or extortionate, or gives any indication of abuse of discretion on the part of the management. One thousand dollars a year is about as small an amount as a \$4,000,000 or \$5,000,000 corporation could give with decency to such a cause.

It may be argued by government counsel that the same procedure was followed in the St. Joseph Stockyards case by the Secretary and the eliminations were therefore approved by this court in its decision of the appeal in that case.⁽⁴⁵⁾

The question is not noticed in the opinion of this Court and in the opinion of the court below, reported in 11 Fed. Supp. 322 at 337, it is stated that the eliminations are "supported by the evidence." That may well have been the fact in the St. Joseph Stock Yard case but the evidence above cited to this court, being all of the evidence introduced upon the subject, demonstrates that *there is no evidence of record here to support these eliminations.*

In *Mobile Gas Company v. Patterson*, 293 Fed. 208, it was held that reasonable contributions by a gas company to

Note 45—*St. Joseph Stock Yard Co. v. U. S.* 298 U. S. 33.

local charities were not improperly charged to operating expenses, the court saying (p. 226).

"It may be observed, however, that in our highly developed civilization with its numerous complexities, good citizens, including well conducted public utility corporations, voluntarily contribute small amounts to charity, hospitals and other benevolent institutions operating as a part of the life of a given community."

Dealing with this exact problem, the court in the *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735 at 753, said:

"The test applied by the Secretary is rather narrow. If the stockholders or directors of a corporation are willing that their corporation do its part in a reasonable way, in carrying the public load of the community the prosperity of which is closely interwoven with its own, it would seem to be an exercise of managerial power not subject to the veto of a public official concerned only with the protection of the public against extortion."

In the face of the complete absence of supporting evidence, we submit that the action of the Secretary is an unwarranted interference with the functions of management and that the findings of the Secretary and of the Court are arbitrary and unlawful.

VI.

THE SECRETARY AND THE COURT ERRED IN FAILING TO PROVIDE PROPER ALLOWANCES FOR AMORTIZATION OF THE EXPENSES OF HEARINGS UNDER THE PACKERS AND STOCKYARDS ACT, 1921. THE FINDINGS OF THE SECRETARY AND OF THE COURT IN THIS MATTER ARE UNSUPPORTED BY THE EVIDENCE, ARBITRARY AND CONFISCATORY.

The finding of the Secretary is contained in paragraph 163 of the order (R 324). The Secretary states therein that

the audit shows an average annual expenditure during the five year period, 1930-1934 inclusive, on account of the expense of hearings, of \$8,786.88 and that during that period there was more investigational work "than is likely to be the case when once the reasonableness of the rates charged by respondent has been finally determined . . . It is to be presumed that there will be less expense in the future on account of this item than there has been during the last five years. It is found, therefore, that \$100 a month or \$1,200 annually should be covered into rates on account of this item."

The court, in Finding No. 21 (R 1254) finds:

"\$1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act."

The assignment of error upon which we rely is assignment No. 13 reading as follows:

That the Court erred in failing and refusing to enter a Finding substantially in accord with suggested Finding entitled "Packers' and Stockyards' Administration Expense" requested by petitioner and on the contrary, finding in paragraph 21 of the Findings of Fact herein that "\$1200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act", for the reason that said Finding as entered fails to amortize over a reasonable future period or at all the costs and expenses of the present litigation, fails to recognize and take into account the fact that rate investigations are of necessity recurrent, is contrary to the evidence, unsupported by the evidence, arbitrary, contrary to law and operates to confiscate petitioner's property.

The assignment of error clearly defines the issue. It is devoutly to be hoped that litigation will be less frequent in the future than it has been in the past, but nevertheless, a rate built upon the theory of a net income left after deduction of expenses from gross income, which expenses do not make any allowance for the amortization over a reason-

able period of expenses already incurred, is necessarily arbitrary and, we believe, confiscatory.

By stipulation of the parties (R 363) it was agreed that the expenses of the pending rate hearing total \$40,439.27. We submit that a reasonable period of amortization is five years, not only because it has been so held⁽⁴⁶⁾ but because the government economist and rate expert, Dr. Dozier, testified repeatedly that all of his computations were on the basis of a rate which would continue in effect for "four or five years" (R 613, 625). Amortized on that basis the annual expense item which should have been figured in determining whether or not the rate structure would be fair and compensatory, would be approximately \$8,000. instead of \$1,200. as allowed by the Secretary. This represents a difference equivalent to \$105,000. of rate base value and is substantial.

Government counsel will cite to the court the case of *Columbus Gas & Fuel Company v. City of Columbus*, 17 Fed. (2d) 630 at 640, which case enunciates the principle that if rates are not already inadequate the law suit cannot be permitted to make them so. That case, however, is adequately distinguished in the opinion of this court in *West Ohio Gas Company v. Public Utilities Commission*, 294 U. S. 63 at 74.

As in the West Ohio case, the Secretary of Agriculture, like the Public Utilities Commission, has authority to and did substitute another rate schedule. The language of this Court is directly in point:

"Thus viewing them, we think they must be included among the costs of operation in the computation of a fair return. The company had complained to the Commission that an ordinance regulating its rates was in contravention of the statutes of the state and of the Constitution of the nation. In that complaint it prevailed. The charges of engineers and counsel, incurred in defense of its security and perhaps its very

⁴⁶ Note 46—57 Fed. (2d) 735 at 754.

life, were as appropriate and even necessary as expenses could well be . . .

If the rates are inadequate to the point of confiscation, the complainant has no need, it is said, to count upon the expense of the lawsuit; if they are not already inadequate, the lawsuit cannot make them so. *Cf. Columbus Gas & Fuel Co. v. City of Columbus*, 17 F. (2d) 630, 640. An argument to that effect runs through some of the decisions, though we are not required now either to accept or to reject it. But the case is different where a commission, after setting a schedule of rates aside, is empowered to substitute another to take effect by retroaction and cover the same years. *In determining what the substitute shall be, the commission must give heed to all legitimate expenses that will be charges upon income during the term of regulation, and in such a reckoning the expenses of the controversy engendered by the ordinance must have a place like any others.*" (Citing the *Denver Union Stock Yard* case and other cases). (Italics ours).

To the same effect see *New York and Richmond Gas Co. v. Prendergast*, 10 Fed. (2d) 167.

Monroe Gaslight Co. v. Michigan Public Utilities Commission, 11 Fed. (2d) 319 at 325.

New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351 at 357.

Mobile Gas Co. v. Patterson, 295 Fed. 208 at 224.

We do not believe that Mr. Justice Cardozo intended that such charges should be figured in the expense account (and therefore indirectly in the rate base) only if the utility were successful in its contentions that the prescribed rate was confiscatory or otherwise unlawful. It is a question of good faith and if the regulated industry believes that the regulatory body has invaded its constitutional rights, it is not only the privilege but the duty of the management, on behalf of its stockholders, to resist that invasion. This principle is clearly stated in *Mobile Gas Co. v. Patterson*, *supra*, from which we quote as follows (293 Fed. 208, 224):

"It is unquestionably a part of prudent business on the part of a utility to resist the imposition of any rate which it may have reasonable ground for believing to be confiscatory. This is true even if it is finally adjudged that the rate is not confiscatory, provided only the resistance is in good faith and is justified by reasonably prudent judgment in the ordinary conduct of business, and there can be no question of the right of the utility to incur such expense as a part of its operating expense, where, as in this case, the rate resisted is adjudged to be confiscatory. It is unnecessary to pass upon the amount of this allowance, as the conclusion of confiscation is clear without it. The question as to the period over which such an expense should be amortized is a question of judgment, and I am of the opinion that a period of five years is appropriate."

The \$1,200. annual allowance does not include any amortization but is stated by the Secretary to be only for future expenditures which he presumes will be greatly reduced. Engaged in business 2000 miles from the seat of government, it is doubtful if the allowance is sufficient for even that purpose, but we do not attack it on that ground. We do attack the findings because, having excluded this expense from the account of appellant, although actually incurred and in large part paid, appellant is not permitted to recoup the same during any future period by amortizing this expense over a reasonable period. This, we submit, is arbitrary and contrary to law.

VII.

THE COURT ERRED IN FINDING THAT \$536,825.00 IS THE VALUE OF THE USED AND USEFUL LAND OF APPELLANTS FOR THE REASON THAT SAID FINDING IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The question at issue can be briefly presented. If the government land appraiser was a qualified expert, then the findings of the Secretary and of the trial court are based upon substantial evidence and we admit that the court,

under the authorities cannot set those findings of the administrative agency aside.

The decision of this point resolves itself around the question as to what is the nature of the knowledge which renders the opinion of one man admissible in evidence as having probative value and that of another wholly inadmissible. It is not necessary to go afield and discuss the training and experience qualifications of one offering his opinion on scientific or medical problems, or problems of economics, criminology, etc. The question here presented is the qualification of one as an expert on land values.

In *Wigmore on Evidence*, Vol. 1, Sec. 718, it is stated:

Knowledge must be of value in the vicinity. Since value is the exchangeable rate accepted by the community, it is obvious that the rate may differ, in passing from one region to another, where different conditions prevail and a different judgment would be formed by the local community. . . .

The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down. . . .

The point is that local knowledge is essential to qualify one who presents himself as an expert in land values and offers his opinion in evidence. Without such specialized knowledge, the evidence is not substantial.

The Government appraiser, Mr. Zelinski, is a witness of the highest educational qualifications. He is a trained engineer. His structural appraisal on the basis of unit costs of material and labor were accepted by appellant without question. His land appraisal is not so accepted.

He testified (R 497) that until called in this case, he had never appraised any land in Denver, and that he had made no study of the value of other industrial tracts in

Denver (R 516). He testified that he "just investigated such data as had been used in the other proceedings and some supplemental information further down towards town" which he got from the Interstate Commerce Commission (R 517). This last is hearsay. (1 *Wigmore on Evidence* Sec. 719). Yet his appraisal figures were accepted *in toto* by the Secretary and approved by the trial court.

Granting the educational qualifications of the witness and his experience in eastern railroad land appraisals, the record discloses a complete unfamiliarity with the value of industrial tracts in and around Denver. He testified that he had never assembled an industrial tract (R 496). He attempted to base his appraisal in part upon comparative sales of adjoining property.

In one of those sales the Government witness had the figures as to land values and improvement values, wholly reversed. This was in the case of the Murphy barn sale (R 516). After his attention was called to this, the witness stated that if he was wrong, the sale would reflect a higher value per acre on the zones than he had given. It was admitted before the hearing was over that the figures as used by the witness were in fact reversed and consequently the Examiner in the Tentative Findings (R 88) in balancing the evidence, and upon the statement of the witness that a reversal of the figures would reflect a higher value per acre for the Zone, increased the value \$500.00 per acre in Zone 1, \$1,000.00 per acre in Zone 2, and \$754.00 per acre in Zone 9, the three zones affected by the Murphy sale. On this basis, the Examiner increased Mr. Zelinski's land appraisal \$34,000.00. The Secretary disregarded the findings of the Examiner who heard and weighed the evidence, and without any contrary finding or excuse, adopted unchanged the appraisal figures of Mr. Zelinski made before he had discovered the error in his basic information. We do not contend that the Secretary was bound by the tentative findings of his Examiner. We do contend, however, that these facts further demonstrate that the findings of the Secretary in this particular are not based on substantial evidence.

That the witnesses called by appellant to appraise its land were qualified by local knowledge and from twenty-five to thirty-eight years of appraisal experience is admitted by the Government (Order, R 272). We submit that theirs is the only substantial evidence—the only evidence based on knowledge and experience in the locality, which appears of record in the case. It may perhaps be true that these witnesses gave some weight to the potential value of the site, due to its special adaptation to stockyard use. That is not prohibited by the *Minnesota Rate Cases*.⁽⁴⁷⁾

On the basis of a long familiarity with the property and surrounding values, including four separate appraisals from 1920 to 1935 (R 776), appellant's appraisers, acting as a board of appraisal, fixed the present value of the lands at \$1,645,552.50 (R 701). The Government appraiser fixed the value at \$728,284. We agree with the Secretary (R 274) that this difference is too great to be accounted for as a difference of opinion between well qualified and competitive land experts. We insist that upon the admissions of the Government witness himself, he is not an expert qualified by knowledge and experience to appraise a complicated industrial property in Denver, Colorado.

His evidence is not substantial, therefore, and the findings based thereon are not supported by substantial evidence, as required by law.

VIII.

THE COURT ERRED IN FINDING THAT THE RATE OF RETURN OF 6½% AS FIXED BY THE SECRETARY IS A FAIR AND JUST RETURN UPON THE FAIR VALUE OF APPELLANT'S PROPERTY USED AND USEFUL IN RENDERING STOCKYARD SERVICES.

The principle upon which it must be determined whether or not a rate of return is fair and just, was stated thirty years ago by this court and there has been no change therein. In *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, at 48, it is said:

⁴⁷ Note 47—230 U.S. 352 at 451.

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them."

The question, therefore, is whether or not the Secretary gave proper effect to the evidence of record concerning the risks of appellant's business and the rate expected and usually realized in businesses of a similar nature in this locality. We believe it will be admitted that except in the cases where the regulated industry is a utility operating under a monopolistic franchise or governmental grant, and consequently protected against competition from a similar utility, no rate of return as low as $6\frac{1}{2}\%$ has been upheld by the courts up to this time as non-confiscatory. It does little good, however, to cite decisions of this or any other court made many years prior to this date because of the drastic change in economic conditions. Cases which have been decided, however, since 1929, and during the depression from which we have not yet emerged, are of authoritative force.

In *St. Joseph Stock Yards Company v. United States*, 298 U.S. 38, in which the hearing before the Secretary was held in January and February, 1933, and order entered May 4, 1934, the Secretary prescribed and found as fair and reasonable, a rate of return of 7%. The order of the Secretary was approved and upheld by this Court April 27, 1936.

In *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735, in which the hearing was held in February of 1930 and order entered July 28, 1931, the Secretary fixed as fair and reasonable, a rate of return of $7\frac{1}{2}\%$ and this was upheld by the statutory three-judge court on April 4, 1932.

In *Union Stock Yards Company of Omaha v. United States*, 9 Fed. Supp. 864, the order of the Secretary dated March 1, 1933, provided a rate of return of $7\frac{1}{2}\%$ as being fair and reasonable.

It cannot be denied that these are all businesses of a similar nature to that of appellant and the record is silent as to any conditions in those markets which are different from conditions existing in 1935 and at the present time at appellant's market.

The government called as its expert on this matter, Howard D. Dozier, who is the Economist for the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture (R 611). He presented as exhibits, tabulations on yields on government bonds, which yield he called the "basic interest rate," the yield on public utility and industrial bonds and stocks for approximately a ten-year period and a tabulation which showed, according to the witness, the yield on what he called the "net worth" of stockyards. This stockyard list, however, when examined was shown to include auction lots, concentration points and other small enterprises which never have desired nor needed public financing and which are in no wise comparable. He gave it as his opinion that these exhibits showed a decrease of 1% over 1930 in average yield and therefore he recommended a rate of return between $6\frac{1}{2}\%$ and 7% (R 651), his exact language being:

"Yes, I have stated that I thought the zone of reasonableness for the next few years would be between $6\frac{1}{2}\%$ and 7%."

The importance of the stated 1% drop in interest rates is that it is by way of reconciliation of the testimony of the witness in the instant case with his testimony in the previous rate investigation that the zone of reasonableness lay between $7\frac{1}{2}\%$ and 8%.

He admitted (R 640) that no public utility on his exhibit was comparable to The Denver Union Stock Yard Company either in size, amount of the issue or any other factor. He further stated (R 641):

"I think there is no industry on either of the lists (referring to his exhibits) which I have given you which is closely comparable to The Denver Union Stock Yard Company."

These statements are manifestly true when it is considered that his scheduled corporations were all national concerns, listed on national exchanges, and comprised such utilities as American Water Works, American Telephone & Telegraph, International Telephone and Telegraph, and such industrial concerns as United States Steel, the Standard Oil companies, American Tobacco, General Electric, etc.

Respondent's witness was an investment banker of twenty-seven years' experience and well qualified to speak authoritatively concerning stockyard securities (R 1131 et seq.). He testified that he examined the securities listed on Government Exhibit 45 offered by Dr. Doizer and that none of the companies were comparable to The Denver Union Stock Yard Company (R 1138).

In discussing the risks and hazards of the business the witness emphasized the competitive nature of the business; that the Denver market of appellant is in constant competition with the other stockyards, with auction yards and with direct buying. He emphasized the hazard of weather, disease, the seasonal and fluctuating character of the Denver market, and the hazard of the freight rate situation (R 1140).

The witness introduced Respondent's Exhibit 45 which showed that the composite return for the stockyards operating at Wichita, Omaha, St. Paul, Fort Worth, Kansas City, St. Joseph and Sioux City in 1932 was 8.2%. In 1934, the composite earnings of these yards averaged 9.923% but it was recognized that both 1933 and 1934 were abnormal years to the extent that 1933 was affected by the government hog buying program, and 1934 by the government cattle and sheep buying program occasioned by the drought. On the basis of the above testimony and his knowledge of and experience in the sale of stockyard securities, this witness gave as his opinion that the fair and reasonable rate of return in this case would be 8%.

It is manifest from the record that the testimony of the government witness does not comply with the principles enunciated by this Court in the Willcox case, supra. There was no attempt to give comparative figures on similar industries in the same trade territory. This same principle was again enunciated by this Court in *Bluefield Water Works & Improvement Co. v. Public Utilities Commission*, 262 U.S. 679 at 692. The Secretary, nevertheless, adopted the minimum rate of return to which the government witness had testified, namely, 6½%.

No allowance whatever was made for any safety factor. As stated by this Court in *United Railways v. West*, 280 U.S. 234 at 251, 252:

"It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties."

That no leeway whatsoever is provided, is demonstrated by the stipulation (R 359) introduced at the time of the trial in the court below. That stipulation takes the receipts for the years 1935-6, applies thereto the rates prescribed in the Secretary's order, deducts therefrom the expenses computed by the government auditors in accordance with government theories, and shows a return of 6.1% on the allowed rate base of \$2,792,700 in 1935, and a return of 6.74% upon the same rate base in 1936, or an average for the two years, under the Secretary's rates, of 6.42%.

If, as we contend, even on the government theories, that the income directly due to the livestock show in the amount of \$11,592,⁽⁴⁸⁾ should be deducted, if the stock show properties are to be excluded from the rate base, the rate of return under the facts admitted by the stipulation, would have been reduced to 5.68% in 1935 and 6.33% in 1936, or an average of 6% for the two-year period.

We submit that the rate of return is not only inadequate to permit maintenance of credit, but also is less than the return reasonably expected by and allowed to similar concerns. It is therefore unjust, unreasonable and confiscatory.

CONCLUSION

For the reasons hereinabove urged, we respectfully submit that the decision of the lower court should be reversed, and the enforcement of the order of the Secretary of Agriculture of February 17, 1937, should be permanently enjoined.

This is a case which is necessarily dependent for its determination upon a demonstration to this Court that the findings of the trial court and of the Secretary are not supported by the evidence of record. It has been necessary, therefore, to quote from and point to that record at some length. We ask the Court's indulgence if we have done so too extensively.

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Of Counsel.

⁴⁸ Note 48—See ante p. 49 et seq.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 798

DENVER UNION STOCK YARD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA AND SECRETARY OF
AGRICULTURE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

APPENDIX TO APPELLANT'S BRIEF.

STATUTES INVOLVED.

The pertinent provisions of the *Packers and Stockyards Act, 1921*, (U. S. C. A. tit. 7, secs. 181-229) are as follows:

§201. "*Stockyard owner*"; "*stockyard services*"; "*market agency*"; "*dealer*"; *defined*. When used in this chapter—

(a) The term "*stockyard owner*" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "*stockyard services*" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in com-

merce, of livestock; (Aug. 15, 1921, c. 64, §301, 42 Stat. 163.)

§202. *"Stockyard" defined; determination by Secretary as to particular yard.* (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet. (Aug. 15, 1921, c. 64, §302, 42 Stat. 163.)

§205. *General duty as to services.* It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title. (As amended May 5, 1926, c. 240, 44 Stat. 397.)

§206. *Rates and charges generally; discrimination.* All rates or charges made for any stockyard services

furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, §305, 42 Stat. 164.)

§208. Unreasonable or discriminatory practices generally. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful (Aug. 15, 1921, c. 64, §307, 42 Stat. 165.)

§210. Proceedings before Secretary for violations generally; action to enforce order of Secretary. (c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201 to 217 inclusive of this chapter, or concerning which any question may arise under any of the provisions of sections 201 to 217 inclusive of this chapter, or relating to the enforcement of any of the provisions of sections 201 to 217 inclusive of this chapter. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money. (Aug. 15, 1921, c. 64, §309, 42 Stat. 165.)

§211. Order of Secretary as to charges or practices; prescribing rates and practices generally. Whenever after full hearing upon a complaint made as provided in section 210 of this chapter, or after full hearing under an order for investigation and hearing made

by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed. (Aug. 15, 1921, c. 64, §310, 42 Stat. 166.)

§214. *When orders effective generally.* Except as otherwise provided in this chapter all orders of the Secretary under sections 201 to 217 inclusive of this chapter, other than orders for the payment of money, shall take effect within such reasonable time not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction. (Aug. 15, 1921, c. 64, §313, 42 Stat. 167.)

§215. Failure to obey orders generally; punishment.

(a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 211, 212, or 213 of this chapter shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. (Aug. 15, 1921, c. 64, §314, 42 Stat. 167.)

§217. Proceedings for suspension of orders. For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, §316, 42 Stat. 168.)

§226. Powers of Interstate Commerce Commission Unaffected. Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission. (Aug. 15, 1921, c. 64, §406, 42 Stat. 169.)

**TYPICAL PAGES OF GOVERNMENT EXHIBITS
ON VALUATION OF STRUCTURES**

Pages from Government Exhibit No. 29_____Page —

Pages from Government Exhibit No. 30_____Page —

CATTLE DIVISION STANDARDS

(Gov't Ex. 29, p. 159)

		MATERIAL		LABOR	
		Unit	Total	Unit	Total
		Price		Price	
Gate "A"—5 rail, low stile, 10' long					
Rails 5 @ 2x6x10'0" FBM	50				
Hinge stile 2 @ 2x6x5'3"	11				
End stile 2 @ 2x6x4'9"	10				
Inter. stile 2 @ 2x6x4'9"	9				
Brace stile 1 @ 2x6x10'6"	11				
Brace 1 @ 2x6x11'6"	11				
Blocking 2 @ 2x6x3'0"	6				
Hinge cleats 2 @ 2x6x1'6"	3				
111 Total + 10%	MBM	0.122	34.25	4.18	30.60
Bolts 1/2"x8"	ea	3	0.06	0.18	0.18
Paint numbers on gates	ea	2	0.03	0.06	0.15
Hauling and hanging	ea	1	-----	0.72	0.72
Total					4.93
Summary of "A" Gates					
Length 14'0" FBM 153 Panel 2					
" 12'0" " 138 " 2			5.48		5.96
" 10'0" " 122 " 2			4.95		5.45
" 9'0" " 115 " 2			4.42		4.93
" 8'0" " 107 " 2			4.17		4.69
" 7'0" " 100 " 2			3.92		4.45
" 6'0" " 88 " 1			3.67		4.20
" 5'0" " 78 " 1			3.25		3.81
" 4'0" " 68 " 1			2.91		3.49
" 2'6" " 50 " 1			2.57		3.16
			1.95		2.58

CATTLE DIVISION STANDARDS

(Gov't Ex. 29, p. 160)

		MATERIAL		LABOR	
		Unit	Total	Unit	Total
		Price		Price	
Gate "B"—5 rail, high stile, 10' long					
Rails 5 @ 2x6x10'0" FBM	50				
High stile 2 @ 2x6x7'0"	14				
End stile 2 @ 2x6x4'9"	10				
Inter. stile 2 @ 2x6x4'9"	9				
Braces 1 @ 2x6x12'0"	12				
Braces 2 @ 2x4x6'2"	8				
Blocking 1 @ 2x6x3'0"	3				
106 Total + 10%	MBM	0.117	34.25	4.01	30.60
Paint numbers on gate	ea	3	0.03	0.06	0.15
Hauling and hanging	ea	1	-----	0.72	0.72
Total					4.60
Gate "C"—6 rail, 10' long					
Rails 6 @ 2x6x10'0" FBM	60				
High stile 2 @ 2x6x5'6"	11				
End stile 2 @ 2x6x5'0"	10				
Inter. stile 2 @ 2x6x5'0"	10				
Brace 1 @ 2x6x10'8"	11				
2 @ 2x4x6'6"	9				
Hinge cleats 2 @ 2x6x1'6"	3				
114 Total + 10%	MBM	0.125	34.25	4.28	30.60
Bolts 3/4"x7"	ea	2	0.06	0.12	0.12
Hauling and hanging	ea	1	-----	0.72	0.72
Paint numbers on gates	ea	2	0.03	0.06	0.15
Total					4.97

(Gov't Ex. 30, p. 251)

SHEEP BARN—S-1.

			MATERIAL Unit Price	Total	LABOR Unit Price	Total
STANDARDS—First Floor						
Pen Gates—10'0" long						
5 pcs. 2x6x10'0" FBM	50					
1 pc. 2x6x11'0"	11					
2 pcs. 2x4x6'0"	8					
3 pcs. 2x6x4'0"	12					
2 pcs. 2x6x4'6"	9					
2 pcs. 2x6x2'6"	5					
Total + 10%	MBM	.105	34.25	3.60	30.60	3.21
Hardware—						
Bolts— $\frac{1}{2}$ "x8"	ea	3	0.06	0.18	0.06	0.18
Strap pintle hinges						
2 pcs. $\frac{1}{2}$ x2x37", strap						
2 pcs. $\frac{1}{2}$ x2x25" pintle						
	prs.	2	1.75	3.50	0.20	0.40
Bolts— $\frac{3}{8}$ "x6"	ea	8	0.05	0.40	0.05	0.40
$\frac{5}{8}$ "x8"	ea	2	0.06	0.12	0.06	0.12
$\frac{3}{8}$ "x10"	ea	2	0.07	0.14	0.07	0.14
6" hook bolt	ea	1	0.10	0.10	0.10	0.10
10" hook bolt	ea	1	0.15	0.15	0.10	0.10
Lock hook	ea	1	0.25	0.25	-----	-----
Padlock	ea	1	0.65	0.65	0.10	0.10
Numbers painted, two sides	ea	1	0.06	0.06	0.30	0.30
Hauling and hanging	ea	1	-----	-----	0.72	0.72
TOTAL COST OF ONE PEN GATE				9.15		5.77

(Gov't Ex. 30, p. 255)

Gate At Scale—5'0" long					
5 pcs. 2x6x5'0" FBM	25				
2 pcs. 2x6x4'0"	8				
2 pcs. 2x6x4'6"	9				
2 pcs. 2x6x5'6"	11				
2 pcs. 2x6x2'6"	5				
Total + 10%	MBM	.064	34.25	2.19	1.96
Hardware—					
Standard gate strap hinge, hook and two staples	prs.	2	2.05	4.10	0.60
Hauling and hanging	ea	1	-----	-----	0.60
Total Cost of Gate			6.29		3.16
CUTTING CHUTE					
5 pcs. 1x6x18'0" FBM	45				
1 pc. 2x6x18'0"	18				
2 pcs. 2x6x6'0"	12				
2 pcs. 2x6x3'0"	6				
Total + 10%	MBM	0.89	34.25	3.05	1.66
14'0" Gate—					
4 pcs. 1x6x14'0" FBM	28				
1 pc. 1x6x14'6"	7				
2 pcs. 1x6x7'0"	7				
4 pcs. 1x6x3'0"	6				
2 pcs. 1x6x4'0"	4				
Total + 10%	MBM	0.57	34.25	1.95	1.74
Standard strap & pintle hinges	pr.	2	1.75	3.50	0.40

STANDARDS S2

(Gov't Ex. 30, p. 307)

			MATERIAL		LABOR	
			Unit Price	Total	Unit Price	Total
Standard Double Manger						
Cost of one 39 ft. length.						
20—2"x6"x3'3"	FBM	65				
16—2"x4'2'6"		27				
3—2"x8"x39'		158				
7—2"x8"x39'		364				
2—2"x2"x39'		26				
<hr/>						
Total 638 FBM + 10%	MBM	0.702	34.25	24.04	18.65	13.09
Cost of one 14 ft. panel						
				8.62		4.70
Standard Water Trough—Double with Guard						
Average length 14'3"—42" wide x 12"						
av. height—2 openings 12" wide x						
8½" deep x 13'3" long with drain						
and plug, cast in place.						
Concrete	c.y.	1.26	5.24	6.60	3.00	3.78
Forms	s.f.	90	0.02	1.80	0.08	7.20
Reinforcing steel	lbs.	51	0.03	1.53	0.02	1.02
2" nipple and plug	lot	1	0.35	0.35	0.10	0.10
Guard						
Lumber 2—2"x6"x14'3"	29 FBM					
4—2"x6"x1'9"	7					
Total add 10% 36 FBM	MBM	0.040	34.25	1.37	30.60	1.22
<hr/>						
Total				11.65		13.23

HOG SCALES—SH 3-9

(Gov't Ex. 30, p. 461)

		MATERIAL		LABOR		
		Unit Price	Total	Unit Price	Total	
Scale Enclosure—						
#8 wire, 1½"x1½" mesh, framed 1" channels, 2'6"x1'0"—3'0"x7'4"—2'3"x1'4"—11'4"x0'6"—4'0"x3'6"—4'0"x4'8"—3'10" 10'8"	s.f.*	107	0.45	48	0.05	5
Door, same, 2'2"x6'2", 4" strap hinges, hinge hasp	ea*	1	7.00	7	2.00	2
Door, same, 2'6"x6'4"	ea*	1	7.00	7	2.00	2
Shelves	ea	2	1.00	2	-----	-----
Pigeon holes	ea	1	1.00	1	-----	-----
Drawer cabinet	ea	1	2.50	3	-----	-----
6" moulding	ft.*	9	0.12	1	0.10	1
8" moulding	ft.*	10	0.15	2	0.10	1
Painting	sqs.*	5	1.00	5	2.00	10
12" brass gong and cord	ea	1	12.00	12	1.00	1
1" lbr. bench 8' long	ea	1	3.00	3	-----	-----
4 drawers	lot	1	4.00	4	-----	-----
Scale Pit and Platform—						
Excavation—Pit SH3-9	c.y.*	253	-----	-----	0.64	162
Paving, 6" concrete	s.y.*	108	0.84	91	0.26	28
Concrete in Walls & Pedestals						
Concrete	c.y.*	46.8	5.24	487	1.35	123
Forms—Wall	s.f.*	2927	0.05	146	0.10	293

Before The

**SECRETARY OF AGRICULTURE
ACTUAL CASH EXPENDITURES FOR
DEVELOPMENT COST OF THE DENVER MARKET**

Item No.	Date	Grantee	Zone No.	Property Granted	Actual Cost To Yard Company	Column I First Cost	Value Per Acre Adding Carrying Costs	Column II Total Value Including Cost of Carrying to Date Given
1	Jan. 24, 1891	Colo. Pkg. Co.	1	11.158 Acres	\$ 4,375.00	\$ 48,816.25	\$ 5,028.33	\$ 56,106.11
2	Jan. 24, 1891	Colo. Pkg. Co.		Machinery & Equipment	25,000.00	25,000.00	.....	25,000.00
3	Feb. 16, 1898	Decker & Degan		123 Shares	100.00	12,300.00	.....	12,300.00
4	Apr. 9, 1902	Western Pkg. Co.	1	7.262 Acres	4,375.00	31,771.25	7,962.50	57,823.68
5	Apr. 9, 1902	Western Pkg. Co.		Cash	100,000.00	100,000.00	.....	100,000.00
6	Feb. 10, 1903	Chas. Burkhardt	4	1.536 Acres	4,375.00	6,720.00	8,181.25	12,536.40
7	Feb. 10, 1903	Chas. Burkhardt		Cash	4,000.00	4,000.00	.....	4,000.00
8	May 19, 1905	C. B. & Q. R. R.	2	.50 Acres	4,375.00	2,187.50	8,771.87	4,385.94
9	Oct. 17, 1905	Western Pkg. Co.	1	.46 Acres	4,375.00	2,012.50	8,881.25	4,085.38
10	June 26, 1913	Coffin Pkg. Co.	4	1.78 Acres	4,375.00	7,787.50	10,915.62	19,429.80
11	Nov. 23, 1916	Western Pkg. Co.	1	1.431 Acres	4,375.00	6,260.63	11,812.50	16,903.70
12	Dec. 15, 1917	Coffin Pkg. Co.	4	.308 Acres	4,375.00	.....	12,075.00	2,419.10
13	Feb. 19, 1918	Union Pacific	1	.362 Acres	4,375.00	1,583.75	12,118.75	4,886.99
14	Dec. 18, 1919	C. B. & Q. R. R.	2	2.05 Acres	3,000.00	6,150.00	3,000.00	6,150.00
TOTAL						\$254,589.38		\$325,547.10

Before the

SECRETARY OF AGRICULTURE
RECEIPTS AND SALES OF LIVESTOCK AT THE DENVER MARKET
FOR THE YEARS
1913 to 1934 INCLUSIVE.

YEAR	CATTLE			CALVES		
	RECEIPTS	SALES	%	RECEIPTS	SALES	%
1913	448,758	229,061	51	50,450	28,938	57
1914	406,903	225,965	56	35,835	17,817	50
1915	395,922	235,779	59	28,419	16,553	58
1916	552,121	348,766	63	49,339	35,509	72
1917	616,017	399,159	64	37,360	32,593	87
1918	675,702	484,357	72	52,566	42,625	81
1919	766,098	513,315	67	57,629	48,591	84
1920	570,360	363,186	63	46,205	37,252	80
1921	436,490	328,783	75	45,012	41,890	93
1922	586,730	431,436	74	69,515	57,719	83
1923	561,261	455,232	81	58,621	52,648	90
1924	571,703	468,747	82	58,650	59,627	102
1925	526,625	431,766	82	60,222	56,989	95
1926	472,654	396,519	83	56,397	53,209	94
1927	577,004	481,964	83	63,163	53,442	85
1928	590,382	454,008	77	76,819	59,656	78
1929	555,588	461,796	83	68,479	61,567	90
1930	505,169	433,275	86	87,726	72,989	83
1931	439,562	381,915	87	64,354	58,224	90
1932	365,318	329,090	90	59,316	46,802	79
1933	347,619	321,642	93	70,601	53,379	76
1934	633,074	488,012	77	132,343	113,139	85

YEAR	HOGS			SHEEP		
	RECEIPTS	SALES	%	RECEIPTS	SALES	%
1913	246,598	245,438	99	620,431	240,483	39
1914	255,636	257,176	101	692,247	288,655	42
1915	343,653	339,439	99	765,170	445,532	58
1916	466,653	464,057	99	1,409,009	898,531	64
1917	351,903	352,940	100	2,059,898	1,366,269	66
1918	383,543	384,290	100	1,651,759	1,114,554	66
1919	367,634	370,025	100	2,087,152	1,406,382	67
1920	341,240	339,192	99	2,078,688	1,467,491	70
1921	334,094	327,177	98	1,467,911	1,029,046	70
1922	395,219	390,176	99	1,866,784	986,820	53
1923	495,292	471,060	95	1,856,578	947,085	51
1924	569,038	540,110	95	2,039,660	1,135,882	55
1925	467,407	445,147	95	2,357,010	1,423,140	60
1926	497,047	450,489	90	1,825,922	1,211,843	66
1927	456,917	407,484	89	1,908,316	1,120,758	60
1928	567,227	522,861	92	2,295,034	1,557,022	68
1929	538,524	488,741	91	2,290,395	1,512,504	66
1930	512,322	434,203	89	2,061,877	1,560,929	76
1931	597,156	464,723	77	2,498,888	1,850,297	74
1932	651,890	487,237	75	2,833,821	2,196,542	78
1933	771,064	542,365	70	2,902,316	2,060,678	71
1934	709,066	451,228	64	3,108,655	2,376,234	76

**EXTRACT FROM
GOVERNMENT EXHIBIT 41**

**Supplement to Audit for Rate-Making Purposes
Pages 1 to 7 inclusive**

Profit and Loss Statement
Showing Adjusted Net Income
For Rate Making Purposes.

	Five Year Total	1934	1933	1932	1931	1930
Gross Income per Audit	4,496,099.98	1,031,507.96	769,188.88	796,456.11	920,518.35	978,428.68
Less—Eliminations	337,599.35	223,624.76	35,550.65	24,825.82	27,416.64	26,181.48
Adjusted Total Income	4,158,500.63	807,883.20	733,638.23	771,630.29	893,101.71	952,247.20
Gross Expenses Per Audit	3,461,951.70	742,912.49	590,325.41	629,408.22	727,411.29	770,394.29
Less—Eliminations	845,525.23	233,228.48	158,280.28	147,626.26	156,346.59	150,043.62
Adjusted Total Expenses	2,616,426.47	510,684.01	432,045.13	481,781.96	571,064.70	620,350.67
Net Income (Before Federal tax)	1,542,074.16	297,199.10	301,593.10	289,848.33	322,037.01	331,396.53
Deduct Federal Taxes	200,800.11	40,864.89	41,469.05	39,854.15	38,644.44	39,767.58
Net Income	1,341,474.05	256,334.30	260,124.05	249,994.18	283,392.57	291,628.95
One Year Average	268,294.81					

INCOME ELIMINATIONS

	Five Year					1930
	Total	1934	1933	1932	1931	1930
Yardage on Dronth Receipts	85,198.30	73,919.54	11,278.76	.....	.....	.....
Hay Sales " " "	104,527.10	101,918.00	2,609.10	.....	.....	.....
Corn " " "	1,541.10	.....	1,541.10	.....	.....	.....
Loading & Unloading s/c Drouth	13,078.00	12,849.00	229.00	.....	.....	.....
Weighing	4,141.00	4,141.00	.....	.....	.....	.....
Income from RR Tracks	55,506.67	11,363.17	11,042.93	11,001.32	10,712.61	11,386.64
Feed Lot Rental	3,603.00	620.00	706.00	759.00	759.00	759.00
Livestock Show—Stadium Rent	5,475.00	5,475.00	.....	.....	2,500.00	1,929.75
Miscellaneous Stadium Rents	4,429.75	.....	5,362.65	8,984.13	7,641.92	6,478.14
Interest	34,775.51	6,308.67	573.75	812.50	1,879.88	1,775.00
Dividends Received	5,886.13	845.00	2,088.96	3,125.12	3,759.78	3,852.95
H & M Div'n. & Stock Show Property	16,073.71	3,246.90	.....	.....	.....	.....
Miscellaneous—Facilities at Show for Feeding	486.35	60.75	118.40	143.75	163.45	.....
Branding & Dehorning (Gov't Cattle)	2,450.16	2,450.16	.....	.....	.....	.....
Misc. Yard Revenue (Gov't Cattle)	652.57	652.57	.....	.....	.....	.....
Less—Adjustment						
Misc. Income from Gen'l S. Y. Corp'n in 1934—included in surplus item of \$456.00—page 8—should be in current Income Account	225.00	225.00	.....	.....	.....	.....
Total	337,599.35	223,624.76	35,550.65	24,825.82	27,416.64	26,181.48

EXPENSE ELIMINATIONS

	Five Year					1930
	Total	1934	1933	1932	1931	1930
Cost of Hay (Gov't cattle & Hogs)	54,803.85	55,519.37	1,284.48			
Cost of Corn " "	787.67		787.67			
Labor—Loading & Unloading (Gov't)	2,467.65	2,467.65				
" Branding & Dehorning "	2,666.52	2,666.52				
" Feeding "	2,546.14	2,546.14				
" Watering "	1,730.42	1,730.42				
" Cleaning "	3,454.75	3,454.75				
" Weighing "	982.16	982.16				
" Tying Bulls "	19.95	19.95				
Water	1,712.66	1,712.66				
Material and Supplies	1,156.38	963.60	187.78			
Light & Heat	232.58	232.58				
Casualty Insurance	509.55	509.55				
Company Barn	651.78	651.78				
Repairs	877.65	435.10	442.55			
Insurance, Fire, etc.—Stadium	2,056.93	333.36	333.50	421.20	421.20	442.62
" Cattle Wash House	23.42	6.98	6.32	5.04	5.04	5.04
" S. S. Hog Barn	439.31	77.47	82.60	105.48	105.48	68.28
" Auction Barn	100.93	2.18	21.10	26.38	26.38	23.89
" Boiler House—S. S. Property	94.03	14.13	16.60	20.48	20.48	22.34
" Club House	221.25	44.25	44.25	44.25	44.25	44.25

Federal Tax on Bonds	2,318.72	590.00	593.48	595.18	546.37	503.19
Real Estate and Property Taxes	39,388.44	6,912.59	7,102.45	7,796.02	8,468.48	9,107.39
Depreciation Per Books	270,212.57	54,323.60	54,031.99	59,331.31	54,247.37	59,178.30
Interest on Bonds	348,242.37	66,242.37	69,375.00	70,125.00	70,875.00	71,625.00
Interest—Miscellaneous	698.98			19.37	679.61	
Bond Discount & Expense	16,572.39	3,190.56	3,252.48	3,314.52	3,376.47	3,438.36
Repairs—RR Tracks	177.92	37.50	73.10	11.86	44.68	10.78
Federal Income Tax per Books	148,337.91	42,982.48	27,182.48	25,012.58	25,472.48	27,686.39
H & M Div. and S. S Property	31,673.66	6,308.24	4,332.49	3,949.81	8,075.03	8,988.09
Dues, Donations & Subscriptions	14,336.49	3,600.59	2,900.28	2,786.11	2,604.56	2,944.95
Cleaning Expense a/c Stock Show	201.93					201.93
Fiscal Agents, Registrar & Trustees	4,046.46	1,168.85	710.16	722.36	726.51	718.58
Rate Hearings—I. C. C.	19,884.96	1,044.39	14,543.02	4,076.55	1.35	19.65
Rates & Charges—P & S	43,934.38	6,069.21	6,100.00	9,809.75	15,773.24	6,182.08
Sub-Total	1,021,367.71	258,396.98	193,448.78	182,794.78	191,515.08	186,212.11
Less—Adjustments						
Depreciation Expense	166,000.00	33,200.00	33,200.00	33,200.00	33,200.00	33,200.00
Rate Hearing—I. C. C.	9,842.48	1,968.50	1,968.50	1,968.50	1,968.49	1,968.49
Total Adjustments	175,842.48	35,168.50	35,168.50	35,168.50	35,168.49	35,168.49
NET TOTAL	845,525.23	223,228.48	158,280.28	147,626.28	156,346.59	150,043.62

THE DENVER UNION STOCK YARD COMPANY

Dues, Donations and Subscriptions Expense

	1934			1933			1932			1931			1930		
	Total	Al-	lowed	Total	Al-	lowed	Total	Al-	lowed	Total	Al-	lowed	Total	Al-	lowed
Denver Community Chest.....	1,000.00	.....	.....	1,250.00	.....	.....	783.00	.....	.....	1,100.00	.....	.....	1,000.00	.....	.....
Denver Chamber of Commerce.....	240.00	.....	.....	240.00	.....	.....	450.00	.....	.....	450.00	.....	.....	450.00	.....	.....
U. S. Chamber of Commerce.....	50.00	.....	.....	25.00	.....	.....	75.00	.....	.....	25.00	.....	.....	25.00	.....	.....
Junior Chamber of Commerce.....	15.00	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Tickets and Boxes—Stock Show.....	395.50	.....	.....	120.25	.....	.....	640.75	.....	.....	349.75	.....	.....	396.00	.....	.....
American Stockyards Association.....	832.56	.....	.....	763.28	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Church Donations.....	115.00	.....	.....	64.00	.....	.....	79.00	.....	.....	89.00	.....	.....	81.39	.....	.....
Flowers.....	4.00	4.00	.....	46.50	46.50	.....	29.00	29.00	29.00	17.55	17.55	.....	.....	.....	.....
United Appeal.....	75.00	.....	.....	25.00	.....	.....	50.00	.....	.....	.....	.....	.....	.....	.....	.....
Volunteers of America.....	10.00	.....	.....	20.00	.....	.....	25.00	.....	.....	5.00	.....	.....	10.00	.....	.....
Veteran Volunteer Firemen.....	5.00	.....	.....	5.00	.....	.....	.....	.....	.....	3.00	.....	.....	2.75	.....	.....
Firemen's Protective Association.....	15.00	.....	.....	10.00	.....	.....	10.00	.....	.....	10.00	.....	.....	.....	.....	.....
Denver Traffic Club.....	18.00	.....	.....	18.00	.....	.....	18.00	.....	.....	18.00	.....	.....	20.00	.....	.....
Denver Commercial Traffic Club.....	18.00	.....	.....	13.50	.....	.....	13.50	.....	.....	18.00	.....	.....	18.00	.....	.....
I. C. C. Traffic Reports.....	25.25	25.25	.....	10.50	10.50	.....	17.00	17.00	17.00	18.00	18.00	.....	15.75	15.75	.....
Traffic Service Corp.....	10.00	10.00	.....	10.00	10.00	.....	10.00	10.00	10.00	10.00	10.00	.....	20.00	20.00	.....
Brand Inspectors—Christmas.....	70.00	.....	.....	35.00	.....	.....	40.00	.....	.....	65.00	.....	.....	65.00	.....	.....
Denver Live Stock Exchange.....	95.53	.....	.....	106.75	.....	.....	116.85	.....	.....	156.10	.....	.....	152.00	.....	.....
Denver Post.....	12.00	12.00	.....	12.00	12.00	.....	12.00	12.00	12.00	12.00	12.00	.....	12.00	12.00	.....
Rocky Mountain News.....	.....	.....	.....	12.00	12.00	.....	12.00	12.00	12.00	24.00	24.00	.....	.....	.....	.....
Tax Payers Review.....	5.00	5.00	.....	5.00	5.00	.....	3.00	3.00	3.00	.....	.....	.....	.....	.....	.....
Policemen's Protective Association.....	50.00	.....	.....	50.00	.....	.....	50.00	.....	.....	50.00	.....	.....	.....	.....	.....
Y. M. C. A. Association.....	.....	.....	.....	.....	.....	.....	25.00	.....	.....	50.00	.....	.....	.....	.....	.....
Christmas Party—Exchange.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Building.....	.....	.....	.....	.....	.....	.....	24.71	.....	.....	38.21	.....	.....	27.45	.....	.....
Lunches at Auction.....	55.00	55.00	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
4-H Club Luncheon, etc.....	34.00	34.00	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Traffic Red Book.....	8.00	8.00	.....	.....	.....	.....	.....	.....	.....	10.00	10.00	.....	.....	.....	.....

Stockyards Bowling Team.....	10.00	5.00	30.20	9.25	10.00	.....
Greeley Bowling Tournament.....	7.50	.....	.....	9.25	.....	.....
Cigars & Candy, Meals, etc.....	11.50	30.20	.....	.....	.....	.....
Old Folks Home.....	5.00	5.00	.....	.....	.....	.....
City Directory.....	19.00	15.00	15.00	19.00	.....	.....
Christmas Seals.....	1.00	.....	.....	.....	.....	.....
American Red Cross.....	.....	.....	.....	50.00	.....	.....
National Jewish Hospital.....	.....	50.00	.....	50.00	.....	.....
Little Sisters of the Poor.....	.....	5.00	.....	10.00	.....	.....
Rescue Mission.....	7.00	.....	.....	15.00	.....	.....
Lamb Feeders Association.....	20.00	20.00	.....	.....	200.00	200.00
Banquet—Judging Team.....	.....	25.00	25.00	146.50	90.12	90.12
Dinner—Market Agencies.....	.....	88.30	.....	.....	.....	.....
Music—Stock Show a/c.....	.....	.....	.....	.....	.....	.....
Boys and Girls.....	.....	175.00	175.00	.....	.....	.....
Veterans of Foreign Wars.....	5.00	5.00	.....	.....	.....	.....
Chicago Drivers Journal Yearbook.....	1.00	1.00	.50	.....	1.00	1.00
Rev. Bridwell.....	15.00	.....	.....	.....	20.00	.....
Church Messenger.....	11.00	.....	.....	.....	.....	.....
Joint Labor Day Committee.....	10.00	.....	.....	.....	.....	.....
Denver Tourists Bureau.....	100.00	.....	.....	.....	.....	.....
Wedding Gift.....	250.00	.....	.....	.....	.....	.....
Gents Driving & Riding Club.....	10.00	.....	.....	.....	.....	.....
Colorado Womens College.....	100.00	.....	.....	.....	.....	.....
International Vet. Congress.....	25.00	.....	.....	.....	.....	.....
Police & Sheriffs Association.....	25.00	.....	.....	.....	.....	.....
Federal Income Tax Service.....	66.00	66.00	.....	.....	.....	.....
Western Legionnaire.....	5.00	.....	.....	.....	.....	.....
Letter Carriers—Donations.....	5.00	.....	.....	.....	.....	.....
National Federation of.....	.....	.....	.....	.....	.....	.....
Federal Employees.....	11.00	.....	.....	.....	.....	.....

Dues, Donations and Subscriptions Expense—Continued—

	1934		1933		1932		1931		1930	
	Total	Al- lowed	Total	Al- lowed	Total	Al- lowed	Total	Al- lowed	Total	Al- lowed
American Legion	5.00									
Program—Holy Name Basket Ball	5.00									
Office Employees—Hay Ride, etc.	3.00	3.00								
Gaidman Community Center	2.50									
President's Ball—Tickets	18.00									
Lakeside Unemployed			1.00							
Colo. State Board Immigration										
(World's Fair Adv. Tokens)			24.00							
Water Survey			100.00	100.00						
Beth David Sisterhood			2.00							
Newspapers .....			.90	.90						
Denver Democrat—Paper			2.00							
Colo. Travel Industry—Committee			50.00							
City Charter—Labor Rate Amend.			25.00							
List—Open and Prepay Stations					2.00	2.00				
Jewish Home—Hospitals					4.00					
Tickets—National Guard					2.50					
Tickets—Firemen's Ball, etc.					5.00		2.50			
J. H. Meal & Sons—McWilliams- Flowers					5.00	5.00			23.75	
Mrs. Phelix Royenski—Tickets					5.00					
Denver Press Club					25.00					
Citizens Employment Comm.					150.00					
Breeders Gazette					1.00	1.00				
Livestock Producers & Feeders Assn.					11.20	11.20				
Copy—Sixty Years Cheyenne .....					.50					
Tax Payers, Inc.					25.00					
Directors' Dinner					20.50	20.50				
Bro. Serv. Prog. (Valley of Colo. Orient)					5.00					

[illegible]

RESPONDENTS EX. 13
DOCKET 450.

Before the
SECRETARY OF AGRICULTURE
THE DENVER UNION STOCK YARD COMPANY
COMPARISON OF DECEMBER, JANUARY AND FEBRUARY
EARNINGS OF

The Denver Union Stock Yard Company for the Years 1930 to 1935, inclusive.
(December Earnings are for December, just previous to year shown.)

	1930	1931	1932	1933	1934	1935
December	\$10,000.85	\$17,862.26	\$ 7,345.57	\$4,144.84	\$15,898.36	\$1,541.87
February	10,018.09	5,731.31	8,062.46	3,076.25	4,167.67	1,199.08
Total	\$20,018.94	\$23,593.57	\$15,408.03	\$1,068.59	\$20,066.03	\$ 342.79
Average	\$10,009.47	\$11,796.78	\$ 7,704.01	\$ 534.29	\$10,033.01	\$ 171.39
January	\$28,573.00	\$32,780.46	\$13,917.45	\$6,564.26	\$18,378.57	\$8,176.69
Increase January over average	\$18,563.53	\$20,983.68	\$ 6,213.44	\$7,098.55	\$ 3,345.56	\$8,348.08
Total Excess January over December & February Average	\$69,552.84					
Average per year	\$11,592.14				7.00	
Yardage on Pure Bred Bulls January	\$ 1,403.00	\$ 1,639.00	\$ 1,190.00	\$ 833.00	\$ 835.00	\$1,051.00
February	41.00		69.00			
Total	\$ 1,444.00	\$ 1,639.00	\$ 1,259.00	\$ 833.00	\$ 842.00	\$1,051.00

BEFORE THE
SECRETARY OF AGRICULTURE
DOCKET 450

Respondent's Ex. J

EXHIBIT BRINGING UP TO DATE RESPONDENT'S
EX. 13, SHOWING EXCESS OF RESPONDENT'S JAN-
UARY EARNINGS OVER THE AVERAGE OF DE-
CEMBER AND FEBRUARY, CAUSED BY THE STOCK
SHOW HELD DURING JANUARY OF EACH YEAR.

Note: Ex. 13 shows the six years 1930 to 1935 inclusive.

December 1935 earnings	\$ 8,746.48
February 1936 earnings	6,229.2

Average	7,487.84
January 1936 earnings	24,559.52

Excess of January over average	\$17,071.68
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Supplementing Respondent's Ex. 14, The National West-
ern Stock Show paid rent for the stadium property of
\$7,000.00 for the 1935 show and \$7,000.00 for the 1936 show.

Plaintiff's Ex. 1.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLO.

THE DENVER UNION STOCK YARD CO.

Plaintiff.

VS.
UNITED STATES OF AMERICA, AND THE SECRETARY OF
AGRICULTURE,

Defendants.

IN EQUITY
NO. 10913

EXHIBIT SHOWING HIGHER INCOME OF PLAINTIFF DURING
JANUARY 1937 COMPARED TO AN AVERAGE OF DECEMBER 1936
and FEBRUARY, 1937, CAUSED BY THE STOCK SHOW HELD IN
JANUARY 1937, AND BRINGING UP TO DATE RESPONDENT'S
(PLAINTIFF'S) EX. NO. 13 and NO. J.

Net adjusted earnings for December 1936.....	\$ 6,935.57
Net adjusted earnings for February 1937.....	8,642.93
Total	\$ 15,578.50
Average per month	7,789.25
Net adjusted earnings for January 1937.....	\$ 22,030.97
Excess of January over December—February average.....	\$ 14,241.72

Total excess on above basis for January over previous December and following February for six years 1930 to 1935 inclusive as shown by Respondent's Ex. 13.....	\$ 69,552.84
Total excess for January 1936 over December 1935 and February 1936 as shown by Respondent's Ex. J.....	17,071.63
Total excess for January 1937 as shown above.....	14,241.72
Total for eight years 1930 to 1937 incl.....	\$100,866.24
Average per year for eight years.....	12,608.28

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LEGEND ---- GREEN INDICATES PROPERTY ALLOWED AS USED AND USEFUL.
RED " " ONE HALF ALLOWED AS USED AND USEFUL.
YELLOW " " NOT ALLOWED AS USED AND USEFUL.
I " SEWER OUTLETS TO RIVER

USEFUL.
USED AND USEFUL.
AND USEFUL.

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CHARLES ELMORE CROPLEY
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1937

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND
SECRETARY OF AGRICULTURE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLORADO.

REPLY BRIEF OF APPELLANT

ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
WINSTON S. HOWARD,

Counsel for Appellant.

PERSHING, NYE, BOSWORTH & DICK,
Of Counsel.

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<p>These properties are clearly used and useful in the rendition of stockyard services as appears from the testimony of government witnesses. It should therefore be included in the rate base under the command of Congress to the Secretary of Agriculture as contained in the Packers and Stockyards Act, 1921. The fact that they are transportation facilities does not place them under the jurisdiction of the Interstate Commerce Commission or prevent their being stockyard facilities. Cases cited by defendants distinguished. ✓</p>	
B. Stock Show Properties:	16
<p>The position of the Government that livestock sent to the yards for sale during show week does not reach the show properties, is contrary to fact as is also the statement that no livestock is sold at the show. The bulk of appellant's property is devoted to stock show purposes during the week of the show. There is nothing in the Packers and Stockyards Act, 1921, which places pure bred livestock, or the sale thereof, outside the proper activities of a stockyard. It is admitted that the facilities are not excessive. The record clearly establishes that income is derived directly from and on account of the stock show, which income admittedly has not been eliminated from the income account although the property has been excluded. The matter falls squarely within the management sphere.</p>	
II. Denial of Going Concern Value:	30

The Government points to no excess allowance which can be called the equivalent of going concern value which it admits exists in appellant's plant and business. The overheads mentioned are all overheads

which add to the cost of the plant and in that sense are construction overheads. They have nothing to do with the attached business or going concern value.

The proof of expenditures actually incurred in attaching business is not the equivalent of the capitalization of past losses or deficits. Cases cited by defendants distinguished.

III. Charge to Yard Traders:41

The yard trader receives no free service. The allocation of pens is not at his request or for any other reason than appellant's desire and duty to operate the yards most efficiently for the public benefit. It is admitted that the trader is an essential part of the market machinery and his buying and selling operations together form his function on the market, desired and insisted upon by the producer and included knowingly in the marketing charge which he pays when his livestock is sold. There is no basis, in the record or otherwise, for the attempted segregation of the selling side from the buying side of the yard trader's function.

The present schedule of appellant results in no discrimination since the yard trader pays the full marketing charge whenever he uses the machinery of the market in his reselling operations. Although the Secretary insists there is no change in this his proposed schedule is to the contrary.

IV. Land Valuation:53

Defendants do not meet the argument that the Government land witness was totally unfamiliar with local conditions and for that reason his testimony cannot be deemed substantial. The rule in The Minnesota Rate Cases interpreted and applied to testimony of appellant's witnesses.

V. Disallowance of Dues, Donations and Subscriptions62

Expense, also expense of Rate Investigation:

The Packers and Stockyards Act, 1921, does not give the Secretary the power to disallow business expenditures made in good faith by the management of the company in furtherance of its business, in the

III

Page

absence of proof that such amounts so expended are excessive or extortionate. The exclusion of membership dues in Chambers of Commerce, Traffic Clubs and other similar business organizations having to do with the livestock industry, is arbitrary. Charitable contributions to organizations operating in the stockyard area are likewise proper.

It is established that it is prudent for a utility to contest rates which it believes confiscatory and therefore proper that they be included and considered in the rate set-up. The Government testimony establishes that five years is a reasonable period for amortization.

The total amount of expenditures thus disallowed is equivalent to a denial of rate base value of \$137,000.00 and is therefore material.

VI. Rate of Return:67

The appellant is not receiving even the $6\frac{1}{2}\%$ average return which is the minimum rate testified to by any witness. The Government witness testified that a rate of less than $6\frac{1}{2}\%$ would be outside the zone of reasonableness.

The application of the Secretary's rates to the business of the years 1935 and 1936 shows an average return of between 5.33% and 6.42% depending on whether excluded values are restored to the rate base. In any event, the return is less than the minimum amount found reasonable by the Secretary.

CONCLUSION:73

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IN THE
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REPLY BRIEF OF APPELLANT

ARGUMENT.

Counsel for defendants have discussed the questions presented in this case in slightly different order from that in which they are presented in appellant's brief. Accordingly, the following table may be of assistance to the Court:

<i>Defendants' Brief</i>			<i>Appellant's Brief</i>		
Sec.	Page	SUBJECT	Sec.	Page	
I A	18	Exclusion of Trackage and Loading and Unloading Facilities	III	55	
I B	34	Exclusion of Stock Show Property	II	31	
II	57	Going Concern Value	I	12	
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V-A	109	Exclusion of Dues, Donations and Subscription Expense	V	85	
V-B	112	Exclusion of Expenses of Pending Rate Hearing	VI	89	
VI	115	Rate of Return	VIII	96	

In this reply brief we will discuss the matters in the order adopted by counsel for defendants.

Before doing so, however, we note the statement of Government counsel that the brief of appellant does not discuss the scope of the review in this case. We did not believe it necessary. This is a case charging that the rate order is confiscatory and deprives appellant of its property without due process of law contrary to the Fifth Amendment to the Constitution. It is a settled rule, therefore, that the Court must and will reach its independent judgment on both the law and the facts, to determine whether or not constitutional rights have been infringed.

The latest expression of this rule, and the extent to which the Court will go, is contained in *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38, 50-54. It is there pointed out that the fixing of rates is a legislative act and that in determining the scope of judicial review of that act, there is a distinction

between acts within the sphere of legislative authority and acts which transcend the limits of legislative power. So long as the legislative branch acts within its proper sphere, the Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within that sphere. A different situation exists, however, when invasion of constitutional rights is alleged. We quote from pages 51 and 52 of the opinion: (*italics ours*).

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. *Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation.* It is said that we can retain judicial authority to examine the *weight of evidence* when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for

reasons of convenience to disregard it in others. *The principle applies when rights either of person or of property are protected by constitutional restrictions.*

The principle is also well stated in *The Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735, 739:

(b) Or an order may be attacked upon the ground that it deprives the petitioner of its property without due process of law. When the attack is made upon constitutional grounds, a court is required to exercise its independent judgment as to both law and facts

Constitutional rights may be as successfully and as seriously invaded by mistakes of fact as by mistakes of law. When a citizen asserts that the rights guaranteed him by the Constitution have been invaded, the responsibility rests upon the courts to hear him, and he cannot be denied a hearing on the ground that his claim rests upon a question of fact. Where such a claim is made, the petitioner is entitled to present all of the material facts

Appellant charges in this case, confiscation arising both from mistakes of law and mistakes of fact on the part of the trial Court as well as on the part of the Secretary. As stated in our first brief, appellant's case stands or falls upon the proposition that the findings of fact and conclusions of law based thereon, are either contrary to the evidence of record or not supported by substantial evidence of record. We submit, therefore, that the scope of review includes not only

an examination of that evidence, but a proper weighing thereof in accordance with the principle so clearly stated in the *St. Joseph Stock Yards* case, *supra*.

We pass now to the direct answer to the brief of defendants.

I.

EXCLUSIONS OF PROPERTY.

Under this heading, commencing with page 18 of their brief, counsel for defendants deal with the subject matter of points I and II of appellant (brief of appellant, pp. 31 - 66 inc.), namely, the exclusion from the rate base of the value of the loading and unloading facilities, including trackage, and the exclusion of the Stock Show properties. The Government denies appellant's contentions and asserts that these properties are properly excluded.

At the outset of their argument, Government counsel assume the point at issue. They say that the Secretary found these properties to be not-used and not-useful in the rendition of stockyard services and that "the value of this not used and useful land and of these not used and useful structures could not, *therefore*, be included in the rate base." Four cases are cited, on page 18 of defendants' brief, which, so far as material here, go to the point that *if* property is *in fact* not used and not useful, its value is to be excluded from the rate base. We agree. The question at issue here, however, is the validity of the Secretary's findings in this regard. Appellant asserts that these properties are not only used and useful in the rendition of stockyard services but also are an integral part of

the plant and equipment of appellant, all of which for almost 17 years has continuously been posted by the Secretary as a public stockyard within the meaning of the Packers and Stockyards Act, 1921. (Government Exhibit 1).

A. Trackage, loading and unloading facilities, and the so-called chute alleys.

There is no question about the used and useful nature of these facilities. Government witness Christensen (R 390) testified on this point as follows:

The Stock Yard Company owns these railroad tracks and other improvements which are necessary to their operations adjacent to the stockyards and other industries within the city of Denver. The Stock Yard Company does not own any locomotives, cars or other railroad equipment

Transportation facilities comprise two classes, viz:

A—Those referred to in Volume 1 as Class A facilities, which are used and reasonably necessary in that course of commerce whereby livestock and feed and material incidental to the conduct and operation of the stockyards, move to or from the stockyards; The trackage and loading and unloading facilities are all listed by the witness in Class A.

We take issue with the statement of counsel on page 19 of the brief of defendants to the effect that these facilities "are not employed in the rendition of stockyard services." § 302 of the Packers and Stockyards

Act, 1921 (U.S.C.A. Title 7, Sec. 202, Appendix to brief of appellant p. 103) reads: (*italics ours*)

"Stockyard" defined; determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means *any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances*, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

The pens are definitely within the definition and we submit that the docks and chutes are "appurtenances" to every pen and enclosure in the stockyard area.

§ 301 (b) (U.S.C.A. Title 7, Sec. 201 (b) appendix p. 102) defining "stockyard services" reads as follows (*italics ours*):

(b) The term "stockyard services" means services or *facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;*

This definition fits each and every one of these excluded properties—trackage, docks, chutes, pens and alleys, whether the livestock stops for sale or merely for feed, water and rest under the 28 hour law.

The question, therefore, is similar to that involved in *St. Louis & O'Fallon Ry. Co. v. United States*, 279 U. S. 461, as recently pointed out by this Court.* The question concerns the command of Congress addressed to the Secretary of Agriculture in relation to its valuations of stockyard property.

In *St. Louis & O'Fallon Railway Co. v. United States*, 279 U. S. 461, 49 S. Ct. 384, 73 L. Ed. 798, the Court was not dealing with the order of a state commission, or with a question of due process, but with the command of Congress addressed to the Interstate Commerce Commission in relation to its valuations of railway property. The Court construed that command and found that it had not been obeyed.

If by command of Congress, these facilities are stockyard facilities, their value must be included in the rate base in order that the Secretary may establish rates which will yield a fair and reasonable return upon the property devoted to the public service, unless there is some other provision in the Packers and Stockyards Act, 1921, requiring a different result.

The Government says there is this additional provision. The argument is that by Section 406 (U.S.C.A. Title 7 §226, appendix to brief of appellant p. 106) the Secretary of Agriculture is prohibited from interfering

* *Railroad Commission v. Pacific Gas & Electric Co.* 302 U. S. 304, 58 S. Ct. 334 at 341:

with the power of the Interstate Commerce Commission or from having concurrent power or jurisdiction over any matter within the power or jurisdiction of the Commission. Counsel then say that these facilities are all used in the transportation of livestock, that transportation by rail is under the jurisdiction of the Interstate Commerce Commission, and therefore, that these facilities are under the jurisdiction of that Commission. Hence, counsel argue, the Secretary has no jurisdiction over these facilities used in the transportation of livestock and cannot include the value of these properties in the rate base.

If true, the argument is not sound. It is based primarily upon Section 15 (5) of the Interstate Commerce Act. Because we shall shortly demonstrate the pertinency of the exceptions named therein to the facts of this case, a portion of that section is italicized. Section 15 (5) of the Interstate Commerce Act, as amended in 1920, reads in part as follows: (*italics ours*)

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, *except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations.*

That section requires the carriers to own or provide suitable means for the loading and unloading of livestock into cars or pens, and specifies when the cost of such service shall and shall not be included in the line-haul rate and absorbed by the carriers. It does not attempt to affect the title or ownership of those facilities. If the facility is owned by the Yard Company and used and useful in the receiving, handling and shipment of livestock in commerce (Sec. 201 (b) of the Packers and Stockyards Act, 1921, *supra* p. 7), it remains and is a stockyard facility.

We grant for purposes of argument that the Commission has jurisdiction under Section 15 (5) of the Transportation Act, of the amounts which a carrier can pay the Stock Yard Company for providing these necessary facilities. That is not decisive of the question. Neither this Court nor the Commission has held that the Commission has a right to require a stockyard to lease its facilities to the railroads except in the case of the Chicago Stockyards which, as a prerequisite to such finding, was held to be a common carrier. *United States v. Union Stockyard Co.* 226 U. S. 286, 306, *Atchison, Topeka & Santa Fe RR. Co. v. United States*, 295 U. S. 193. The opposite result has been recognized where the stockyard was not a common carrier. *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, wherein the Commission cancelled, at the suit of the carriers, a tariff filed with the Commission by the stockyards company setting out these charges for loading and unloading livestock.

Nevertheless, let us assume that the Commission does have such power. The Interstate Commerce Act

and the Packers and Stockyards Act, 1921, did not give the Commission power and authority to require the stockyard company to provide these facilities at such rate as the Commission may fix. As a practical matter, it is essential for the stockyard company to get the livestock and hence, if we assume that the Commission can control the amount the carrier will pay, we can assume that the Yard Company not only will but must accept it whether or not it is a fair return upon the amount invested by it in those facilities. In valuing the properties, and putting that value into the Yard Company rate base in such case, the Secretary takes into the income account, the offsetting amount received from the carriers. If small, the shipper of livestock is not hurt, because he has had included in his freight rate less than the fair return. If large, there is less balance to be spread into stockyard rates. There is no "double impost." The jurisdiction of the Secretary does not overlap that of the Interstate Commerce Commission in any particular.

Denver Union Stock Yard Co. v. United States,
57 Fed. (2d) 735 at 749.

The cases cited by counsel for defendants do not militate against our position. We admit that under the Interstate Commerce Act, transportation does not cease until the livestock has been unloaded into suitable pens for delivery to the consignee. This is held by *Dimmitt-Caudle-Smith Livestock Commission Co. v. Chicago, Burlington & Quincy RR. Co.*, 47 I.C.C. 287, 318 and most of the other Interstate Commerce cases cited on page 27 of the brief of defendants. Involved in such cases, however, is the question of whether the

carrier could collect from the shipper or consignee a charge for such service, not whether the stockyard company could make such a charge to the carrier. In none of them was any jurisdiction over the Stock Yard Company assumed or exercised by the Commission.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92 *supra*, one of the cases cited by opposing counsel on page 27 of their brief, the case as finally resolved by the Commission was that the Kansas City Stockyards was not a common carrier, hence its tariff filed with the Commission was ordered cancelled. The Commission found, however, that since the Yard Company permitted its rails to be used by any one having business at the yards, the usage was public transportation and hence the carrier could pay the Yard Company its demands for the use of the facilities without such payment constituting an unlawful rebate under the Interstate Commerce Act.

In *Strauss & Adler v. New York Central Railroad Company* 153 I.C.C. 609, the question presented was whether the railroad defendants could charge against the shipper or consignee, the service charges assessed by the stockyards at Pittsburgh and Buffalo. The case held that the carriers would have to absorb these charges. The yards themselves were found to be non-railroad-operated yards and there is nothing in the case which indicates any attempt on the part of the Commission to exercise jurisdiction over those two stockyards.

As stated above, the cases dealing with the Chicago stockyards are not in point in this controversy because The Union Stockyard & Transit Company of

Chicago, which is the corporate name of the Chicago Stockyards, both by virtue of its charter provisions and because of its actual railroad operation, or connection, has continuously been held to be a public carrier. Consequently, its repeated attempts to cancel its tariffs on file with the Commission have been defeated. See *Livestock Loaded and Unloaded at Chicago*, 218 I.C.C. 330. The basis for the holding that the Chicago Stockyards is a public carrier is well set out in *United States v. Union Stockyard Company*, 226 U.S. 286 at 306, where this Court points out that the joint operation of the Stockyard Company and the Junction Railways, and their common ownership by a holding company called The Junction Railways & Union Stockyards Company, makes the stockyard in that case a common carrier subject to the jurisdiction of the Interstate Commerce Commission.

The Commission has never claimed any such jurisdiction over appellant at Denver, which does not own and never has owned any motive power or rolling stock, has never held itself out to be engaged in common carriage, and is not under joint ownership or control with any other corporation whatsoever. The situation here is much more analogous to that at Kansas City as portrayed by *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co.*, *supra*.

We admit, however, that the Kansas City case just mentioned, and reported in 33 I.C.C. 92, was decided before the adoption of Section 15 (5) of the Interstate Commerce Act. We do not believe that this makes any difference, however, since that section, properly viewed, is an enactment of the rule in *Cov-*

ington Stockyards Co. v. Keith, 139 U.S. 128, which antedates the Commission ruling at Kansas City.

All through the Government argument the statement is made that the railroads absorb these transportation charges. We pointed out in our first brief at page 63 that only about 20% of these charges are absorbed by the carriers at Denver (R 1046) due to the fact that Denver is a transit market and the bulk of these receipts are fat or feeder livestock which is sold under the transit arrangement, or after having stopped to try the market. This is a further reason why the Chicago cases are not in point because at Chicago, 100% of the transportation charges are absorbed by the railroads due to two factors,—first, that Chicago is, as one witness described it, “the end of the road,” i.e. the last market to which cattle from this western country are shipped for sale, and second, it is a rate break point in railroad tariffs. Consequently, for either one or both of these reasons, livestock does not stop at Chicago to try the market and does not move out on through billing if sold in transit.

We quoted at page 9 of this brief, Section 15 (5) of the Interstate Commerce Act, italicizing a portion thereof, and stated that we would comment upon the exceptions named in that Act. The exceptions are that transportation charges are not absorbed in cases where the unloading or reloading enroute is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. Where livestock is stopped at Denver, sorted, sold and moved out on through billing, the railroad carriers, under the authority of the Interstate Commerce Commission, deems such stoppage to be “un-

loading or reloading enroute at the request of the shipper, consignee or owner" and consequently, all unloading and reloading charges and other transportation costs are added to the way-bill and collected from the shipper. Transactions of this sort, plus the stoppage of livestock to try the market as shown by the testimony, constitute 80% of the transactions at the Denver market.

Much of the Government argument is also directed to the statement that the question is academic and the note commencing at the bottom of page 20 of the brief of defendants purports to show an annual average rate of return from the so-called transportation facilities of 10.39%, which, if bedding sales are included, and therefore excluded from the income account, would increase this percentage to 12.94%. It is to be remembered that this computation of the Government is based upon the government valuation figures as to land and trackage. The railroads themselves, by contract, pay The Denver Union Stock Yard Company for the use of its spur or industry tracks on the basis of \$8,772.00 per acre plus \$30,000 allowance for actual expense in grading. They also pay one-half of the state and county taxes. This land valuation is greatly in excess of the Government figure for acreage in the same zones and incidentally points to and supports our contention in Part VII, commencing on page 93 of our first brief, that the land valuations of the Government are arbitrary and confiscatory and not grounded on substantial evidence. The arrangement with the railroads was the result of arms length bargaining.

Based upon the agreed valuation, we admit that the return is approximately 7% and to that extent only is the question academic. From a dollars and cents standpoint, it makes very little difference to us whether the railroad trackage, loading and unloading docks, chutes and chute pens are included or excluded. A matter of principle, however, is involved and when the Secretary extends his arbitrary action to exclude the value of alleys which are in general use (R 1170), though bordering the docks and chutes and chute pens, merely because a part of their use is in gaining access to and from the trackage and loading facilities, we maintain that the Secretary's action is arbitrary and cannot be sustained.

B. Exclusion of the stock show properties.

The admitted value thus excluded from appellant's rate base is \$244,515.00 (brief of defendants, p. 34). The basis for exclusion is given in the paragraph in the middle of page 37 of 'defendants' brief, thus:

It is manifest for two principal reasons that the Secretary was required under the Packers and Stockyards Act to exclude this property from the rate base: (1) the property is not used by appellant but by another corporation which is separate and distinct from appellant and which conducts an entirely different and separately managed business and (2) this property is not used to render stockyard service.

An analysis of this statement will show the misstatements, assumptions and misconception of the evidence of record with which this portion of the brief of defendants is replete, and will demonstrate the unsoundness of the Government's position. In the argument

which follows, the word "brief" refers to the brief of defendants herein, unless otherwise noted.

It is admitted that the Western Stock Show Association is "another corporation" but it is no more separate and distinct than is any controlled subsidiary or affiliate. At page 35 of the brief, counsel say:

After attempting to operate the show appellant found the burden onerous and conceived the idea of promoting a new corporation to take over the work.

And again at page 37, counsel say that if the stock show had been an integral part of appellant's business, its operation would not have been "unloaded on a separate corporation."

The record does not justify these statements and their necessary implications. We refer the Court to the testimony of Mr. Pexton, commencing at the bottom of page 829 of the record (folio 1558) through page 843. The Government did not attempt to contradict or refute it. We quote a portion of that testimony:

Thirty-five years ago, or about 1900, the type of cattle produced in the territory tributary to the Denver market was mediocre in quality and breeding. They were the Southern Longhorn type, which had been driven north largely from Texas as the country developed. They were hard to fatten, were not a desirable meat when fattened, were not good units of meat and did not give a good account of themselves, in ratio to the time and feed consumed, either on the range or in the feed lots. At that time

Colorado cattle were not known as being particularly good feeders and did not command a premium at Denver or other markets. This condition with regard to mediocre cattle was general in the territory tributary to Denver market at the time of which I have been speaking, namely 1900 and the early 1900's, and in my opinion resulted in penalizing the producer of those cattle as to price and outlet. As a result of this situation it was felt by the majority of the producers of the west and the owners of the Denver Stock Yard that much could be done to improve the type of cattle produced in Colorado and adjacent states, to advertise the better cattle that could be produced, to create a premium for them, and to enlarge the outlet on the Denver market. It was apparent that such action, with the expected success, would result in a major benefit to the livestock producers and a minor benefit to the Denver Stock Yard in the proportion with which the additional returns would be divided. I say that because it costs no more to market a high-quality animal than a poor or mediocre animal. The marketing charge is the same, while the producer receives a larger net return.

The Stock Yard Company undertook this work primarily because of producer demand. Complying with this desire on the part of its patrons, in the year 1906 a Stock Show was started in Denver. The first show was held in tents and other temporary structures. It met with such success that steps were immediately taken for the Stock Yard Company to provide

permanent buildings and take other action to see that the Show became an annual fixture and of national importance. This led to the building of the Stock Show Stadium in 1908 and other buildings to properly house the Show, which is now known as the National Western Livestock Show, which is admittedly the third largest and most important livestock show in the United States—and the largest show in some respects.

Outside of the Stadium and the Sales Arena the Stock Show is handled in connection with the horse and mule property, the buildings being used by the latter 51 weeks of the year and being vacated by the horse and mule people the one week of the year the Show is being held. By handling in this manner, we have been able to secure 100 per cent utilization of all buildings, except the Stadium and the Sales Arena. We also use a larger part of the main cattle division during Stock Show in the handling of Stock Show livestock. Approximately 200 pens in the south end of the yards are used for the handling of bulls. Fat cattle in the Show are yarded in the pens just north of the Exchange Building. Feeder cattle, usually over 100 carloads, entered in the Show, are yarded north of the fat cattle to about the 22 alley. In other words, the bulk of the stockyards property during Show week is devoted to purposes of the Stock Show and not merely tract or Zone 9.

Obviously, the more direct interest in the show by the largest number of people, the

greater success it will have. The Stock Show proper is operated by the Western Stock Show Association, which is an association of various persons interested in the livestock industry. This association has a Board of Directors consisting of 39 members which includes all phases of the industry. Additional Directors are provided from time to time as producers or others appear who are willing to work for the good of the industry. The directorship includes officers of the Stock Yard Company, of the packing plants, of Denver banks, railroads, producers of all kinds of livestock, and others. It has been found that by handling in this manner much greater interest can be created, more support is received from local people as well as others, and a large free ticket list is avoided. Obviously, when several business men, serving as Directors of the Show, call on a certain industry or certain people for support, they receive a much better hearing and more consideration than if someone from the Stock Yard Company did the calling and solicitation. Any additional support or revenue, of course, reduces the expense of the Show and, therefore, the expenditure of the Stock Yard Company for this purpose. By handling in this manner we have made the Show more efficient, we have created greater interest, we have accomplished better results and have reduced expenses as well as adding to income, all of which rebounds to the financial as well as the educational interest of the producer.

The Stock Yard Company, through its Pres-

ident and General Manager and Secretary and Treasurer, attends all meetings and generally supervises actions and expenditures. All money paid out must be approved by the Secretary and Treasurer of the Stock Yard Company. The General Manager of the Show reports at frequent intervals to the President of the Stock Yard Company and takes no action of any consequence without consulting with him. The existence of the Stock Show Association is in no way a leasing out of facilities or delegation of authority that the Stock Yard Company may own or have. We have substantially the same authority over the Show that we would have under any circumstances, and, in addition, in handling it in this businesslike way, have a great deal of support and interest that might not otherwise exist.

There is no principle of rate making which requires the elimination of the value of property from the rate base of a utility merely because in furtherance of the purposes of the utility a means is adopted to increase the used and useful nature of that property in the public interest. This is particularly true where, as in this case, the means is the formation of a "corporation-not-for-profit" under Colorado law, from which corporation no member can receive any distribution of earnings and whose affairs are managed by directors whose only necessary qualification is an interest in furthering the industry.

The second statement is that the property is not used to render stockyard service. Test this by the legislative definition and by the evidence of record.

On page 38 of their brief, eight lines from the bottom, counsel misquote the statute. Section 301 (b) of the Packers and Stockyards Act, 1921, defines "stockyard services" to mean "services or facilities furnished at a stockyard in connection with the receiving marketing or handling in commerce of live-stock."

Counsel assert on page 39 of their brief that "live-stock consigned to the market for purposes of sale never reaches the stock-show property". They further say that the only livestock which does reach the stock-show property "is fancy show stock which is brought there for *exhibition purposes* during the show week". No one who has ever seen the Denver show or who has studied this record could make such statements.

These statements raise the question, under the evidence of record, as to what is "the stock-show property", used during "the show week". The testimony of Mr. Pexton (R 831) above quoted, shows that not only the properties in Zone 9, but all of the cattle division (Zone 1) up to alley 22, which is approximately under the viaduct running between the sheep barn and the Cudahy Packing plant, as shown in the photograph in the envelope on the back cover of our first brief. Livestock sent to the show is yarded and cared for in this area, the fat cattle and feeders in the pens northeast of the Exchange Building, i.e. below the Exchange Building as one looks at the photograph, and the bulls are yarded and cared for in the triangular block of pens southwest of the Exchange Building, i.e. between that building and Zone 6. Much of this livestock is exhibited in the stadium and sold in the sales pavilion on Zone 9, excluded by

the Secretary. The carload lots of fat cattle and carload lots of bulls, because of the physical impossibility of exhibiting and selling masses of cattle in the small sales pavilion, are sold where yarded. A sales arena is constructed each year in the pen area for the feeder auction, at which up to 20,000 to 30,000 head of feeder cattle, depending upon market and economic conditions, are sold during a two-day auction session. This is as much a part of the annual show as the exhibition and sale of prize cattle on Zone 9. Neither the marketing of bulls in such large volume (R 801,1037) nor the feeder auction could be accomplished at any other time than at the show (R 796,802,941,1037). Government witness Christensen, after giving his opinion evidence on direct examination as quoted by counsel on pages 39-41 of defendants' brief, testified from his own knowledge and observation on cross-examination as follows (R 429,430):

..... Yes, during the show livestock is sold in the sales pavilion but in certain other buildings I have not seen it sold. The sales pavilion is not the same as the stadium. Yes, individual animals are frequently exhibited at the stadium before going to the sales pavilion, and some of the livestock that is sold during the show week is handled in the yards proper and sold in another auction facility in the cattle division. A great deal of livestock is sent to the yards during the show time for sale. Yes, I think a good deal of grade stuff, so-called, is also sent here at that time as well as purebred breeding stock. Denver has a very extensive auction sale of feeder cattle. In point of dollars there

is a large volume of livestock sold *at the Denver show*. There is also a large market for bulls

If Government counsel mean by "show property" those few buildings located on Zone 9 (the buildings in that zone colored yellow on the photograph), even then the testimony is clear that livestock is *exhibited in the stadium and sold in the sales pavilion*, which are the principal buildings excluded by the Secretary. We have no hesitation in admitting that it is the individual head of purebred stock, mostly for breeding purposes, which is sold in the sales pavilion, carloads of purebred stock being sold, as we have stated, in the pen area where they are yarded, *but there is no provision of the Packers and Stockyard Act, 1921, or any rule of law which determines that the sale of purebred livestock is not the "marketing and handling in commerce of livestock" or which gives the Secretary of Agriculture jurisdiction to prevent or impede such sales*. Counsel will say that the Secretary does not prevent the Yard Company from engaging in any business it likes but only says that the value of properties so used cannot be included in the rate base. This is sycophantic. The denial of a fair return is the most effective means of prevention and hindrance which bureaucratic authority has yet devised. It is not to be presumed that Congress intended to give to any administrative officer or body, power to prevent or impede any public activity which would improve the quality of meat producing animals, or increase the efficiency of and gains to the producer.

The portions of the record just cited as well as those cited at pages 35 et seq. of appellant's first brief con-

tradict the assertions of the Government that income is not derived by appellant because of the show. The Government entirely evades the mass of uncontradicted testimony mentioned in our first brief establishing that the Stock Show has built up both the receipts of livestock and the demand for livestock at the Denver market.

The record references which follow are to the pages of the record where these facts are definitely established. Record pages 686-687, 697, 795-796, 801-802, 831, 834, 837, 843, 941. We again say that there is no contradictory evidence. Government counsel cite but two cases in this portion of their brief, namely, the decision of the District Court from which this appeal is taken, and *St. Joseph Stock Yards Company v. United States*, 298 U.S. 38 at p. 57, where this Court was dealing with the exclusion by the Secretary of a hotel, called the Transit House. There is nothing in the *St. Joseph Stockyards* case on this point which is contrary to our position. In that case it was found that there was no showing made that the absence of the Transit House would materially affect the business of the yards and for that reason the finding of the district court and the Secretary was therefore upheld. In the instant case, as above shown, the evidence is full and complete to the effect that the stock show and the use of these buildings for that purpose is intimately connected with and does affect the business of appellant. If, as stated by this Court, it is proper to exclude property which does not affect the business, we submit that it follows conversely, that it is improper to exclude from the rate base the value of property the absence of which does definitely affect the business.

Furthermore, in view of the evidence in this case, we maintain that the Secretary is inconsistent. If it be proper to exclude the two or three buildings in Zone 9, it is proper to exclude the bulk of appellant's yard. The testimony establishes, as above pointed out, that the bulk of appellant's yard is devoted to stock show purposes during stock show week. The sales arena erected in the Cattle Division near the viaduct, shown in the photograph, is no different from the sales pavilion in Zone 9 so far as the function thereof is concerned. The only difference is that it is not roofed and must be taken down and put up each year at considerable expense. We would prefer to have a permanent arena of sufficient size in this locality for that purpose but its absence certainly corroborates the testimony of Government witness Christensen (R 429) and of the other witnesses who testified upon the point that the facilities are not excessive or not needed for the show.

At pages 50 to 52 of brief of defendants, counsel advance the argument that appellant's claim of income derived from the show is speculative in the face of testimony from producers that livestock is held back for the show. Counsel argue from this statement that the livestock would arrive at some other time. The evidence of record is to the contrary. Such evidence is easily understandable if the conditions confronting a range market are understood. As we pointed out in our first brief, range cattle are largely driven off the forest ranges and open ranges by climatic conditions and this results in a very seasonal condition at Denver. The cattle run commences generally in September and ends about December 1st. Producers, knowing the conditions, will cull out of

their herds uniform carloads which, for one reason or another, have so matured as to make it likely that they would show to advantage and command the higher price which is usually received during show week (R 794, 835, 968, 1003-1005). The manifest reason for holding back livestock for the show is to receive this higher price. It also serves the purpose of preventing a glutted market (R 795, 801). Producers Pace, Jamison and Mitchell testified directly (R 687, 795, 801) that at least a percentage of the livestock would not come at other times. The facts in evidence concerning January sales, compared to the sales in December preceding and February following, at the Denver market, demonstrate not only that the stock show does affect the business of the yards but also that income in large amount is derived directly from and on account of the show. There is no denial in the brief that although the Secretary has excluded the so-called stock show properties, this income has not been excluded from the income account.

The justification advanced for this by the Government is that this income is earned "in the yards". That is true, but it is, nevertheless, income directly traceable to the show. For example, a part of that income is the yardage charge of \$1.00 per head on the 1,500 to 2,000 bulls which are annually received and could only be received and sold in such volume at the stock show. Government counsel do not mention this market on bulls which admittedly, and in the evidence, is the largest market of bulls in the United States (R 795, 801, 833) and which would not occur except for the stock show (R 687, 801, 833). Perhaps Government counsel will again argue that these bulls are "fancy show stock." We again reply that they are

"livestock" within the meaning of the Packers and Stockyards Act, and particularly necessary to the production of livestock in commerce because of the state and federal requirements which require only registered bulls to be turned loose with herds on the public domain (R 801).

At page 41 of defendants' brief, it is said that the fact that buildings located on the show property stand idle during fifty-one weeks of the year is persuasive evidence that these buildings do not subserve a stockyard purpose. The length of use is not the criterion, provided the benefit to the industry, both from the standpoint of its patrons and from the standpoint of the utility itself, is constant and continuous, which the evidence in this case shows it is. In any event, the statement is not correct, nor are the findings of the Secretary and the Court to the same effect, sound. The barns on Zone 9 are utilized by the horse and mule division at all times of the year when not utilized for the stock show. These barns were not excluded by the Secretary but merely the stadium with its heating plant and hook up shed. The sales pavilion and tile barn were also excluded. These with the barns and half of the cattle area are in the truest sense the show property and its use is not limited to one week. The pen area, for example, which is occupied by the bulls during one week and by the fat and feeder cattle sent in on account of the show, is partially utilized during much of the remaining portion of the year and fully utilized during the peak seasons of the cattle run by livestock having no connection with the show. There are blocks of pens at the north end of the yard which are only utilized during the heavy seasonal run of cattle. These are properly included by the Secretary because a

public utility must be prepared to take care of regularly anticipated peak demands. Viewed from the standpoint that the cattle division up to alley 22, as well as all of Zone 9, is devoted entirely to the stock show, there is no more reason for excluding the stadium and sales pavilion because they take care of this peak demand of the show for a certain type of facility, than there would be for excluding the blocks of pens at the north end of the yard to which we have just referred.

It is immaterial that certain other yards listed in the note on page 47 of the brief of defendants do not have stock shows comparable to the one held in Denver. Other managements may not deem them essential and yet, of the markets which are known as the ten central markets, six do maintain such shows. As stated on page 966 of the record, due to the shows at Omaha and Kansas City, there is not the same need for such a facility at Sioux City and St. Joseph, Mo. With the largest show of all at Chicago, there is not the same need for a show at St. Paul.

The fact of the matter remains that the evidence demonstrates that the stock show has been and is a powerful medium for the development of business at the Denver market. It makes no difference whether it be deemed an advertising medium or a factor of general benefit to the industry. If the Secretary wishes to make us an advertising allowance equal to $6\frac{3}{4}\%$ on the value of the excluded show properties, the result would be the same. The proper basis, however, is that the stock show is a proper activity, entered into by the management in good faith, concerning which there is a complete absence of any showing of

inefficiency or improvidence. Under such circumstances, the Court will not substitute its judgment for that of the management and will not permit arbitrary interference therewith by the administrative board. *West Ohio Gas Co. v. Public Utility Commission*, 294 U.S. 63 at 72, *Banton v. Belt Line Rwy*, 268 U.S. 413, 421, *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276 at 288, 289, *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735, 748.

II.

THE DENIAL BY THE SECRETARY OF GOING CONCERN VALUE.

The argument of the Government (brief of defendants pages 54-83) is that there has been no denial of going concern value or exclusion thereof from the rate base, but that such value "is inextricably interwoven with other values" and hence no separate allowance need be made. The Government also says that appellant has failed to offer such clear and convincing evidence of this value as would authorize a separate allowance.

At the outset let us agree, as we did in our first brief, that no separate allowance need be made *if it is a fact that such value was included otherwise in the valuation of the utility property*. The question, therefore, squarely presented is whether or not there is such extra allowance in the valuations in this case. Government counsel have for the most part contented themselves with citation of the findings of the Secretary and of the trial court and quotations from the opinion of the trial court, but we submit that since

these are the very findings which we charge to be erroneous such citations lack probative force.

At the bottom of page 72 of the brief of defendants, counsel recognize that the rule in *The Minnesota Rate Cases* was designed to eliminate the possibility of valuing the land in such a way as to include an increment of value attributable to the going concern element. They say, however, that while this is the case when the rule is applied to railroads, gas, water and light plants, it does not work out that way in the case of stockyards, because the value of the stockyard land is influenced upward by the presence of packing houses and related industries surrounding the stockyard land, which industries would not be present but for the stockyards.

Whatever theoretical basis there may be for such an argument, which we deny, the fact of the matter is that it was not followed by the Government witness. This is easily demonstrable from the record. Mr. Zelinski testified in the first place that when he stripped the stockyard land of all improvements, including therein all of the alleys and roadways which lead to the related industries, it left the tract as a large tract without dedicated public highways and hence of decreased value. We quote briefly from the Government testimony:

It should not be overlooked, however, that for the purpose of comparing the values of this property with the sales of units comparable to the integral portion of which the yards are now comprised, it is necessary to take into consideration the lack of dedicated public streets and alleys to serve so large an area. (R. 477).

Where I spoke of the absence of highways in the tract I mean an absence of dedicated public streets. * * * You must remember in this case I am valuing this property not for the special use and in the special way that the Stockyard Company is using it, but I am considering its availability for a stockyard use and stripped of these improvements I am trying to visualize the effect of the lack of direct access to a large portion of this area, which I think should be considered in the valuation. (R. 495).

Yes, I testified that I had appraised this property in accordance with my interpretation of the Minnesota rate case, which is with all the packing houses and other related industries in place, but with the stockyards and the improvements which themselves constitute the underground and superficial structures of the stockyards removed. No, I do not think it is inconsistent to say that with this interpretation of the Minnesota rate case the presence of the packing plants *would influence the value downward* to other industries, because in seeking to fix the upper limits of value on the property one of the controlling things, of course, is to determine what the land might be worth for an alternate industry, which is of a higher character than the stockyards company, and if it were so available I would then have to look for the values of that higher use. In this case I reached the conclusion that a stockyard utility would be its highest utility. Yes, in this case *the lessening in price due to the packing*

plants being there is more than offset by the fact that the zoning law of the City and County of Denver requires that an industry of that type and of the type of the stockyards be in this section, but I still had to look to see if the property under the circumstances could be used for a higher utility. (R. 533).

In view of the above quotations from the record, there is manifestly no basis for the argument of counsel above referred to, nor for the further statement appearing on page 72 of the brief that were it not for the fact that the stockyard is a going concern with a business intimately correlated with the railroad and packing industries, the land valuations determined by Mr. Zelinski obviously would be considerably reduced. Mr. Zelinski testified exactly to the contrary, as above shown. He did testify that the zoning ordinance of the City and County of Denver more than offset his assumed depressing factors, but we submit that this is the allowance of present value of the land as such, and not of any going concern value of appellant's plant. It stands on the same basis as his other elements of value, such as proximity of the land to highways, availability of water, drainage possibilities of the site into the Platte River, nearness to good labor supply, etc., all of which, we repeat, are elements of the present value of the land as such, necessarily regarded and considered by any appraiser in the valuation of land, no matter for what industry it may be valued, and not the measure of the going concern value of the business.

When we also consider that Mr. Zelinski disregarded the offer of Mr. Burkhardt of \$10,000.00 an acre for

Zone 6, and disregarded the actual price paid by the Local Beef and Mutton Company for its tract, both of which prices we admit were influenced by the availability of a stockyards to packing plants to be constructed (R 501, folio 472; R 510, folio 515) it is apparent that his valuation of the stockyards land was not influenced *upward* by comparative sales to correlated industries.

So much for the land. The remaining question is whether or not going concern value was allowed in the valuation of the structural property.

It is admitted that the structural property was valued upon the basis of unit costs of material and labor. As a matter of fact this could not be denied in view of the testimony of record by Mr. Zelinski whose valuation was adopted *in toto* by the Secretary. That testimony is quoted at some length in our first brief at pages 18 and 19. Government counsel, however, say that because to these bare costs there has been added the construction overheads and general overheads, an adequate allowance for going concern value has been made. Consider the items which counsel claim are general overheads as distinguished from construction overheads. There is the item of "Omissions and Contingencies." Whether they be called construction overheads or general overheads is of small moment because they are a definite factor in the cost of any construction and are figured as such by any person, firm or corporation embarking upon the construction of an industrial plant. Omissions and unforeseen contingencies universally come in and add to the cost of the construction.

"Engineers' and architects' fees." These by the very

terms used have to do with the construction and are universally considered part of the cost.

"Taxes during construction and interest lost upon the money tied up in material and labor" are likewise under any sound business reasoning part of the cost of the construction.

The only two items which perhaps might be viewed differently which are direct general overheads are the items of legal expense and general salaries and expense. At page 523 of the record, Mr. Zelinski states that no organization expense of any sort is included in any of these overheads, and that the item of salaries of officers and expense covers the expense "which would be necessary to look after the payment of vouchers and checking up on the performance of the contracts during the period of the construction." As thus limited by the witness, we submit that these are likewise construction costs.

The net result is that our statement as made in the first brief remains uncontradicted, namely that the valuation of structures in this case was made entirely upon the basis of the actual present-day unit costs of so much lumber, so much brick, so much concrete, so many hours of labor, so much superintendence required to build the structures. There is no element of going concern value included in any such basis of computation.

Government counsel, however, say at page 71 that the very method of ascertaining value for rate making purposes that was employed in this proceeding tended to establish a valuation "sufficient to recognize and cover the going concern element, even if it had not

been covered in the valuation of the specific structures." This statement is made upon the basis that the method adopted was reproduction new cost less depreciation, "unmodified by consideration of the actual or historical cost." Counsel say further that if their valuation engineers or the Secretary had considered other factors legally recognizable such factors "would undoubtedly tend to diminish the value further."

We particularly take exception to such phrases as the one last quoted. It is pure assumption on the part of counsel. There is not the slightest evidence of record which indicates that any of these other factors would have diminished or tended to diminish the value as found. The Government introduced no evidence of historical cost of the entire property, yet counsel say that the major portion of appellant's structures was built many years ago when labor and materials were considerably less expensive than at the present time. There was no proof made as to what the building costs were at such former time. On the contrary, Mr. Zelinski himself evidenced either a great reluctance or lack of knowledge of existing facts as to the date of construction of the major portion of appellant's plant. At pages 521 and 522 of the record Mr. Zelinski admitted that in 1917 appellant built a large section of the cattle division, but he did not know whether it amounted to 29% of the total cattle area "but it was a very large proportion of the plant". He further admitted that in 1928 there was a further extension of a material portion of the cattle division. "No, I did not figure whether it was 16½% of the entire cattle area, but I knew it was material." In 1929 the sheep barn, which, incidentally is the largest concrete sheep barn in the world, was completed, neces-

sitated by the fact that Denver has become the largest feeder sheep market in the United States. We submit that these are the major portions of our yard, not built, as counsel say "many years ago" or in piecemeal construction, or at times when materials and labor costs were much less. The statements of counsel are utterly without foundation in the record. This is a judicial proceeding, and findings to be sustained must be based upon evidence of record. There has been no abandonment of this proposition by this Court.

We submit, therefore, that there has been no showing on the part of the Government of any allowance for going concern value, which the Government admits exists in appellant's plant and business, or that any such excess value is inextricably interwoven with the valuations as found.

Government counsel cite six cases, all of which were cited in appellant's first brief. We differ with counsel's interpretation and adaptation thereof. In the *Cedar Rapids Gas Company* case,* the attempt was made to include in the valuation of a gas utility an extra value on account of the franchise or governmental grant by the municipality, but this was denied, and properly so, because whatever additional value resulted from the franchise was the result of a relinquishment by the sovereign people of a part of their sovereignty, for which the utility could not take credit.

In *Des Moines Gas Company v. Des Moines*, 238 U. S. 153, a reading of the case will show that there was included in the value of the gas utility \$6,000.00 for organization expenses and \$300,000.00 for pro-

* *Cedar Rapids Gas Company v. Cedar Rapids*, 223 U. S. 655.

motion, organization and legal, injuries and damage expense. These were designated as overheads, and were found by the Court to be the equivalent of going concern value, but this Court, in full accord with that finding, stated:

That there is an element of value in an assembled and established plant doing business and earning money over one not thus advanced is self-evident. This element of value is a property right, and should be considered in determining the value of the property upon which the owner has a right to make a fair return when the same is privately owned, though dedicated to public use.

The Court found that the allowance of a large amount for promotion and organization expense was the equivalent in that particular case of that additional value. Mr. Zelinski expressly testified, as above noted, that no organization or promotion expense was included in any of his valuation figures.

In *Los Angeles Gas and Electric Corporation v. Railroad Commission*, 289 U. S. 287, this Court found that an extra allowance of \$5,500,000.00 was included in the rate base of that gas and electric utility, which might appropriately be assigned to elements of value which were not otherwise fully covered. This Court stated (page 317) that "the fact that this margin in the rate base was not described as going value was unimportant if the rate base was in fact large enough to embrace that element." In order for the Los Angeles case to be pertinent or authoritative in the instant case it is necessary for the Government to establish the existence of this excess or margin. As above

shown there is no evidence supporting any such finding.

In *Dayton Power and Light Company v. Commission*, 292 U. S. 290, the true basis for the denial of going concern value was the fact of the recent organization of the Power Company. Also, an allowance was made in the rate base for the cost of attaching new business, and, both under the theory and the decisions of this Court, attached business is the chief element in going concern value. In the Dayton case, the amount allowed as the cost of attaching business was not as great as the amount of going concern value claimed by the company, namely from \$125,000.00 to \$140,000.00. The Court pointed out, (page 317) that the Power Company was a new company, engaged in business for a few years with total physical assets of the value of less than \$1,000,000.00. Its claim to any going concern value was stated to be that "in the brief term of its existence it professes to have added to that value from \$125,000.00 to \$140,000.00 by combining the parts into an organization and causing them to work together." This Court denied this, saying that going concern value is not something to be written into every balance sheet as a perfunctory addition, but something which calls for an examination of the history and circumstances of the particular enterprise. Appellant, in the case at bar, has been in existence since 1886. The history is a long and successful one. Mere valuation of its plant as one which is "able and willing" to earn an income does not give consideration either to the history or circumstances of this particular enterprise.

In *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38, it is stated that there appellant failed to

make clear and convincing proof of the existence of the value. Reliance there was made entirely upon the hypothetical and speculative theory of a Mr. Howson. Counsel say that the testimony of Mr. Hyder in the instant case is equally speculative. In the Howson theory an attempt is made to determine the cost of attaching business. To do this he contrasts a hypothetical plant with an existing plant, attempts to allow for the effects of competition and to estimate the cost of the amount of solicitation assumed to be necessary to get the business up to its present volume. Mr. Howson speculates in various other ways, reaching finally a total figure. Mr. Hyder, as an expert, and based upon his years of experience as shown by the record, applied a value figure of \$10.00 per car to *the volume of business as shown by exhibits of record*. The only element of speculation is his opinion that the volume of business had a value to a purchaser of \$10.00 per car. His testimony is no more speculative than is the testimony of any expert witness called upon to give opinion evidence as distinguished from factual evidence.

However that may be, Mr. Hyder's testimony was only corroborative of other testimony in this case as to actual expenditures made for the purpose of developing or attaching business. We deny that there is any similarity between this testimony and the capitalization of past losses condemned in the Galveston case. As stated in our first brief the record substantiates the fact that these expenditures would and have attached business.

Brooklyn Borough Gas Company v. Prendergast,
16 Fed. (2d) 615 at 636:

The cost of *obtaining* the valuable, but intangible asset, which has come to be known as "going value," is not, in my opinion, to be confused with "pioneer losses," which the courts have held are not to be capitalized. I do not regard Woods' estimate of the amount of time, labor, and money necessary to develop the business as in any way the estimation of pioneer losses. It is a cost that must be met, if the business is to be successfully established. To hold such costs as losses, and deprive a utility of the advantages to be gained from such expenditures, would be manifestly unjust. Such costs have their reflection in going value. . . .

This is the principle upon which appellant proved the expenditure of slightly more than \$325,000, for the purpose of attaching business to its market. A court is not required to shut its eyes to certain practical facts. The Packers and Stockyards Division of the Department of Agriculture can point to no case where a successful stockyard has not been required, after its construction, to make grants and subsidies to at least one or more nationally operating packers and several commission men and yard traders. A packing plant represents a large investment and the packer must be induced to take the gamble of such a large investment at the new point. The commission man and yard trader must be induced to enter the new market and commence a buying demand which will attract others to that market. These grants and subsidies are not "gifts" as counsel calls them, in any true sense of the word. The *quid pro quo* received by the Yard Company is the buying outlet which is necessary to the existence of a market. There are three national packers

with large investments in plants surrounding the Denver market. At least three other national packers are constantly represented by order buyers. The record is full of uncontradicted proof of the strength of the buying demand on the Denver market. Valuation of appellant's property on the basis of present value of land plus unit cost of structures, with or without overheads, cannot reflect the going value of appellant's established business.

We are mindful of the language of this Court in the *St. Joseph* case, to the effect that the plaintiff stockyard had not established the existence of going value by clear and convincing proof of its existence. Whatever may have been the facts in the *St. Joseph* case, we respectfully submit that in a case of the nature of the case at bar, no burden is upon the Stock Yard Company to offer clear and convincing proof of going concern value. The case would be different had the Secretary denied that such a value exists in the plant, because then appellant would be under the recognized obligation of showing that such finding is not supported by substantial evidence. In the instant case, however, the Secretary makes no such finding, but, on the contrary (R 309 et seq) finds that such value does exist in appellant's plant. The rate investigation in which that finding was made was instituted upon the motion of the Secretary himself and without complaint. Under the Packers and Stockyards Act, the Secretary is without power and authority to change existing tariffs unless the rates are unreasonable and, in theory at least, the investigation, therefore, is for the purpose of determining whether or not the rates are reasonable. The law presumes an impartial investigation, and clearly in the first instance no burden of proof of sustaining the reasonableness of

existing rates is cast upon the Stock Yard Company. We submit that we are not called upon to prove the amount of going concern value. We agree that we do have the burden of demonstrating to this Court from the testimony of record that going concern value is not included in the valuations of property. The ascertainment of the amount of going value is for the rate-making body.

For example, suppose in this case that this Court finds from the evidence that the land was valued on the basis of bare land stripped of improvements at present value; that the structures were valued on the basis of unit costs and therefore that the finding of the Secretary that going concern value was included in these valuations is without foundation. The ultimate result of such a decision would be to cast upon the Secretary in the impartial investigation required by the Packers and Stockyards Act the duty of ascertaining in the next investigation the amount of excess allowance, whether or not it be called going concern value, which is included in the valuation to cover this element. Such a finding having been made, if the appellant then contests it, it will be the duty of appellant to offer clear and convincing proof that the amount of excess so found is not the fair and reasonable amount of its going concern value. That, however, is not the instant case. In the rate investigation here involved, appellant did offer proof of the cost of attached business in an effort to have the Secretary give proper consideration thereto and include some such amount in the rate base of appellant. The Secretary failed to do so and contents himself with stating that the valuations as made on the basis of reproduction cost less depreciation of physical assets adequately covers this element, *without being*

able to point to a single item of excess value to which such label can be attached. We again point out to this Court, as mentioned in our first brief, that it is contrary to the theory of going concern value to hold that it is a depreciable asset affected by lapse of time unless there be proof of a stagnant or retrogressing enterprise. No such proof is in the record, and yet the Secretary depreciates 20% the items of overhead which are the only items to which Government counsel can possibly point as including this element of going concern value.

We submit that the findings of the Secretary are contrary to the evidence and no argument or cited authority in the brief of defendants destroys this position.

III.

THE CHARGE TO YARD TRADERS.

This section of the brief of defendants, commencing on page 83, does not meet either the argument made or the authorities cited in Section IV of appellant's brief. Government counsel's argument, like the findings of the Secretary, is not grounded upon the evidence of record.

On page 85, counsel say that there is a separate division within that part of the stockyard known as the cattle division which is called the trader division and cites page 240 of the record as authority for this statement. *That page of the record is the finding of the Secretary to which we take exception in this case and which assertion is unsupported by the evidence.* It is the "questioned document", so to speak, and cannot properly be offered to prove the questioned facts.

There is no separate trader division in the sense implied by the Secretary or by Government counsel, i. e.

of a facility or block of facilities constructed for them to enable them to conduct their business in the yards. There is a trader division during the period of heavy receipts, just as there is a commission men's division and a packers' division, but none of these so-called "divisions" are set aside for the purpose of aiding the packer, the commission man or the trader to engage in business on the Denver market, or for the purpose of granting any such class a special privilege in aid of his business. *As stated in our first brief at page 72, pens are allocated by the Yard Company to the packer, the commission man and the trader for the Yard Company's own orderly operation and management of its business and its yard and for no other purpose. No member of any of these classes, nor the class itself, acquires or has any right, title, or interest, by way of lease or otherwise, in any pen or block of pens.*

Government witness Christensen (R 416) testified concerning the allocation of pens, as a result of which these so-called divisions occur; thus:

It is part of the program of management of the yards for the utilization and orderly conduct of the Yard Company business. Yes, the Yard Company can change these assignments at any time it sees fit and apparently does so.

And again at page 419:

When I spoke in my report of packer pens, I did not mean that they are leased to the packers but are only assigned to them in the orderly operation of the Yard by the Yard Company.

Julius Wolf, the only trader who testified in this case, stated (R 993):

When I said a moment ago that "our men drive them to our pens," I mean by that the pens that have been allotted to us by the Stock Yard Company. We have no lease on those pens and they can take them away from us and do take them away from us when they need them and make us yard our cattle some place else, in a good many instances, especially when there is a large run.

Mr. Pexton, assistant general manager of appellant, also testified (R 887) that the allocation or assignment of pens to commission men and traders is for the convenience of the company and its efficient handling of the patrons' cattle.

We repeat, there is no foundation whatever for either the statement of counsel or the findings of the Secretary that the trader is given or has a "division" of our "valuable facilities" yet this is the sole ground for the Government claim that the trader receives free service and hence is the recipient of a discriminatory privilege unless charged therefor. It is misleading to say (brief of defendants, bottom of p. 85) that during the light season, traders are allocated pens in the commission section of the yards "*to avoid the necessity of driving live-stock to the trader division.*" This implies a permanent trader division which is temporarily abandoned during the season of light receipts. Nothing could be farther from the fact, as the above testimony shows.

At the top of page 87 of their brief, counsel say that the trader operates on both sides of the market, that as buyers they afford part of the market outlet and compete with other buyers. Counsel say that in his selling operations, the trader is a competitor of ship-

pers who have livestock on the market for sale. Analyze these statements in the light of the evidence.

Government witness Christensen (R 421) and all producer witnesses (R 691, 791, 802, 942) testified that the buying outlet—a strong buying demand—is what the shipper wants and must find in the market he patronizes. The stronger buying competition the better the price to the seller (R 791). From this standpoint, therefore, the trader is beneficial to the shipper.

But, a market, particularly in the range country as distinguished from the corn belt or feed lot country, which has a buying demand only from order buyers or for uniform lots of livestock, is only partially fulfilling its public function and duty. The order buyer dealing solely on commission, has little or no capital investment and buys livestock of a particular type for particular orders. He is not in position to, nor does he, buy odd lots and out of these odd lots sort and accumulate uniform lots of livestock. During the range cattle peak season of September to December, the bulk of the shipments contain odd lots. That is the way the shipper sends his livestock in and yet they must be absorbed. Cattle cannot be sorted either on the range or at the loading point (R 942). The yard trader's most important function is to buy odd lots and clean the market (R 942, 947). At Denver or at any range market, the trader is essential. Producers would not ship to a market where the trader demand was light (R 802). So from this further standpoint, the evidence shows that the trader is not only beneficial but essential to the shipper.

Now, the shipper is neither blind nor stupid. He knows that when a trader buys, the trader must sell.

His sale to the trader is on that known basis. His approval of and demand for the trader as a part of the market outlet is on that known basis. There is not the slightest factual or legal basis for the separation and segregation of the trader function indulged in by the Secretary. The evidence in this case shows that the producer or shipper knowingly and willingly pays in the marketing charge assessed against him for whatever is necessary to secure and insure the full operation of the trader's function (R 792, 943). The trial court in its opinion (R 1273) cited this fact as proof that the trader was receiving free service and therefore is the recipient of a discriminatory privilege. This we submit is erroneous. If I willingly pay a price which includes a service for another whose business will further my own, that service is not "free" in any true sense, nor does it result in any undue discrimination against me. That, we insist, is the shipper-trader situation in the case at bar.

But the Secretary and counsel say the trader competes with fresh arrivals on the market and that this is detrimental to the shipper's interests. If he does ~~so~~ compete, that is intended by the shippers and the trader's buying service could be held to have been paid for on that basis. No shipper has yet complained. The Government offered no proof either of the extent of such competition or of its existence. The cross-examination of appellant's witnesses does not show that such competition is otherwise than slight (R 691, 797, 1019).

The argument of counsel for defendants does not meet in any manner the argument contained in appellant's brief commencing on page 71, that the charge, which is made by appellant and called by the Secretary

a "yardage charge", is assessed only when the shipper's livestock is sold and is in fact a marketing charge. It is a charge for the use of the market and not for the use of facilities only. It includes the cost of the Yard Company in furnishing all services necessary to effect a speedy and complete marketing of the livestock received.

Counsel say at page 92, that the yard trader, while being a purchaser, is also a seller and that the existing rate structure does not treat both or all classes of sellers alike. It is true that part of the yard trader's function on the market which, as we have shown, is thoroughly understood by the shipper and intended by him, is to sell or otherwise dispose of the shipper's livestock which the trader, in performance of his function, has absorbed. The record demonstrates, however, a very decided difference between the shipper as a seller and the yard trader as a seller. The shipper ships his livestock, in practically all instances, to his agent, the commission man, for sale. These cattle are therefore offered generally on the market and use the market machinery. The yard trader, on the other hand, as fully established by the evidence, is familiar with demands of persons not at the market and either because of orders in his pocket, in which case like the order buyer, he buys and ships out or because of contacts outside the market, he obtains those orders after he has absorbed the cattle (R 691, 797).

Mr. Wolf, the trader who was called by appellant, has sufficient volume (25,000 to 30,000 head annually) so that his firm does not exercise an order buying function but is purely a yard trader. Commencing with page 989 of the record, he describes his market function and

particularly the trader method of selling. He points out that after he buys cattle, he calls his clients in the country by telephone, and knowing their needs (R 991), resells without those men ever coming on the market, that only 3% of his total purchases (R 992) are sold "out of our alley to people who casually come in" and those are not even reweighed but sold on original weights. We submit that the evidence clearly establishes a vast difference between what the Secretary designates as the two classes of sellers.

At the Denver market, different from the St. Joseph, Omaha, Kansas City and Chicago markets, when the trader does appear on the market as an ordinary seller comparable to the shipper, and sells through a commission man, *he pays the full marketing charge the same as any other shipper.* We are mindful of the fact that in the note appearing at the bottom of page 84 of the defendants' brief, it is stated that the Secretary's schedule of rates has always been treated by the Government as authorizing the full charge on livestock resold through commission men and that in counsel's supplemental brief filed in the trial court, the Government stated that the Department so interprets the rate schedule. If so, then not only the stockyard companies at St. Joseph, Omaha, Kansas City and Chicago, but also the yard traders are misinformed. It must be admitted that livestock sold by the yard traders through commission men is "resold livestock" and in the rate order in this case appearing at page 346 of the record, it is provided:

Yardage will be charged as shown below:

- (1) On livestock received and sold at these yards, also including livestock resold through commission firms. . . .

Rail:

Cattle\$.30 per head
 Calves (under one year old)20 per head

Resold and/or Reweighed for purposes of sale:

Cattle\$.15 per head
 Calves (under one year old)10 per head

Trucked in or driven in:

Cattle\$.35 per head
 Calves (under one year old)25 per head

Cattle purchased by the yard trader are purchased from a commission man and if the Government's contention is correct, that first sale is the one which comes under the heading of arrivals by rail. The exact contention made by the Government as the basis for the imposition of this charge is that the cattle are "resold". The transactions, therefore, clearly fall within the resale provisions of the rate schedule. It is the rate schedule which must be published and posted. There is nothing under the Packers and Stockyards Act which provides for the posting of an informal interpretive construction.

At pages 83-84 of defendants' brief, it is stated that appellant does not question the Secretary's estimate of the product of the rates and that obviously no question of confiscation is raised because the Secretary reduces no rates. It simply authorizes the imposition of charges which had not hitherto been made. No error is assigned in this appeal involving the estimated amount which would be raised by the Secretary's rate to yard traders.

The ease with which this charge can be avoided by purchases in the country or by selling on original weights is too plain for any argument. The point was raised and relied upon in the court below. If we are correct in our contentions that the yard trader's function is included in the marketing charge, then this double exaction is improper and results in a reduction *pro tanto* of the existing rate schedule. For example, it is part of the cause of the reduction of the cattle rate from 35c to 30c per head.

The *St. Joseph* case is not decisive and neither is the Omaha decision of *Tagg Bros. & Moorhead v. United States* 29 Fed. 2nd 750, cited by defendants. At St. Joseph a half yardage charge was being assessed against the yard trader even where the livestock was resold as planted livestock through commission men. The question there in dispute is clearly shown in the opinion of this Court, 298 U. S. 38 at page 70:

The appellant insists that the secretary overestimated the income from this source by \$20,803. The controversy is over the number of livestock to which the charges for resales or reweighs for the purpose of sale would apply.

In the Tagg Bros. case, commission charges and not any charge imposed by the stockyard company were involved, and it was found that the commission men were only charging half commission to yard traders on livestock sold by the commission men for the yard trader. Both these situations, we would agree at once, are discriminatory in the extreme but we submit, conversely, that the practice as in force at Denver of treating all sellers alike when they utilize the machinery of the market and charging the same marketing charge

to all such sellers is not discriminatory. Since it is not discriminatory and is established both by the evidence of producers as well as by the testimony of the management, that the practice is one desired by the producers and is in furtherance of the efficient marketing of livestock, we submit that it is a matter which falls within the discretion of the management. The Secretary is without jurisdiction to change it in the absence of clear and convincing contrary evidence. Such evidence cannot be found in the record. We repeat, that the interference with existing rates must be based upon evidence and that those rates cannot be changed or reclassified upon the whim of the regulatory body.

IV.

LAND VALUATION.

The Government replies to our contention that the testimony of Government witness Zelinski is not substantial evidence:

1. That his admitted lack of knowledge of local conditions is immaterial;
2. That he is a graduate civil engineer with long land appraisal experience in railroad work under the Interstate Commerce Commission;
3. That he has been accepted as a qualified witness in the Omaha and St. Joseph cases;
4. That appellant's witnesses considered earning power and intensive use as elements of value contrary to the rule of The Minnesota Rate Cases.

We will answer these briefly and in that order.

(1) Counsel quotes the statement of the trial court (R 1271-1272) that Mr. Zelinski's lack of familiarity with local conditions is as immaterial as is the fact that the three experts offered by appellant "never valued any other stockyards before, either in Denver or elsewhere." We submit that this demonstrates an erroneous viewpoint affecting the court's decision. The question at issue was the present value of *this particular* tract of industrial land in Denver, Colorado. The question was not what its value might be as a stockyard compared to stockyard values in Denver or elsewhere.

The record does show that Mr. Eppich, one of appellant's experts, had appraised this land in 1920, again in 1925, again in 1930 and had made this appraisal in 1935 (R 776). Mr. Eppich has been on the City Zoning Board since 1925, and thrice Chairman thereof. In addition, he had had thirty-eight years experience in real estate and appraisal work in Denver (R 775). With this background, he spent one month in the current appraisal of appellant's land.

Mr. Newcomb, another of appellant's witnesses, with thirty-three years experience in the real estate business in Denver, had made two other appraisals of appellant's land (R 750), had been familiar with it for over twenty years, had long and extensive experience in the appraisal in Denver of industrial tracts (R 748-750).

Mr. Ivins, the third of appellant's land witnesses, had had twenty-four years experience in the real estate business in Denver and eighteen years industrial appraisal and assemblage experience (R 698). Some of his sales of trackage property had been made within the month prior to his current appraisal (R 699, 700).

Contrast Mr. Zelinski with any one or all of the above witnesses. He spent about two weeks on the appraisal (R 497) of 131 acres of industrial property in Denver, had never been in Denver before (R 497, 517), and did not investigate the values of other large industrial tracts (R 516, 517). Mr. Zelinski may be an outstanding appraiser of railroad rights of way, but it is folly for either the trial court, the Secretary or his counsel to brush aside as immaterial the admitted lack of familiarity of the Government witness with local values and local conditions.

(2) — We admit that Mr. Zelinski is a graduate civil engineer with years of experience with the Interstate Commerce Commission. This shows his educational basis or capacity for knowledge, but does not demonstrate the existence of that degree or type of special knowledge which gives probative force to his opinion on land values.

Appellant accepted Mr. Zelinski's figures as to the reproduction new cost of the structural property because it appeared from the evidence, and from his testimony that he had written to brick manufacturers, cement and lumber companies and had ascertained the delivered cost of those materials at the stockyard in Denver, Colorado, and also because he had written labor union officials in Denver, Colorado, and other employment sources, to discover the then present wage scale and labor cost in Denver, Colorado. This familiarity with local conditions qualified his opinion as to structural property. It is this absence of knowledge of local conditions with regard to land values which disqualifies his opinion.

(3) True, Mr. Zelinski's testimony was accepted

by the trial court in the *St. Joseph Stock Yard* case (9 Fed. Sup. 322, 333) but there is nothing in the reported case to show that his testimony was attacked on the ground of a lack of familiarity with local conditions. His testimony in that case was offered in connection with or corroborated by Mr. Mack, a local appraiser. The situation is entirely different in the instant case.

In the *Omaha Stock Yard* case (*Union Stock Yards Co. of Omaha v. United States*, 9 Fed. Sup. 864 at 874, 875) the trial court overruled plaintiff's objections to Mr. Zelinski as a witness. We submit that the *ratio decidendi* was that the determination of the adequacy of the qualifications of the witness is for the Secretary, and that the court could not interfere with that determination. We respectfully show that the rule of *Spiller v. Atchison, Topeka & Santa Fe Railway Co.*, 253 U. S. 117, 130, has been modified in this particular by the decision of this court in *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38, 52, where the right of a competent court to examine the weight and sufficiency of the evidence introduced before an administrative tribunal is clearly and unequivocally sustained in all cases where it is charged that the administrative action goes beyond the limits of constitutional authority. That is charged in the case at bar.

Government counsel have cited no cases holding or tending to hold that knowledge of local values and familiarity with the property in question is not a prime essential to give probative force to the testimony of one who expresses an opinion on the value of land. The necessity for such local knowledge is shown in the following statement of the general rule (11 R. C. L. Sec. 56, p. 638) :

In regard to property value, the standard of qualification of the witness cannot usually be fixed very high. Not only are professional appraisers or dealers in the class of property in question competent as witnesses but also others who have bought and sold similar property, or who know the price paid therefor, even though that knowledge is based on secondary evidence, *provided of course, they are familiar with the property in question.* (italics ours)

(4) The fourth and last question raised by Government counsel on this point is that appellant's land appraisers considered earning power and intensive use, contrary to the rule of *The Minnesota Rate Cases*, 230 U. S. 352.

These witnesses made the statements cataloged at page 105 of the defendants' brief but these isolated statements are pulled out of their context. Bearing in mind that the rule of this Court as expressed in *The Minnesota Rate Cases*, *supra*, recognizes as an element of value the peculiar adaptability of the land for any particular use, these statements come within that rule. The explanation is clearly given by Mr. Ivins, one of the appellant's appraisers, thus (R 746):

What I meant when I answered Judge Miles and stated that if pens were constructed on Zone 3 it would increase the value of Zone 3, is that any appraiser in appraising land for industrial uses necessarily figures into his valuation the potential value of the site. Perhaps I should not limit this solely to industrial appraisals. Here in Denver we use statistics covering the number of people passing certain corners, and

these figures are compiled by the University of Denver School of Commerce. I think these facts are recognized by all appraisers. The same thing is true in a certain measure in industrial property. If a particular site has clearly a highest and best use, I do not believe any appraiser can overlook the utilization of the tract, and therefore its potential value or potential earnings to a concern engaged in the highest and best use. If pens were on the tract north of Race Court in Zone 3, it would mean that the highest and best use, which all of us, including the Government appraiser, have recognized, namely the stockyards use, had come up to some of the potentialities as we saw them, viewing the land as naked land on March 23, 1935, and since those potentialities would have actually been realized by the construction of pens, this area would have tied in closely and become a part of the main area as an enlargement of that area. Hence, the value of Zone 3 would then more nearly approach the value of the main tract than it did on March 23, 1935. He (Mr. Zelinski) stated with regard to Zone 9 that the potentialities of that zone for small retail store business was what led him to give the greatly increased value which I spoke of yesterday, or about \$6,000 an acre over the value he assigned to Zone 1. Except for the three stores he mentioned, those stores do not exist today on Zone 9, any more than those pens exist on Zone 3, but I take it that Mr. Zelinski and I are looking at it in the same manner necessary from the standpoint of potential intensive return from the highest and best use.

What is the rule of *The Minnesota Rate Cases*? We respectfully suggest that it has been and is as seriously misconstrued and misapplied as any decision of this Court has ever been. So far as the valuation of land is concerned, the rule is that land should be valued for rate-making purposes at its fair value, and that all pertinent facts and circumstances tending to establish that value, one of which facts is the sale price of adjacent similar lands, must be considered. Special adaptability to a particular use or uses is also to be considered and weighed. It must not be forgotten, however, that this case involved a public utility exercising a delegated governmental function in connection with which it had and could exercise the governmental prerogative of eminent domain. Hence, when the railroads in that case sought to have included in the land value of their rights of way, an excess allowance arising, as they claimed, because the railroad is "held up" and must pay more than the fair market value to acquire its rights of way, the Court very properly disallowed this claimed excess. The basis for the disallowance is sound, namely, that the railroads, clothed with the power of eminent domain, have it in their power to compel the acquisition at not more than the fair value. At page 451 of 230 U. S. the Court says:

It is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities.

It would be free to stand upon its legal rights and it cannot be supposed that they would be disregarded.

It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. (citing cases) If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (citing cases) But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained.

The appellant stockyard, in the instant case, exercises no governmental function and does not have the power of eminent domain. It has no club with which to control the market price, and we submit that under those circumstances, there is nothing in *The Minnesota Rate Cases* which makes improper the consideration of potential use and present intensive use as elements of value since such factors are recognized and considered by every reputable appraiser of industrial land.

In the note at the bottom of page 104 of defendants' brief, counsel say we take comfort from the fact that Mr. Zelinski gave weight to erroneous figures in one instance, but that the Secretary "recognized this error and considered the value as being \$16,000." We do take comfort from that, for two reasons, first, because it shows a failure to check and give weight to comparative

sales, and second, because on the witnesses' own statement it demonstrates the propriety of at least the higher value recognized by the trial Examiner but wholly disregarded by the Secretary and the trial court.

Anyone familiar with local values would have recognized that \$6,000 was too low a land value and hence, that something must be wrong with the reported figures. Such a suspicion never crossed Mr. Zelinski's mind, never before having appraised any land in Denver. He might have found his error had he checked the sale with either the vendor or vendee. He did neither (R 512 Fol 524). The corrected figures show a sale at \$22,300.00 per acre, instead of \$8,400.00 per acre, and the witness himself said that such a difference would have "some effect" on the unit value of the Zone (R 516). The trial Examiner gave effect to this (R 88) and increased the value of Zone 1, \$500.00 per acre and made corresponding increases in Zones 2 and 9, also affected by the Murphy sale. It is true that the Secretary, in paragraph 112 of the Order (R 295) recognizes that the sale consideration was \$16,000.00 and not \$6,000.00 but he then adopts the value given by Mr. Zelinski without any increase whatever, which the witness said should be made in such case. The Secretary does not give effect to this increased sales price in his valuations of Zones 1 and 2, but on the contrary, eliminates the adjustments made by the examiner (c. f. R 76, 80, 285, 287). The differences between the Examiner's findings and those of the Secretary are indicated by italics on the pages above cited.

The question returns to this:—Is one who has no familiarity with local values and local conditions a qualified land valuation witness and does the record

demonstrate such lack of that special knowledge as to render Mr. Zelinski's evidence not substantial. We submit that it does, and the findings and orders based thereon cannot stand.

V.

EXPENSE ALLOWANCE

Under this heading, the Government replies to subdivisions V and VI of appellant's brief (pp. 85-93, inclusive), relating to the so-called Dues, Donations and Subscriptions account, and to the expenses of this rate investigation.

The Government first points out that in our exceptions to the Examiner's tentative order, we asked for an annual allowance of \$5,000.00 whereas we now say that \$8,000.00 is the proper amount to amortize the expenses of the rate investigations. If, in view of the record and of the cases cited in our first brief, it is now believed that five instead of eight years is the proper period over which amortization should occur, no inconsistency with the principle at stake is engendered thereby. *The fact remains that no allowance to amortize these expenses over any period of years was made by either the Secretary or the trial court.* This, as we have shown, is contrary to law.

It is next said that the items involved are too insignificant to indicate confiscation. That the items involved under the heading of "Dues, Donations and Subscriptions" are relatively trivial in amount is admitted (see brief of appellant p. 85), but in a case of this nature they are far from insignificant. On the contrary, they are very significant of the arbitrary nature of the findings and order as a whole. Courts are not

concerned with the amount of confiscation, but with the fact of confiscation. Invasion of constitutional rights is not measured in dollars and cents.

As stated in our first brief, the excess over a bare $6\frac{1}{2}\%$ return is \$2,046.00. The eliminations of which we here complain total \$11,000.00. They exceed this "excess allowance" by approximately \$9,000.00 or the equivalent of \$137,000.00 of rate base value at $6\frac{1}{2}\%$. It cannot be said that it is either insignificant or non-confiscatory. The cases cited by counsel in the note on page 108 of defendants' brief are not in point. No claim has ever been made that the bill in this case was defective or insufficient, as in the Poresky and Spielman Motor Company cases. * The remaining cases go to the proposition that the legislative branch of the government has wide discretion so long as its acts avoid confiscation. There is no disagreement on that principle. We repeat, these cases are not in point.

Counsel says on page 110 that the method followed by the Secretary was the same as in the Omaha and St. Joseph Stock Yards cases. The *method* may be the same but the basis of application must have been very different. In the St. Joseph case, ** the trial court held that it was sustained *by the evidence*. There is no evidence to sustain it in the present case.

The record shows that under the heading of "Dues, Donations and Subscriptions", the Secretary and the court excluded the following recognized business expenses (R 577 et seq. also appendix brief pp. 118-121):

* Ex parte Poresky 290 U. S. 30; Spielman Motor Co. v. Dodge, 295 U. S. 89, both cited p. 108 of defendants' brief.

** 11 Fed. Supp. 322, affirmed 298 U. S. 38.

Denver Chamber of Commerce—	
Membership dues	\$240.00
U. S. Chamber of Commerce—	
Membership dues	50.00
Junior Chamber of Commerce—	
Membership dues	15.00
American Stockyards Association—	
Members Assessment	832.56
Denver Traffic Club—Membership	18.00
Denver Commercial Traffic Club	
Membership	18.00
State Brand Inspectors—dinner	70.00
Denver Live Stock Exchange—	
Membership	95.53
Denver Tourists Bureau—	
Subscription and dues	100.00
	<hr/>
	\$1,439.09

In addition to the above, the record shows the disallowance of \$2,171.50 of charitable donations, including \$1,000 to the Community Chest. The record shows, at the places cited in our first brief, that each of the business expenditures have to do with broadening the outlet for livestock while each of the charities operate in the stockyards area and care for or assist the employes upon whom the patron depends for proper handling of his livestock. We submit that the evidence does not support the findings in this case and we deny that the Secretary has, by law, the discretion to decide that expenditures are improper when the uncontroverted evidence is to the contrary.

The management and control of the business and of the expenses thereof, within legal limits, is still vested

in the Board of Directors, so long as they act in good faith. As stated by the late Judge McDermott in *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735 at 753;

If the stockholders or directors of a corporation are willing that their corporation do its part, in a reasonable way, in carrying the public load of the community the prosperity of which is closely interwoven with its own, it would seem to be an exercise of managerial power not subject to the veto of a public official concerned only with the protection of the public against extortion.

As to the litigation expense, counsel attempts to minimize the situation by saying that up to the present hearing here has been but one hearing in fourteen years, hence the likelihood of expense in the future is slight. Perhaps present counsel are unfamiliar with the history of this Bureau. The Act was passed in 1921. The first attempted regulation of a stockyard was in 1926, and dismissed in no uncertain terms by Secretary Jardine in 1927 (B A I Docket 116). Then followed the first St. Joseph case in 1929, and in quick succession the first Denver case. Since the decision in that case, in April 1932, except for a brief space, appellant has been constantly engaged in a rate investigation with the Secretary, *and all without a single complaint having been filed by any patron.*

Furthermore, this statement does not ring true in the light of the Government testimony. Dr. Dozier, the Government economist, said that the rate would remain in effect four or five years (R 613, 625). The certainty of repeated rate controversies was recognized

in *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 at 753, 754. Because of changing conditions, periodic investigations are inherent in rate matters.

In the note appended to page 112 of the brief of defendants, counsel say the stipulation showing the costs of the present litigation to be \$40,329.27 was not before the Secretary, and is not in sufficient detail to be analyzed. This comes with poor grace. Of course it was not before the Secretary. It relates largely to a subsequent time and could not be. Prior to the argument in the trial court, Government counsel asked plaintiff if it intended to introduce any evidence other than the official transcript of the evidence taken by the Examiner. The reply was in the affirmative, saying plaintiff would introduce evidence of the application of the Secretary's rates and of the costs of litigation. To save time at the trial, it was suggested that these be reduced to stipulations. This was done. The Secretary reserved the right to object on the grounds of materiality and relevancy but *no such objection was interposed at the trial* and no request for more detailed information was made. Counsel should not now be permitted to attack the facts set forth in that stipulation. These establish that the cost to the plaintiff of the present litigation is \$40,439.27.

The cases cited in our first brief establish the propriety of amortizing litigation expense over a five year period. That such a period is reasonable in this case is apparent both from the history of this litigation and from the testimony of the Government rate expert. The first investigation was in 1930, the second was five years later. Dr. Dozier testified that he was giv-

ing his testimony on the basis of a rate of return which would remain in effect "from four to five years." It is prudent business on the part of a utility to resist the imposition of any rate which it may have reasonable ground for believing to be confiscatory. *Mobile Gas Co. v. Patterson*, 293 Fed. 208, 224. Charges incurred in defense of its security and perhaps of its very life are as necessary as any expenses could be. *West Ohio Gas Co. v. Public Utility Commission*, 294 U. S. 63, 74. The Secretary and the court dismissed these items of expense either on the ground that they were improper or non-recurrent. The fact remains, however, that no adequate consideration was given thereto and the findings should not be permitted to stand.

VI.

THE RATE OF RETURN.

The issue is squarely presented by the brief of defendants: Is a rate of return confiscatory which yields less than an annual average of $6\frac{1}{2}\%$ upon the value of the property devoted to the public service? It is admitted that the Secretary's proposed schedule during the two years of 1935 and 1936 would have returned 6.1% in 1935 and 6.74 % in 1936, or an average of 6.42% for the two years (brief of defendants, p. 124) and 5.68% and 6.33% respectively, or a flat 6% average (brief of defendants, p. 124 note) if the average stock show income be eliminated from the income account on the accepted principle that the exclusion of property requires the elimination of income derived therefrom.

Again using the gross income and expense figures in the stipulation (R Vol. II, p. 362), if instead of elimin-

ating the stock show income, the depreciated value of the show properties of \$244,500 (brief of defendants, p. 34) be added to the rate base as fixed by the Secretary, the rate of return for 1935 and 1936 would have been 5.6% and 6.2% respectively, or an average of 5.9%. If going concern value in the amount of \$325,000 be also added to the rate base, the returns for the two years would be 5.06% in 1935 and 5.6% in 1936 or an average of 5.33%. Manifestly, there is no lee-way or liberality in these rates.

Shortly after taking this appeal we informed the Government that we might endeavor to bring into our first brief, the 1937 figures and asked if the Government would be willing to stipulate as to them. The Attorney General replied that the Government could not agree to any figures without checking the books and that due to the shortness of time, that was not feasible. It was stated that if we included such figures without such audit and check, the Government would probably object on the ground that such data is not in the record. We do not criticize the Government for this stand. It was and is entirely proper but we mention it so that the lack of this information will not be unexplained to the Court.

The Government argument in support of the 6½% rate of return of the Secretary appears to be that the evidence would support a rate of 6% (brief p. 117) and that the rate of 6½%, therefore, is a liberal return "upon a business which enjoys a virtual monopoly with no prospect of competition." The opinion of the trial court (R 1276) is cited as authority for the last statement.

The 6% return is based upon the testimony of Dr. Dozier, the economist of the Bureau of Animal Industry, Packers and Stockyards Division, who stated that the holder of common stock was entitled to the same return as a holder of the preferred stock of appellant (R 644). This is contrary to recognized and accepted principles. A senior security, with a guaranteed return, has a lower yield than a junior security such as a common stock. The truth of the matter is that the witness was hard put to justify his decrease from a rate of return of from $7\frac{1}{2}\%$ to 8%, which he testified to be the reasonable rate in the 1930 hearing, to a rate between $6\frac{1}{2}\%$ and 7% to which he testified in this hearing.

Dr. Dozier predicated his statement of the 1% drop in rate of return upon certain tables relative to the yield on Government bonds, public utility bonds and stocks, and industrial bonds and stocks (R 615-622). The yield on Government bonds has no pertinency on the question of the yield required to obtain public credit in a private industrial concern. It was pointed out in our first brief that the public utilities and industrial companies listed and considered by the witness were in no instances comparable to the appellant and this was admitted by the Government witness (R 640, 641). It would seem, therefore, that the testimony of Dr. Dozier that the rate of return had decreased from 1930 to 1934 "about one per cent" is a conclusion or opinion of the witness, predicated upon dissimilar facts and tables. His testimony on cross-examination, showed that even his tables did not justify his conclusion. He testified that of the public utility bond issues listed by him, 25% yielded to the investor in 1934 more than 6%, while in 1930 there were only 2.4% of such issues

having a 6% yield. In industrials, 33-1/3% of the issues yielded over 6% to the investor in 1934 against 7 1/2% of such issues with a like yield in 1929. Having introduced the figures on direct examination and stated that he considered them, he admitted on cross-examination that there were more high yield industrials in 1934 than in 1929 and 1930 (R 638, 639). These tables, therefore, do not indicate a 1% drop in the rate of return.

As to common stocks, when the tables are analyzed, the same situation is portrayed (R 647). He further testified that his tables showed a higher average cost of capital in 1934 than in 1929 and admitted this did not indicate a decrease in the rate of return to investors (R 653).

In spite of this testimony, the witness stated that in his opinion the fair and reasonable rate for four or five years in the future would be a rate which would give an annual average return from 6 1/2% to 7% (R 613, 614). He testified that below 6 1/2% the rate would be outside the zone of reasonableness (R 651). By stipulation of the Government (R 354-362) as well as by admissions in the brief (p. 116) it is established that the average return which would have resulted from the application of the Secretary's rates during the two years immediately following the hearing, is 6.42%, even with the stock show properties eliminated and the show income included. Not only is this below the lowest bracket of the "zone of reasonableness" as testified to by any witness, but also it is lower than the rate of return fixed by the Secretary at the Omaha, St. Joseph and Sioux City markets, and agreed to at the Cleveland market. We submit that if the Secretary's findings

must be grounded upon evidence of record, then this finding and this rate of return is arbitrary, unreasonable and confiscatory.

The statement of the trial court, cited by counsel, that appellant enjoys a "monopoly with no prospect of competition" was not made a part of the Findings of Fact, nor could it properly be made a part thereof. It is not supported by the evidence.

Dr. Dozier, the Government witness on the subject, testified (R 653-655) that appellant had no franchise and that no certificate of convenience or necessity is required before a new stock yard could be started, that the shipper has complete freedom of choice as to the market to which he will ship his livestock and that appellant is in competition with nine other central markets (R 663). Mr. Pexton, assistant general manager of appellant, testified that the Denver market is in competition with auction sale rings which have sprung up all over the territory, the competition of which is increasing (R 816); that it is in constant competition with direct buying, which is likewise increasing (R 816, 817) and that all of these factors demonstrate that Denver has no monopoly (R 817, 1035, 1036). Dr. Dozier testified in the 1930 hearing that Denver was in the most competitive position of the ten central markets with the exception of the St. Joseph market, and Mr. Pexton testified that the same is true today (R 1036).

In spite of this testimony in the record, the trial court, in its opinion (R 1276) said "We take *judicial notice* that the plaintiff enjoys a monopoly with no

prospect of competition." Manifestly, this is erroneous. A court cannot take judicial notice of a proposition which is contrary to fact. This error undoubtedly colored the court's finding supporting the Secretary's rate, just as it now forms the basis of the Government's argument on this point. Where there is a grant of a monopolistic franchise, a lower rate of return is proper due to the sovereign's guarantee of freedom from competition in the same industry. We mean by this that although a light and power company may have to compete with coal in a particular community, the franchise protects it from competition in the same community with another light and power company. The protection and lessened competitive hazard warrants a lower service cost to the sovereign people from whom, through their representatives, the franchise was received. That is the basis for counsel's argument (brief p. 120) that "the return of $6\frac{1}{2}\%$ is a liberal return on a business such as appellant's which enjoys a virtual monopoly with no prospect of competition." The error in the statement is that *appellant's business is not of that sort*, as demonstrated by the record. The argument therefore falls.

Far from being liberal, we submit that the schedule of rates does not even return the average rate of $6\frac{1}{2}\%$ and that the findings fixing and upholding this rate and rate schedule are confiscatory.

CONCLUSION

For the reasons stated herein, and in appellant's first brief, we submit that the judgment of the trial court should be reversed and the enforcement of the Order of the Secretary of Agriculture of February 17, 1937, should be permanently enjoined.

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Counsel for Appellants.

PERSHING, NYE, BOSWORTH & DICK,
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Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1937.

—
No. 798.
—

THE DENVER UNION STOCK YARD COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA AND SECRETARY OF
AGRICULTURE, *Appellees*.

—
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.
—

SUPPLEMENTAL MEMORANDUM OF APPELLANT.

—
ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
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Counsel for Appellant.

PERSHING, NYE, BOSWORTH & DICK,
Of Counsel.

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SUPPLEMENTAL MEMORANDUM OF APPELLANT.

Appellant asks leave of the Court to file this supplemental memorandum, due to the effect upon this case and certain of the issues herein of the decision of this Court entered yesterday, April 25, 1938, in case No. 581, entitled *Fred O. Morgan, et al., v. The United States of America and the Secretary of Agriculture*.

The points to be now raised are not covered by the briefs on file in this case, the appellant feeling itself barred from raising them by its interpretation of the decisions of this Court in *Acker v. The United States*, 298 U. S. 426 and *Morgan v. The United States*, 298 U. S. 468. In the *Acker* case there were no proposed findings, and in the decision of this Court in the *Morgan* case just referred to (298 U. S.

468) it was stated that while the filing of proposed reports was good practice, this Court could not say that it was essential to the validity of the proceeding. Accordingly, while the points here raised were presented to the trial Court and overruled by it (R-1255), no argument thereon is contained in either the original brief or the reply brief of appellant. The matters are, however, covered by assignments of error (R-1277, Assignments Nos. 6, 7, 10, and 16).

Each of the points to be briefly presented herein involve the fact that while the Secretary in this case did file proposed findings (R-22 *et seq*) those findings were changed adversely to appellant in the final findings and order in essential particulars although no exceptions were taken by appellant against those particular findings. This the appellant asserted and now asserts was arbitrary action on the part of the Secretary. The two findings referred to relate to condition percent (R-97, Finding 123) and rate of return (R-115, Finding 156).

There was one further finding, namely that involving the valuation of land, where the Secretary still further reduced the value of the used and useful land below that found and stated in the proposed findings (R-77, 79, 88, Proposed finding 93, 97, 113; R-285, 287, 296, Final findings 93, 97, 113). In the case of land valuation, however, appellant had excepted to the proposed findings on the ground that the entire land valuation figure was too low and not supported by the evidence. As stated above the Secretary further reduced the land value.

With regard to condition per cent, the unexcepted to proposed finding was 84 per cent. The Secretary reduced this to 80.545 per cent, resulting in a reduction of the structural value in the rate base of approximately \$80,000. In the rate of return, the proposed finding was $6\frac{3}{4}$ per cent, which the Secretary reduced to $6\frac{1}{2}$ per cent, resulting in a reduction in the annual fair return of \$14,225.00, or equal to over \$200,000.00 of rate base value.

With regard to the land valuation, the amount of the further reduction by the Secretary from the valuation stated in the proposed findings was \$500.00 per acre in zone 1, \$1,000.00 per acre in zone 2, and \$754.00 per acre in zone 9, or a total reduction of \$42,181.00 below the valuations of the proposed report.

We submit that if, as stated in the *Morgan case* No. 581, (decided April 25th 1938) it is arbitrary and a denial of due process for the administrative tribunal not to prepare and tender proposed findings it is equally arbitrary to change proposed findings adversely to the appellant where the proposed findings were not excepted to but, on the contrary, were accepted by the utility. Unless this be the fact it is useless to file proposed findings. Likewise, unless this be the fact, and a litigant be safe in relying upon the proposition that an unexcepted to proposed finding will be entered as part of the final order he is not safe in doing otherwise than filing exceptions to the proposed findings in their entirety, whether or not they are acceptable to him.

Suppose, further, that to avoid further litigation, or for any other reason, appellant had elected to accept *in toto* the proposed report. Any other rule than that which we have stated above, and which is now given sanction by the decision of this Court in the *Morgan case, supra*, would permit the Secretary to enter a final order totally different from that proposed and accepted. As a matter of fact, under the procedure of the Secretary of changing unexcepted to findings, appellant has lost over \$280,000.00 of rate base value in lowered per cent condition and lowered rate of return. The reason why there is only \$14,225.00 of difference between the fair return as proposed and the fair return as finally fixed by the Secretary is that appellant, at the oral argument, presented proof of the expenditure since the hearing of \$22,500.00 for a bridge and \$24,000.00 for a sewage disposal plant required by city ordinance, and these were included in the Secretary's final order, while not, of necessity, included in the proposed report.

As stated in the *Morgan case* (Case 581, page 5):

Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Again at page 6 of the opinion:

The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

At the conclusion of the hearing before the Examiner, the fair and cooperative attitude of The Denver Union Stock Yard Company, appellant herein, was recognized by Government Counsel and made a part of the official record at page 1221.

This spirit of fair play, however, was not continued by the Secretary. We submit that it was arbitrary in the extreme to change the proposed findings as to per cent condition and rate of return adversely to appellant after their acceptance by appellant. The cogent reasons contained in the proposed report on the value of land in Zones 1, 2 and 9 were brushed aside in the final report. We submit that these changes under the circumstances of this case, constitute a denial of due process, justifying the setting aside of the Secretary's order.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 798

THE DENVER UNION STOCK YARD COMPANY,
APPELLANT

v.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the District Court of the United States for the District of Colorado (R. 1263) is reported in 21 F. Supp. 83.

JURISDICTION

The decree of the District Court was entered on December 20, 1937 (R. 1256). Petition for appeal was filed January 18, 1938, and was allowed on January 20, 1938 (R. 1259). The jurisdiction of this Court rests upon Section 316 of the Packers and

Stockyards Act, 1921, c. 64, 42 Stat. 159, 168 (U. S. C., Title 7, Sec. 217). By this section the provisions of law relating to the enjoining and setting aside of orders of the Interstate Commerce Commission are made applicable to orders of the Secretary of Agriculture entered under authority of the Packers and Stockyards Act.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, commonly known as the Commerce Court Act, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Tit. 28, Secs. 41 (28), 47), transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all suits to suspend or set aside an order of the Interstate Commerce Commission should be heard by three judges. Provision was made by the Urgent Deficiencies Act for direct appeal to this Court (U. S. C., Tit. 28, Secs. 47, 345 (4)).

QUESTIONS PRESENTED

1. Whether the railroad rights of way, the loading and unloading facilities, chutes, chute pens and alleys, and the land on which they are located are used and useful in the rendition of stockyard services, and whether the action of the Secretary in

excluding the value of such property from the rate base was lawful (appellant's brief, pp. 55-66; *infra* pp. 20-34).

2. Whether the stock-show property is used and useful in the rendition of stockyard services and whether the action of the Secretary in excluding the value of such property from the rate base was lawful (appellant's brief, pp. 31-54; *infra* pp. 34-54).

3. Whether a sufficient allowance has been made by the Secretary for going concern value (appellant's brief, pp. 12-30; *infra* pp. 54-83).

4. Whether the evidence sustains the finding of the Secretary that the appellant's practice of giving free service to yard traders is unjustly discriminatory (appellant's brief, pp. 67-84; *infra* pp. 83-100).

5. Whether the evidence supports the Secretary's valuation of the land of appellant which was used and useful for stockyard purposes (appellant's brief, pp. 93-96; *infra* pp. 100-106).

6. Whether the prescribed rates include an adequate allowance for dues, donations, and subscriptions (appellant's brief, pp. 85-89; *infra* pp. 106-112).

7. Whether the prescribed rates include an adequate allowance for expenses of hearings under the Packers and Stockyards Act (appellant's brief, pp. 89-93; *infra* pp. 112-115).

8. Whether the return of 6 $\frac{1}{2}$ % employed as a rate factor by the Secretary is reasonable and substantiated by the evidence (appellant's brief, pp. 96-101; *infra* pp. 115-124).

9. Whether the rates prescribed by the Secretary, if applied to the volume actually received subsequent to the test period, would have yielded an amount sufficient to cover all reasonable expenses plus a fair return upon the fair value of appellant's used and useful property (*infra* pp. 124-126).

STATUTE INVOLVED

The pertinent portions of the Packers and Stockyards Act, 1921, are set forth in Appendix A to this brief (*infra* pp. 127-130).

STATEMENT

Appellant is a corporation engaged in the operation of a stockyard which renders services as defined in the Packers and Stockyards Act, 1921. Its stockyard is located in the city of Denver, Colorado. On November 8, 1934, the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness and lawfulness of the rates and charges of appellant's stockyard (R. 3-4). Pursuant to the notice a hearing at Denver, Colorado, before an examiner designated by the Secretary was commenced on June 3, 1935, and concluded on July 3, 1935 (R. 4).

Testimony was taken with respect to all questions pertinent to the determination of fair and reason-

able rates. Appellant and the government introduced in evidence 118 exhibits containing 4,000 pages, including land appraisals, reports of engineers as to structural values, etc., studies of depreciation of appellant's structures and other documentary material. On October 28, 1936, a tentative report was served on the appellant (R. 5). The appellant filed exceptions to this tentative report. On January 7, 1937, pursuant to the request contained in these exceptions, the respective counsel presented oral arguments before Harry L. Brown, Acting Secretary of Agriculture (R. 5). On February 17, 1937, Harry L. Brown as Acting Secretary of Agriculture issued his "Findings, Conclusion and Order" (R. 229-352).

On March 9, 1937, appellant commenced this suit by the filing of a petition in the District Court of the United States for the District of Colorado to enjoin the enforcement of the order of February 17, 1937 (R. 1-22). The petition contained the customary prayer for convoking a three-judge court and asked for an interlocutory injunction and a permanent injunction against the enforcement of the order (R. 20).

An interlocutory injunction was granted by the District Court on March 9, 1937, enjoining the enforcement of the rates and charges prescribed by the Secretary pending the disposition of the case in that court. The appellant was required to furnish an adequate bond to assure refunds to the shippers of livestock if the order is upheld (R.

353). On June 22 and 23, 1937, the cause then proceeded on final hearing before a statutory three-judge court sitting as the District Court for the District of Colorado (R. 1256). On October 8, 1937, the District Court rendered its opinion (R. 1263-1276), and on December 20, 1937, entered its findings of fact and conclusions of law (R. 1248-1256) upholding the order of the Secretary and rejecting all of appellant's contentions. By its decree the court dissolved the interlocutory injunction (R. 1257), but upon motion of appellant and agreement of the government this provision of the decree was stayed for a period of thirty days subsequent to December 20, 1937 (R. 1262-1263). In its order allowing an appeal the District Court further provided that the interlocutory injunction should continue in full force and effect until the final determination of the appeal by the Supreme Court of the United States (R. 1259).

At the hearing before the District Court there was introduced in evidence an abstract of the record of the 1935 hearing before the Secretary and the voluminous exhibits. It was provided by stipulation that the exhibits introduced in the District Court should be transmitted to this Court as original exhibits and that they should not be printed (R. 1306).

The relative yield of the prescribed rates compared with the rates existing when the order was entered is shown in detail in Appendix E of this brief (*infra* pp. 135-136). In this appendix an

application has been made of the prescribed rates and the existing rates (described therein as "Rates under Investigation") to the volume of livestock used by the Secretary as a rate factor. It appears that, as applied to the volume used by the Secretary as a rate factor, the old rates would have produced \$579,342 revenue and the prescribed rates would have produced \$530,117, thus effecting a reduction of \$49,225 annually. In terms of percentages the prescribed rates would produce 91.5% of the revenue produced by the old rates. Thus the reduction amounts to 8.5%.

It should also be noted at this point that as applied to the business of the year 1935 the prescribed rates would have produced a net operating income of 6.10% of the fair value of appellant's property as determined by the Secretary, and that as applied to the business of the year 1936 the prescribed rates would have produced a net operating income of 6.74% of such fair value. The matter of the return which the rates would have yielded in the years 1935 and 1936 is amplified in Point VI (*infra* pp. 124-126).

The pertinent facts in this case are stated in the findings of the District Court (R. 1248-1254). Inasmuch as most of the issues on this appeal require discussion of the facts in connection with the argument, it would unnecessarily prolong this brief to undertake at this point to make a further separate factual statement. Accordingly, further recital of the facts will be left to the portions of the brief devoted to argument.

SUMMARY OF ARGUMENT

This case presents to the Court the ordinary issues of valuation and fair return in a stockyard rate controversy. The issues are whether the valuation of appellant's property, upon which the Secretary of Agriculture has based the maximum rates described in his order, is constitutionally sufficient, and whether those rates, in view of the volume of business to be anticipated, and after the deduction of proper charges for operating income, will yield to appellant a constitutionally adequate return on the value of its property.

The Secretary found and employed as the basis of his order a value of \$2,792,700 for appellant's property used and useful in the rendition of stockyard services. In spite of the fact that many of appellant's structures were built many years ago when labor and materials were considerably less expensive than at the present time, the Secretary used as the basis of his valuation reproduction cost unmodified by any considerations of original or historical cost. The Secretary's development of the rate base proceeded as follows: On the basis of the evidence before him the Secretary determined that the total cost of reproduction new of appellant's used and useful property, including overheads, was \$2,530,201. To this figure the Secretary added \$2,283 as a net addition on account of an inventory correction in the water and sewer systems, bringing the total to \$2,532,484. The Secretary also found that the evidence demonstrated that a condition per

cent of 80.545 was proper in this case. Applying the condition per cent of 80.545 to \$2,532,484, the Secretary found the total cost of reproduction new, less depreciation, to be \$2,039,789. Adding to this \$536,825, which figure represents the Secretary's valuation of the land which he found to be used and useful, plus \$30,267 to cover one year's interest on the used and useful land during the construction period, and \$139,300 as an allowance for working capital, the Secretary reached a figure of \$2,746,181. Further additions in the amount of \$22,500 for a bridge and \$24,000 for a sewage disposal plant brought the total fair value of appellant's property to \$2,792,681.

Appellant claims that the Secretary improperly excluded from the rate base as not used and useful the value of certain railroad trackage, loading and unloading docks, chutes, and chute pens, together with the value of the land upon which these facilities are located, and that therefore the rate base should be increased by \$177,108, the value of this property as contended by appellant. Appellant also claims that the Secretary improperly excluded from the rate base as not used and useful the so-called "stock-show property." It contends that \$219,033 should be added to the rate base as the value of the land and structures of this property.

Appellant further claims that the rate base should be increased \$325,000 as a separate additional allowance for going concern value. The Sec-

retary contends that a liberal allowance for going concern value has been included in the valuation of those items employed to compose the rate base and that therefore no separate additional allowance is necessary. Appellant claims that the Secretary's finding that approximately one-half the prescribed charge on sales by producers is the proper charge to be imposed on yard traders was an improper invasion of the functions of management and that it was confiscatory and discriminatory. The Secretary contends that this charge was effected to prevent discrimination and an unequal burden on those using the facilities of the yard. The remainder of appellant's contentions as to the inadequacy of the Secretary's rates to yield a fair return revolve about estimates of land valuation, exclusions of certain expense items, and a discussion of the rate of return found to be proper and its application to the volume of business reasonably to be anticipated. These questions are developed in detail in the portions of the argument devoted to that purpose.

In view of the fact that the record fully sustains the Secretary's order upon any theory of judicial review, the question of the scope of judicial review is not separately considered in this case. A more detailed summary of the government's position on the principal questions presented follows:

I. THE PROPERTY THE VALUE OF WHICH WAS EXCLUDED BY THE SECRETARY FROM THE RATE BASE WAS NOT USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES

A. *Exclusion of the value of property used for transportation facilities*

It is conceded by appellant that the controversy on this point is largely academic and that no issue of confiscation arises or exists. This is true because the income from this property, which was also excluded, was more than adequate to earn a fair return on the fair value of this property. Apart from this, however, the Secretary's exclusion from the rate base of 8.985 acres of land upon which these transportation facilities are located was proper. The trackage is leased from appellant by several railroad companies and the services relating to the loading and unloading of livestock are performed by appellant in accordance with a contract between it and these companies. The transportation itself and the connected services of loading and unloading are not "stockyard services" as defined in Section 301 (b) of the Packers and Stockyards Act but are a part of transportation under Section 15 (5) of the Interstate Commerce Act. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 133; *United States v. Union Stockyard*, 226 U. S. 286; *A. T. & S. F. Ry. Co. v.*

Kansas City Stock Yards Co., 33 I. C. C. 92; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. The ownership of this property as applied to transportation is immaterial. The test is the function for which the property is used. The statutes and cases referred to definitely establish that this property is indispensable to the proper prosecution of transportation. It is equally clear that the services performed are employed in aid of this function and are not stockyard services. For these reasons the Secretary properly excluded the value of this property from the rate base.

B. The Secretary's exclusion of the value of the stock-show property, consisting of 2.633 acres of land and structures located thereon, was proper because this property is not utilized in the rendition of stockyard services

Appellant's entire argument is built upon the educational and advertising effect of the stock show. This is no indication that the property is used in rendering stockyard services, which is clearly demonstrated by virtue of the fact that the livestock consigned to the market for purposes of sale never goes near the stock-show property. Moreover, the stock show is conducted by the Western Stock Show Association which is separate and distinct from appellant and which conducts

an entirely different business that is separately managed. It is also of importance to note that the show is carried on during only eight days of the entire year. Appellant's contention that the Secretary has included income which it alleges to be attributable to the stock show is unwarranted by the evidence. Whatever revenue is derived in the main stockyard during the period of the show is *stockyard*, not stock-show, revenue. The business from which it is derived is *not handled on property which has been excluded from the rate base*, but is performed in the yards.

II. THE SECRETARY PROPERLY REFUSED TO MAKE A SEPARATE ADDITIONAL ALLOWANCE FOR GOING CONCERN VALUE OVER AND ABOVE THE AMOUNT THEREFOR WHICH WAS INCLUDED IN THE ITEMIZED PROPERTY APPRAISAL EMBRACED WITHIN THE RATE BASE.

The Secretary's valuation includes a substantial amount for going concern value which is inextricably interwoven with other values employed on the basis that the stockyard business was established and operating successfully. The liberality of the Secretary in using reproduction cost as the measure of structural value without giving consideration to other factors such as original cost is obvious in this case. Other instances of liberality, such as the addition of construction and general

overheads in the amount of 40.17 per cent of the cost of labor and material, clearly leave in the rate base an unlabeled margin adequate to cover the going concern element.

The Secretary refused to make a separate additional allowance for going concern value and we submit that none was required in this case. It is our belief that the decisions of this Court establish the proposition that rate regulatory bodies are not required to make separate allowances in rate bases for going concern value over and above recognition and consideration for that factor in other valuations, particularly where that separate allowance is based upon mere speculative and theoretical conjecture. The inclusion of a separate allowance is not required unless the evidence clearly demonstrates that by reason of an inadequate valuation the result is confiscatory. No such evidence exists in the instant case.

III. THE MAXIMUM RATES AND CHARGES PRESCRIBED BY THE SECRETARY ON LIVESTOCK RESOLD OR REWEIGHED FOR PURPOSE OF SALE ARE LAWFUL AND ARE SUSTAINED BY THE EVIDENCE

The Secretary found that the appellant had not been assessing a "yardage charge against traders' livestock" resold or reweighed for purposes of sale except that resold in the commission division. As a result, he prescribed a schedule of rates to be

charged against such resold or reweighed livestock at substantially one-half the regular yardage charge. The Secretary found as a fact that a substantial portion of appellant's yards was being used by these yard traders. He also found that appellant's policy of allowing the traders the use of yard facilities without charge was unjustly discriminatory to those who were charged for such use. The evidence sustains these findings of the Secretary and clearly reflects the reasonableness of the maximum rates required by his order. Conditions at the Denver stockyard with respect to arrangements for yard traders, their relationships to producers and others, are not substantially different from those at other stockyards where charges for livestock resold or reweighed for purposes of sale are imposed upon yard traders. Similar charges were sustained in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, and *Union Stock Yards Co. of Omaha v. United States*, 9 F. Supp. 864. There is no merit in appellant's contention that these charges imposed upon yard traders will be passed on by them to the producers. Even if the contention were true, the considerations requiring the charge would still prevail. The contention made by appellant that the imposition of these charges will operate to drive the yard traders from the market is entirely conjectural. Such a result has not followed at other markets where similar charges have been imposed.

IV. THE SECRETARY'S DETERMINATION OF THE FAIR VALUE OF APPELLANT'S LAND WHICH IS USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES IS AMPLY SUPPORTED BY THE EVIDENCE

The Secretary found that the total value of appellant's land which is used and useful in the rendition of stockyard services is \$536,825. In doing so the Secretary adopted the valuation placed upon the land by the government's valuation engineer, Mr. Zelinski, whose qualifications have been approved by this Court in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 58.

Mr. Zelinski gave consideration to the topography, size, and shape of appellant's land and its location with respect to the railroads and packing plants to which its business is intimately related. He also gave weight to available city facilities.

It is apparent from a review of the evidence that appellant's appraisers committed substantially the same error as was condemned in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 59-60, when they took into consideration the so-called "stockyards" value of the property instead of the fair average market value and thus violated the rule established in *The Minnesota Rate Cases*, 230 U. S. 352.

V. THE MAXIMUM RATES AND CHARGES PRESCRIBED BY THE SECRETARY INCLUDE AN ADEQUATE ALLOWANCE FOR ALL REASONABLE EXPENSES INCURRED BY APPELLANT

The Secretary found that the reasonable expenses, exclusive of return on investment, which

should be covered by the rates amount to \$346,545. Appellant challenges the sufficiency of this allowance with respect to (1) the annual allowance of \$325 for dues, donations, and subscriptions, and (2) the annual allowance of \$1,200 for the cost of hearings under the Packers and Stockyards Act.

The Secretary allowed only such contributions as were of peculiar benefit to appellant's employees and patrons. It was his belief that other contributions should not be covered into the rates. The Secretary and the District Court were of the opinion that \$1,200 as an annual allowance on account of hearings under the Packers and Stockyards Act was sufficient in view of the infrequency of such proceedings.

VI. THE RATES FIXED BY THE SECRETARY ARE SUFFICIENT TO YIELD A FAIR RETURN ON THE FAIR VALUE OF THE USED AND USEFUL PROPERTY IN ADDITION TO ALL REASONABLE STOCKYARD OPERATING EXPENSES

The Secretary in arriving at the schedule of maximum rates which he prescribed as reasonable used a rate of return of $6\frac{1}{2}$ per cent. We submit that in employing this rate factor to arrive at the schedule of rates which he prescribed he acted reasonably and fairly. Substantial evidence in the record so demonstrates and supports his action. The rates arrived at in this manner and prescribed as reasonable by the Secretary were subsequently applied to the actual business re-

ceived by appellant during the years 1935 and 1936. They would have produced, according to stipulation, a return of 6.10 per cent in 1935 on the fair value of appellant's property used and useful in rendering stockyard services and a similar return of 6.74 per cent in 1936, or an average return for these two years of 6.42 per cent of the rate base as determined by the Secretary. It is submitted that rates which produce this return are not confiscatory in view of the fact that, as shown by the record, conservative investors have to be content with returns considerably less than 6.42 per cent.

ARGUMENT

I.

THE PROPERTY THE VALUE OF WHICH THE SECRETARY EXCLUDED FROM THE RATE BASE WAS NOT USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES

The Secretary found that 46.779 acres of appellant's 130.57 acres of land and the structures located thereon were not used and useful in the rendition of stockyard services (R. 271). The value of this excluded land and structures could not therefore be included in the rate base. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 57; *Los Angeles Gas & Electric Corp. v. R. R. Comm'n*, 289 U. S. 287, 311; *Houston v. Southwestern Tel. Co.*, 259 U. S. 318, 324.

Appellant has excepted to the exclusion from the rate base of the value of the land and structures leased to a group of railroads for use in rendering transportation services, and to the exclusion of the value of the land and structures owned by appellant and used by it in performing its contract with the railroads for the loading and unloading of livestock. Neither the property leased by the railroads nor that owned and used by appellant in connection with the loading and unloading of livestock by appellant for the railroads for compensation can be considered as used and useful stockyard property. The land and structures used by the railroads and those used in connection with loading and unloading of livestock are not employed in the rendition of stockyard services as defined in Section 301 (b) of the Packers and Stockyards Act as "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

Appellant has also excepted to the exclusion from the rate base of the value of certain land and structures known as the stock-show property. This property was excluded by the Secretary on the ground that it was not used and useful in the rendition of stockyard services as defined in Section 301 (b) of the Packers and Stockyards Act.

The aforesaid exclusions will be separately considered.

A. Exclusion of the value of the property used for transportation purposes or as transportation facilities

With respect to the Secretary's exclusion of the railroad land and trackage and of the land and facilities used for loading and unloading, it is conceded by appellant that only an academic controversy exists and that the action of the Secretary in this instance is not confiscatory (appellant's brief, p. 60).¹

Valuing this property on the basis of fair value as found by the Secretary it appears that appellant is earning approximately 10% on the fair value of such property. The only effect of including in the rate base property bearing a high rate of return and including the income from such property would be to indicate that rates lower than those prescribed by the Secretary might be justified.²

¹ Appellant has said in its brief at page 60:

The Secretary excluded from income and expense accounts of appellant all income and expense received or incurred in connection with the trackage. This is proper if the facility is to be excluded. As a matter of fact, the question is somewhat academic because that income is sufficient to return a fair rate upon the investment. It is to be noted that we do not in this instance allege that the action of the Secretary is confiscatory.

² The railroad property and the loading and unloading facilities may be valued in exactly the same way as appellant's other property. The fair value of the land occupied by these facilities is shown by the order (order, paragraphs 83-115; R. 277-297) and totals \$54,337. The total reproduction new cost of the structures is shown by the record to

Although the point is an academic one, as appellant concedes, the merits will nevertheless be discussed.

The findings of the Secretary relating to loading and unloading facilities are set out in Finding No. 40 (R. 245). Government witness Christensen, on cross-examination, described the so-called "chute alleys" as follows (R. 413):

* * * they are two parallel alleys, one serving the loading and unloading pens and then a parallel alley serving the stockyard pens parallel to the chute alleys. On Government Exhibit No. 8 the brown line covers a dotted line which represents the fences between the chute alleys and the stockyard alley, the latter serving the stockyard pens and the former serving the unloading chute pens. Yes, the fence is broken all along with gates.

be \$182,040 (Gov. Ex. 28, pp. S-2, S-6, S-8). Taking the reproduction new cost less depreciation (Gov. Ex. 28, pp. S-2, S-6, S-8), the present value of the structures is \$143,497. The total fair value of the property is the sum of the fair value of the land plus the fair value of the structures, or \$197,834. The average yearly net income from this part of appellant's business may also be computed from the record. The various sums for making up the gross income from this source are shown in Government Exhibit 38, pages 84, 96, 97, 100, 113. The various items of expense may be computed from Government Exhibit 38, pages 127, 128, 136, 137, 160, 163, 164, 171, 174, 175, 176, 234, 237, 243, 244, 263, and by making certain necessary computations and adjustments for depreciation, taxes, etc., it is possible to determine the total expense. The difference between the gross income and the total expense represents the net income.

The following table shows the result of the computations:

When the livestock are let through these gates on their way to the pens for loading, their transportation is begun; when they are let through these gates on their way from the pens into which they have been unloaded, their transportation is ended. The line of the fence broken with these gates is the boundary of the area excluded by the Secretary and is the only possible line of physical demarcation between transportation and stockyard functions (R. 245). Witness Christensen on direct examination testified, referring to the map which is Government Exhibit No. 8 (R. 391):

Units 32, 33, 34, and 35, and the chute alleys are comparable to what might be termed railroad depot facilities. They consist of the railroad loading and unloading docks and chute alleys which are adjacent to the

Annual average gross income (1930-1934)	\$66, 771. 73
Annual average total expense (1930-1934)	46, 212. 69
Annual average net operating income (1930-1934)	20, 559. 04
<hr/>	
Total fair value of railroad and loading and unloading properties	197, 834. 00
Annual average rate of return	Percent-- 10. 39

Appellant may contend that the profit on all "straw bales" sold by the stockyard company for the purpose of bedding cars should be allocated to the railroad property and loading and unloading facilities. While we do not have the exact figures for the years 1930-1934, it has been stipulated that the annual average profit from this source for 1935-1936 was \$5,046. If we assume that this figure represents the annual average profit from bedding sold in the years 1930-1934, it then becomes necessary to increase the annual average net income by \$5,046, making a total of \$25,605.04. On this basis the annual average rate of return is increased to 12.94%.

railroad docks. They are facilities and services furnished by the Stock Yard Company, used for loading and unloading and receiving and delivering by the railroads of livestock at the stockyards, consisting of the property commonly known as the C. B. & Q. Dock, the U. P. Dock, C. & S. or Quarantine Dock and the River Dock, including platforms, chute pens, and chute alleys providing means of necessary ingress and egress to and from said docks which serve the transportation facilities hereinbefore referred to. Without these docks and chute alleys and the loading and unloading services employed by the railroad companies, they could not receive for shipment or effect delivery of livestock at the stockyards.

All of these facilities are used by appellant in performing its contract with the railroads for loading and unloading livestock. The railroads pay appellant on a per car basis for performing this service (Gov. Ex. 5, p. 136). The charges are absorbed by the railroads or included in the freight rates. The Secretary has not assumed jurisdiction over such charges.

In the face of the decisions, later to be discussed, in which it has been held that loading and unloading facilities and services are part of transportation, appellant argues (appellant's brief, pp. 57-58) that, determining the character of facilities and services by their "use," the loading and unloading activities are "stockyard services" and not transportation services. The argument is based on the words of Section 301 (b) of the Act, defining such

services as "furnished at a stockyard in connection with * * * [handling] in commerce of livestock." The argument in effect is that all activities involving the use of any facilities at the Denver stockyard in connection with "commerce of livestock" are stockyard and not transportation services and that the facilities employed are stockyard and not transportation facilities (appellant's brief, p. 58).

Appellant in thus seeking to extend the jurisdiction of the Secretary ignores the fact that his jurisdiction is limited not only by the Packers and Stockyards Act but by the Interstate Commerce Act. Regulation of transportation services and jurisdiction over facilities used in rendering such services are expressly reserved to the Interstate Commerce Commission.

It is clear that not only the side tracks but the loading and unloading docks, pens, chutes, and alleys are transportation facilities as distinguished from stockyard facilities, and that all of the 8.985 acres were properly excluded by the Secretary as not "used and useful" in reference to "stockyard services or facilities furnished at a stockyard" (Packers and Stockyards Act, Sec. 301 (b)).

Our position in this respect is supported by a long line of authorities.

In *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U. S. 498, this Court said, referring to the Interstate Commerce Act (pp. 522-523):

The reasoning of the Commission is justified by the statute. It includes in the term

“railroad” “all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.”

See also *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641 (1930).

In *Dimmitt-Caudle-Smith Live Stock Commission Co. v. C. B. & Q. R. R. Co.*, 47 I. C. C. 287 (1917), the Interstate Commerce Commission declared (at p. 318):

* * * the transportation of live stock does not terminate until after the stock has been unloaded into suitable pens. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128; *United States v. Union Stock Yards Company*, 226 U. S. 286; *A., T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99. *The duty to unload stock into suitable pens includes the duty to provide such facilities and the means of reaching them, or else to hire those owned by others.* [Italics supplied.]

Section 15 (5) of the Interstate Commerce Act (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484; 49 U. S. C. sec. 15 (5)) provides in part:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

Prior to the enactment of the above section, this Court had said in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 133:

The railroad company, holding itself out as a carrier of livestock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving livestock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned.

Accordingly, it was held in that case (p. 136):

The transportation of livestock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be

delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

That the furnishing of facilities for loading and unloading livestock transported is a part of the transportation service was also held by this Court in *United States v. Union Stockyard*, 226 U. S. 286; *Adams v. Mills*, 286 U. S. 397, 410; *Atchison Ry. v. United States*, 295 U. S. 193. The Interstate Commerce Commission has many times held to the same effect. *A., T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I. C. C. 92 (1915); *Dimmitt-Caudle-Smith Live Stock Commission Co. v. C. B. & Q. R. R. Co.*, 47 I. C. C. 287, 318 (1917); *Chicago Live Stock Exchange v. Atchison, Topeka & Santa Fe Railway Company*, 52 I. C. C. 209 (1919); *Chicago Live Stock Exchange v. Atchison, Topeka & Santa Fe Railway Company*, 58 I. C. C. 164 (1920); *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330 (1935).

The line thus established as the dividing line between stockyard and transportation services has been retained under the Packers and Stockyards Act and has been maintained by the Interstate Commerce Commission and by this Court in determining the respective jurisdiction of the Interstate Commerce Commission and of the Secretary of Agriculture under the Packers and Stockyards Act. Section 406 (a) of the Packers and Stockyards Act provides:

Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

The Interstate Commerce Commission in *Strauss & Adler v. New York C. R. Co.*, 153 I. C. C. 609, 619 (1929), expressly rejected the contention that under the Packers and Stockyards Act jurisdiction of service charges for unloading and reloading livestock was in the Department of Agriculture, holding that unloading and reloading were included in "transportation." In *Atchison Ry. v. United States*, 295 U. S. 193, 201, this Court, in holding invalid a yardage charge sought to be imposed by a stockyard company on livestock of which delivery was taken by consignees at unloading pens, said (referring to Section 15 (5) of the Interstate Commerce Act and to the Packers and Stockyards Act, particularly Section 406 (a)):

The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is a place where transportation ends.

In *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, the Interstate Commerce Commission had before it the application of the Chicago Stock Yards Company for cancellation of tariffs filed with the Commission. The Chicago Stock

Yards Company owns railroad facilities which are leased to railroads and performs unloading services in the handling of livestock on a contract basis with the railroads in exactly the same way as does the Denver Union Stock Yards Company. The tariffs which it was seeking to cancel were for the loading and unloading services. The stockyard company urged the cancellation on the grounds that the services were not transportation services but were part of the stockyard services under the jurisdiction of the Secretary of Agriculture. The Interstate Commerce Commission rejected this contention and denied the application, saying (213 I. C. C. 330 at 340):

The services performed and facilities furnished by respondent were, at the time of the decision in the *Union Stock Yards case*, an inseparable part of the railroad transportation. And now this has been rendered more than ever true by the declaration in section 15 (5) of the act, the transportation wholly by railroad shall include delivery at public stockyards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments, without extra charge to the shipper. While, doubtless, the emphasis of the amendment is laid on the making of no extra charge, its purpose of obtaining that result is secured by declaring that the transportation by railroad shall include such service. We do not think that a

harmonious construction of the statute results from, on the one hand, an indisputable jurisdiction over the prescribed delivery into suitable pens, the same having to be treated as an inseparable part of the rail transportation to be furnished by the railroads without separate charge, and, on the other hand, the assumption that we are without jurisdiction over respondent in performing such part of the transportation and its charges therefor, which must be included in the line-haul rate. The Packers and Stockyards Act, August 15, 1921, expressly provides that nothing therein shall affect our jurisdiction or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within our jurisdiction. It is plain that Congress did not intend a neutral zone of no jurisdiction over respondent's charges and it is equally plain from the statement above quoted from *Atchison, T. & S. F. Ry. Co. v. United States, supra*, that jurisdiction over respondent's charges to "the place where transportation ends" was left with us.

It is immaterial whether the property utilized for transportation facilities and services is owned by the carrier itself or is leased by the carrier. Likewise, it is immaterial whether the services of unloading and loading are performed by the carrier's employees or by appellant's employees as they are at the Denver yards. Thus, in *Livestock*

Loaded and Unloaded at Chicago, 213 I. C. C. 330, 338, the Interstate Commerce Commission declared concerning unloading and loading which was done by respondent stockyard company under a contractual arrangement with carriers:

* * * the fact that such service is performed by respondent would not sever the service from the transportation by railroad. * * * The fact that the railroads must proffer the service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable.

Appellant bases its argument that because the land in question is owned by the stockyards company and not by any of the railroads furnishing transportation facilities the land should not be excluded from the rate base (appellant's brief, p. 60) upon an erroneous interpretation of the decision of this Court in the *Hygrade* case (*Atchison Ry. v. United States*, 295 U. S. 193) and of the decision of the Interstate Commerce Commission in *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. In these cases this Court and the Commission concluded that unloading of livestock into pens at the Chicago stockyard was a transportation service to be performed by carriers without extra charge to shippers or consignees, and that unloading and loading at that yard were transportation services for which the Union Stock Yard & Transit Company was required, as a common carrier, to publish and have on file with the Com-

mission schedules of its tariffs for those services. Appellant contends that both decisions were based upon the peculiar facts of the Chicago stockyard situation, particularly the terms of the corporate charter of the stockyard company and the intercorporate relations by which that company was a subsidiary of a holding company along with a railroad carrier. However, in *Atchison Ry. v. United States*, 295 U. S. 193, none of these facts was referred to by this Court. Furthermore, it is clear that the Commission reached its decision independently of the special facts mentioned above.

Therefore, appellant's assertion (appellant's brief, p. 60) that it never has represented itself as a common carrier is irrelevant. Moreover, appellant's argument shows that appellant obviously has confused the question of whether or not the Union Stock Yard & Transit Company in Chicago was a "common carrier" subject to the jurisdiction of the Interstate Commerce Commission with the question of what is and what is not included in the service of transportation. These questions are entirely distinct.

It is beside the point to argue, as appellant does (appellant's brief, p. 59), that the Interstate Commerce Commission does not have power to order the construction of spur tracks "located or to be located wholly within one State." Neither can the Interstate Commerce Commission order the construction of passenger depots, and yet these, it is

established, are inseparably component parts of interstate passenger transportation. *I. C. C. v. Los Angeles*, 280 U. S. 52, 70. As has been pointed out in *Western & Atlantic v. Public Comm.*, 267 U. S. 493, 497, the lack of power of the Interstate Commerce Commission to order the construction of spur or side tracks "wholly within one State" is because of the statutory prohibition in the Transportation Act of February 28, 1920, Section 402 (41 Stat. 474, 49 U. S. C., Sec. 1 (22)), under which positive compulsion by order, as in the case of passenger depots (*R. R. Comm. v. Southern Pac. Co.*, 264 U. S. 331, 345), is left to state agencies.

Appellant owns a system of railroad tracks which lie within the confines of its stockyard and the land on which these tracks have been laid. It owns no locomotives or other transportation equipment, but leases these tracks to a group of railroads under a joint agreement (R. 884; Gov. Ex. 5, p. 15; Respondent's Ex. 21).

These railroad facilities, all of which lie within the confines of appellant's yards and none outside (R. 884), constitute a web of switch tracks used by the railroads for shunting cars of livestock to and from the loading and unloading facilities and to and from the various packing and industrial plants adjacent to the yards. If the loading and unloading of livestock is a transportation service, as this Court has held, then of necessity the hauling by train of the livestock up to these loading and unloading facilities must be a transportation serv-

ice and the land and tracks used in accomplishing it are transportation facilities.

B. Exclusion of the value of the stock-show property

The Secretary has excluded from the rate base certain property and the structures located thereon designated as the stock-show property. This property is part of Zone 9. The Secretary found that 4.448 acres of land in Zone 9 and the structures located thereon devoted to the horse and cattle division were used and useful in the rendition of stock-yard services (R. 267, 268, 271). The stock-show property, the value of which the Secretary excluded from the rate base, consists of 2.633 acres of land on which are located a club and store building, a stadium, a sales pavilion, a stadium heating plant, a stock-show restaurant, a stock-show hog barn, and a stock-show wash house (R. 269, 271). The Secretary's findings respecting this property are set forth in paragraphs 68 to 71 and paragraph 75 of his order (R. 264-269, 271). The Secretary ascertained the value of the excluded land as \$40,143 (R. 296) and the value of the structures as \$204,372 on an appraisal of their reproduction cost new at \$253,737 (R. 299, 300) with a deduction for depreciation on the basis of a condition per cent of 80.545 (R. 304). The total value of the land and structures as depreciated therefore is \$244,515.

This property, which is used by the Western

Stock Show Association, a non-profit corporation, to conduct a stock show for eight days in January of each year, is rented by the Association from the appellant (Gov. Ex. 5, pp. 445-447).

How appellant acquired all of the stock-show property is not too clear from the record. It appears that in 1906 appellant started a stock show which at first was held in tents and temporary structures (R. 831). Steps were taken to provide permanent buildings and to see that the show became an annual event. In 1908, appellant built the stadium (R. 831, 1039). After attempting to operate the show appellant found the burden onerous and conceived the idea of promoting a new corporation to take over the work. The Western Stock Show Association was organized on the theory that it would be able to inspire the necessary public subscription required to finance the show and that prospective subscribers would not think that the contributions were for the benefit of appellant (R. 842, 970, 1040, 1041). The Association has no stock (R. 970), but membership in it was originally sold as a means of procuring money for the operation of the show, thus relieving appellant of that expense. Appellant's assistant general manager frankly admitted that this was "a clever move" on its part to free itself of certain burdens incident to the operation of the stock show (R. 205, 970).

The Association has a board of directors which consists of 39 members and which includes officers

of the stockyard, of the packing plants, of the Denver banks, and of railroad companies, producers of all kinds of livestock, and others (R. 842). The new Association built a stock pavilion with money solicited from the business people of Denver and afterward built a tile barn with excess revenue, constructing both the pavilion and the barn upon vacant land owned by appellant. Whether appellant leased the vacant land to the Association is not clear from the record, but it is clear that the Association was originally considered as having title to the pavilion. It also appears that the Association was considered as having title to the tile barn (R. 971). Just how the appellant acquired title to these properties is not indicated. Appellant's witness, Pexton, stated (R. 971):

Two or three years later [after the building of the tile barn] they had a deficit of some \$23,000 which the Stock Yard Company had to pay. We then took title to the barn. Because of rent they have not paid in the past we feel that the sales pavilion is ours, and we feel the same way about the tile barn.

This explanation does not seem very satisfactory from a legal as well as a business point of view, but appellant's present relationship to the Association seems to be that of lessor-lessee. Appellant annually leases the entire stock-show property to the Association for 75% of the net revenue of the show not to exceed \$7,000. A contract

executed between the two corporations fixes their legal relations with respect to the property (Gov. Ex. 5, pp. 545-547). Appellant is performing a function no different in renting its property to the Association than when it rents this same property to the West Side Athletic Club for the purpose of staging athletic contests (see Gov. Ex. 5 pp. 450-452). The business carried on in either instance is the business of renting certain property to outside enterprises. This is not a "stockyard service" and the Secretary refused to consider it as such.


It is manifest for two principal reasons that the Secretary was required under the Packers and Stockyards Act to exclude this property from the rate base: (1) the property is not used by appellant but by another corporation which is separate and distinct from appellant and which conducts an entirely different and separately managed business and (2) this property is not used to render stockyard service.

Little more need be said on the point that the stock show is not an integral part of appellant's business. It is apparent that it was not so regarded by appellant or its operation would not have been unloaded on a separate corporation. The stock show evidently was turned over by appellant to a separate corporation in order to rid itself of an onerous burden and to give control of the stock show to a greater extent to the community, im-

portant portions of which, like packing companies and their personnel, were as much interested in the show as the appellant. Consequently, even if the conduct of a stock show could be regarded as the rendition of stockyard services incident to the operation of a stockyard so as to fall within the regulatory jurisdiction of the Secretary under the Packers and Stockyards Act, that jurisdiction could not be exercised upon the appellant in reference to the stock-show project but would have to be imposed upon the Western Stock Show Association.

Entirely apart, however, from any question as to who is performing the functions of a stock-show enterprise, in the final analysis it is a test not so much of who performs the function as it is of *what function is performed*. Whether the Denver Union Stock Yard Company operates the stock show or whether that function is performed by the Association does not alter the fact that running a stock show is not performing a "stockyard service," defined in Section 301 (b) of the Act as "services or facilities furnished by a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock."

The shipper sending livestock to the Denver market as a general rule consigns it to commission men at appellant's stockyard. He does not



expect his livestock to use any part of the stock-show property. It is indisputable that livestock consigned to the market for purposes of sale *never reaches the stock-show property*. The only livestock which does reach the stock-show property is the fancy show stock which is brought there for exhibition purposes during the show week. It seems apparent that the exhibition of prize stock during one week of the entire year is as foreign to the marketing of the shipper's livestock consigned directly to the yards as is the maintenance of a veterinary college or agricultural school whose function it is to give advice which benefits the livestock industry.

Witness Christensen, a resident of Denver and a field assistant to the chief of the Packers and Stockyards Division, Bureau of Animal Industry of the Department of Agriculture, stated that he had been constantly engaged over a period of 16 years in supervising and extensively studying livestock markets and facilities at Denver, St. Joseph, Kansas City, East St. Louis, Omaha, Sioux City, Cleveland, and Wichita (R. 383-385). In speaking of the stock-show property and facilities, this witness stated that in his opinion they were not used and useful in the rendition of stockyard services (R. 393). He further stated (R. 395):

These facilities were not designed as a market place, for which purpose they would be superfluous and would not have been provided. They are used primarily by the

Western Stock Show Association for exhibition purposes and neither that company or any of its concessionaires are within the jurisdiction of the Packers and Stockyards Act or render stockyard services. When the facilities are not used by the Stock Show Association, some of them are used for yarding horses, but this is more than offset by the fact that practically all of the horse and mule division is vacated and utilized by the Stock Show Association during the Stock Show period. Occasionally the stadium is leased for athletic events but none of the facilities enumerated above is ever used in the rendition of stockyard services. In my opinion, and it is my understanding, that none of these units aid or facilitate or are necessary to the respondent in the rendition of stockyard services.

This witness further explained his position in this connection when he stated (R. 397-398):

Throughout my direct examination I have stated that certain properties, in my opinion, did not aid or facilitate and are not necessary to the respondent in the rendition of stockyard services. I have tried to classify and allocate the facility in accordance with the definition of the word "stockyard" in Section 302 of the Packers and Stockyards Act and in accordance with the definition of the term "stockyard services" in Section 301 (b) of the Act. I do not contend that a corporation engaged in operating a stockyard may not also engage in

other lines of business and own property and render public or private services not within the jurisdiction of the Packers and Stockyards Act, *but my thought is that used and useful facilities and services are those reasonably necessary in the rendition of stockyard services as defined in the Act and reasonably necessary for continuation of stockyard services for a reasonable period.* [Italics supplied.]

The fact that the buildings located on the stadium property stand idle during fifty-one weeks of the year³ is persuasive evidence that these properties do not subserve a stockyard purpose. That the District Court was fully cognizant of this fact is demonstrated by its opinion wherein it is stated (21 F. Supp. 83, 87; R. 1268):

Attention is also called to the fact that the show lasts for a week only and the lessee, the Western Stock Show Association, does not pretend to furnish any stockyard facilities. But even if it is a stockyard facility, *it is not available to patrons during the remaining 51 weeks of the year*, and a very small proportion of the livestock handled uses these buildings even during the week of the show. [Italics supplied.]

And in Finding 10 of its Findings of Fact and Conclusions of Law the court stated (R. 1252):

³ Except at such times as they are leased to persons for various purposes foreign to the stockyard industry, such as athletic contests, etc.

The so-called stock show property is unused except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. *The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show.* The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling of this livestock and the Secretary does not attempt to regulate the charges made in connection with the stock show. [Italics supplied.]

Apparently it is appellant's contention, from the great amount of testimony referred to in its brief (R. 685, 686, 794, 800, 940, 832, 834), that the promotion of the stock show is the performance of a stockyard service to shippers of livestock by bringing prize breeds of high quality stock to the show, by stimulating the interest of stock growers in producing a better quality of livestock, and by inducing buyers of such blooded stock to attend the show. Assuming that all this is accomplished, it merely indicates the *educational and advertising value* of the show. Conjectural advertising and educational values are not "stockyard services" within the contemplation of the Act. There may be some basis for considering a part of the cost of the

show as an advertising expense which warrants some contribution by appellant to the cost,⁴ but it offers no basis for concluding that the stock-show property is used and useful in rendering stockyard services to shippers who consign their livestock to the yard.

Appellant places much emphasis on testimony to the effect that the holding of a stock show has greatly benefited the livestock industry generally (appellant's brief, pp. 35-42), but this proves nothing beyond that fact. It does not show that the stock-show activities are stockyard services, for the same effects could be produced by other means, as, for example, by the publicizing of printed information on the breeding, raising, and marketing of livestock, or by providing short courses on these subjects similar to those afforded by agricultural colleges. Yet it is not to be supposed that appellant would contend that such activities would be stockyard services under the Packers and Stockyards Act. It is difficult, therefore, to regard as constituting persuasive argument to this effect either appellant's statement (appellant's brief, p. 43) that "Boys' and Girls' Club livestock (4-H

⁴ That it does make such a contribution in the form of services rendered without compensation is amply supported by the evidence. Appellant's officers render certain services to the Stock Show Association, some of its employees keep the Association's books, and others do certain work during the progress of the show. The expense incident to this work has been allowed to remain in appellant's stockyard expense account (R. 267).

Clubs) with registered pure-bred cattle, calves, sheep, hogs, and horses are exhibited in the structures in controversy (R. 967)", or appellant's citation that "The Department of Agriculture is spending considerable sums of money in an effort to induce cattlemen to raise a better grade of cattle" (appellant's brief, p. 46).

The stock show is an enterprise which ordinarily must be subsidized. Persons receiving benefits should bear the burdens of that subsidy. This class doubtless includes some of the patrons of the Denver Stock Yard Company, but these patrons who participate in the advantage of the show as exhibitors or visitors during the stock-show week constitute a very small percentage of those who pay rates for stockyard services. In this connection the Secretary, in commenting upon the great emphasis placed by appellant on the fact that the stock show had resulted in benefit to the industry as a whole, stated (R. 266-267):

* * * this is beside the point. The matter to be determined is whether or not respondent, who is a zealous member of the Stock Show Association (which assesses entrance fees, grants concessions for a consideration, and solicits contributions from various Denver businesses) should absorb deficits which occur in connection with the show and *pass those deficits on to all those who use the regular facilities of the yards.* [Italics supplied.]

It is manifestly unfair to tax the patrons of the Denver market for the cost of educating producers in general in the art of raising better livestock. The District Court found (Finding 11, R. 1252) that "Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole" and in its opinion stated (21 F. Supp. 83, 87; R. 1267):

There is considerable evidence that the show is a benefit to the industry as a whole, *as distinguished from the Denver yards in particular*, and tends to improve herds and to advertise Denver as a good cattle market. [Italics supplied.]

It follows that the assumption that it is the responsibility of the appellant to underwrite all deficits incurred by the Stock Show Association is to pass on to the patrons of the Denver market in the form of regular stockyard rates a financial burden which in justice they ought not to pay.⁵ If

⁵ Appellant states "that it is fair, reasonable and just for all livestock producers, *including those who do not attend the Show*, to pay their part of the costs thereof through rates because of the benefits received as members of the industry". [Italics supplied.] It further states that two producer witnesses, Mr. Mitchell and Mr. Farr, had so testified, and that "*there is no contrary testimony.*" [Italics supplied.] (Appellant's brief, p. 45.) The error of such an assertion is reflected in the testimony of another of appellant's witnesses, whose opinion was not proffered by appellant. At page 696 of the record Mr. Pace stated:

Yes, it is natural to believe that there would be some patrons of the Denver yards who wouldn't show at the

appellant is seeking some allowance for the stock show on the ground that the stock show is a philanthropic enterprise for the benefit of the livestock industry, it should ask that such allowance be included in the allotment for contributions. Appellant has already made a substantial contribution (*supra*, footnote 4, p. 43). If it is appellant's contention that the stock show increases the stockyard business, then it should request that a reasonable allowance be made for advertising expense as a charge against its income.* But neither of these arguments is persuasive for including the value of this property in the rate base as used and useful stockyard property necessary in rendering the services which a shipper purchases when he pays the stockyard rates.

Appellant points to the decision handed down by the District Court for the District of Colorado in 1932, 57 F. (2d) 735, 750, and quotes from the opinion to the effect that the business of appellant is entirely dependent upon the livestock busi-

Stock Show and who don't come to the Stock Show to either buy or sell, but then it is largely attended by people who do come for that purpose. No, I don't know the attendance nor the number who patronize the Denver yards by either buying or selling. .

It is my understanding that if he does not come here and if he does not patronize the Show nor buy any cattle, he wouldn't have anything to pay. [Italics supplied.]

* Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason. *West Ohio Gas. Co. v. Comm'n*, 294 U. S. 63, 72.

ness and that if that business perishes the appellant will perish, and if that business flourishes the appellant will flourish. From this premise appellant apparently concludes that the exclusion of the stock-show property and its structures from the rate base will cause its stockyard business to perish. We submit that this is gross exaggeration and a patent *non sequitur*.⁷ In the first place, the livestock industry in all its varied activity is one thing; the *stockyards* business is another—it is but a branch of the whole. The Secretary is not attempting in this proceeding to regulate the *entire livestock industry*.⁸ The legitimate scope of his regulation extends only to the *stockyard business*. Only the stockyard rates have been charged as unreasonable and in connection with stockyard rates alone is a change sought to be effected. It is therefore incumbent upon the Secretary to include as used and useful only such property and struc-

⁷ The experience of other markets demonstrates that a stock show is not an essential part of the stockyard business. St. Joseph, Sioux City, St. Louis, St. Paul, Cincinnati, Indianapolis, Cleveland, Jersey City, Buffalo, and Pittsburgh have no shows comparable to the one held in Denver (R. 966).

⁸ The Secretary has not attempted to regulate the stock-show charges or to determine the reasonableness of its rates, including admission charges, charges to concessionaires, entry fees to exhibitors, etc., or of its expenses, including premiums, judges' fees, advertising, rental, etc. The Western Stock Show Association does not purport to render stockyard service; if it did it would have to file tariffs with the Secretary of Agriculture, which it has not done.

tures as are embraced within the ambit of that business, *and that business alone.*

If the intimation of the appellant is that because the stock-show property and structures have been excluded it necessarily follows that the stock show will perish and with it the stockyard business, we submit that such a deduction is wholly unwarranted. And the only pertinent reply we can make is that there is not a scintilla of evidence in the record to substantiate such a view.

In *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, this Court, in considering the exclusion of a commercial hotel known as the Transit House, pointed out that special benefit to a few did not justify an annual levy on all patrons of the yards which would be occasioned by the inclusion of the Transit House within the rate base. At page 57 of the opinion this Court said:

The District Court held that it would have to be shown very clearly that the business of the yards would be materially affected by the absence of a nearby hotel before it could be said that its maintenance was so related to the stockyards business as to be properly included in fixing the rate for yard services. The court said there was no such showing. We take the same view.

We submit that appellants have failed to show that simply because a collateral activity to the stockyard business bestows an advertising and

educational benefit upon the *livestock industry as a whole* it follows that its curtailment will result in serious impairment to the *stockyard business of appellant*.

In commenting upon the exclusion of the stock-show property, the District Court said (21 F. Supp. 83, 87; R. 1268):

* * * hence we are not justified in overruling the Secretary, especially where, as in this instance, a stock show is not an indispensable facility and its exclusion does not affect the value of the property as an integrated and established enterprise. *Los Angeles Gas Co. v. R. R. Comm'n*, 289 U. S. 287.

Appellant further contends that the Secretary has assumed an anomalous position by excluding the stock-show property from the rate base and at the same time including what they allege to be income and expense *attributable* to that property. That this is a strained construction of the Secretary's order and a misconception on the part of the appellant is apparent from a reasonable inspection. First of all the Secretary has taken care to exclude all income fairly attributable to the leasing of property for the purpose of the show. The rental derived from the lease has not been included (Gov. Ex. 41, p. 2); neither have the expenses incurred incident to the services rendered by appellant's employees in connection with the show (R. 267). This raises the question whether there is any other income which should be credited to the show.

Appellant claims there is and points to its Exhibit 13 which indicates the excess earnings of the month of January over the average of the earnings of December and February for the period 1930-1935, inclusive. Appellant also cites the excess earnings of January 1936 over those of December 1935 and February 1936; and the excess earnings for the last two weeks of January 1937 over the average of the earnings for the last two weeks of December 1936, the first two weeks of January 1937 and the first two weeks of February 1937 (appellant's Exs. J and R). On this showing appellant grounds its contention that the excess earnings are derived because of the stock show. This contention necessarily proceeds on the theory that were it not for the stock show these increased receipts, realized in January, would not otherwise accrue to the stockyard company later. That this is a highly speculative and optimistic assertion is adequately demonstrated by the evidence. In the first place, appellant failed completely to adduce any evidence to substantiate its assumptions. Its own witness, Mr. Pace, demonstrated the high degree of speculation indulged in by appellant when he stated on cross-examination (R. 695-696):

It is a pretty hard question to say how many cattle come into the Denver yards on account of the Stock Show *that would not otherwise come*. I couldn't tell you as to how many or anything of that kind, but we

think that the receipts are very largely increased, but as to the amount, I wouldn't want to say. [*Italics supplied.*]

In this connection Mr. Bufkin, senior accountant for the Packers and Stockyards Division and an auditor in many rate investigations (R. 545), indicated (R. 577) that if it were the contention of appellant that the increased income derived during the period of the show would not otherwise accrue to the Denver market, it was incumbent upon it to prove such an assertion by its computations. This, we submit, appellant has failed to do in spite of the conclusions drawn by its witnesses. Appellant claims the conclusions are supported by "cogent reasons," but the record does not so demonstrate. It seems only fair to conclude that at best the show acts as an accelerating factor in stimulating increased activity during the period of its operation—activity which, were the show discontinued, would doubtless be distributed more evenly throughout the normal trading periods, cutting off the January peak and leveling out price fluctuations. One of appellant's own witnesses, Mr. Mitchell, definitely indicated that the practice is to hold stock in abeyance until the time of the show when he stated (R. 800):

Yes, to my knowledge livestock is held off the market for the Show. I hold my stock off year after year waiting for the Stock Show week to come.

At page 805 of the record this witness stated:

Yes, every year I hold back livestock for the Denver show, but I have shipments on the Denver market pretty near every week.

The action of this shipper is typical of a good many others. Is it reasonable to conclude from this that if it were not for the stock show the increased receipts of January would never accrue to the Denver market? It is more consonant with reason to conclude that it is the natural thing for shippers to withhold their cattle until show week when they can accompany them to Denver, deposit them at the yards, and then attend the show. It is their fiesta week, one of the get-together times (R. 695) when rodeos, exhibitions of prize stock, and other forms of attraction are offered for the public at large. Were it not for the show, receipts for January would in all probability be lighter. Such a concession, however, is certainly no reason for claiming that this regularly shipped stock would not come to the yards at a later time during the normal trading periods. No doubt the prize stock would not come to Denver, but with that we are not concerned. That type of animal is exhibited as a high quality breeder, and such of it as is sold is auctioned off at the show at prices in excess of the usual sales prices (R. 801, 802).

This is a function quite different from the services performed at the stockyard in connection with the stock consigned to that yard by its patrons for

sale. The evidence demonstrates that a high degree of speculation was indulged in by appellant's arrogating to the stock show the receipts *handled at the yard*. The testimony quoted or described by appellant (appellant's brief, pp. 50-52) fails to show any increase in *annual receipts* because of the stock show. It establishes only the fact that receipts are greater for January, when the show is held, than in December or February, subnormal trading periods. The important factor is that all of this volume of business is *regular stockyard trade* handled in the usual manner in the stockyard proper, paying the regular stockyard rates, and sold by commission men as other livestock is sold. *None of this business is handled on the property which has been excluded from the rate base*. Consequently, the income derived by virtue of the services performed *in the yards* is a *stockyard* revenue and is not, as appellant claims, stock-show revenue.

For these reasons the stock-show property is not part of appellant's stockyard facilities nor is it utilized in the furnishing of stockyard services within the meaning of Section 301 (b) of the Packers and Stockyards Act: (1) livestock consigned to the market for the purposes of sale never goes near the stock-show property; (2) whatever educational or advertising value the show has to offer is no indication that it is performing a stockyard service; (3) the Secretary is fixing stockyard rates, not rates for the entire livestock industry; and (4)

whatever increased revenue is derived during the period of the show is *stockyard*, not stock-show, revenue. Appellant has also failed to prove that this stockyard revenue would not accrue to the Denver market during the normal trading periods were it not for the acceleration offered by the show.

It is our contention that the Secretary, from a consideration of all the evidence adduced in this connection, properly excluded the value of this property from the rate base.

II

THE SECRETARY PROPERLY REFUSED TO MAKE A SEPARATE ADDITIONAL ALLOWANCE FOR GOING CONCERN VALUE OVER AND ABOVE THE AMOUNT THEREFOR WHICH WAS INCLUDED IN THE ITEMIZED PROPERTY APPRAISAL EMBRACED WITHIN THE RATE BASE

In arriving at the fair value of appellant's property, which is used and useful in rendering stockyard services, the Secretary stated (R. 311):

In adopting the cost of reproduction new less depreciation of structures and the value of land, as heretofore found with respect to structures, equipment, and land, consideration has been given to the element of going concern value. Adequate allowance for the element of going concern value has been included, although no separate item on its account has been set forth.

The District Court, noting that no separate allowance was made for going concern value, reviewed

the valuation process followed by the Secretary and found that his valuation represented the total fair rate base upon which appellant is entitled to earn a fair return. The finding of the District Court on this point is as follows (R. 1252-1253):

No. separate allowance is made for going concern value, but an allowance for going concern value is included in the total rate base upon which petitioner is permitted to earn a reasonable return. In addition the rate base includes among others such items as allowances for proximity to highways and railroads; freedom from floods; access to water supply and other city services; favorable location in regard to related industries; and the effect of the city zoning ordinance; its availability for a stockyard and as an assembled tract as distinguished from several tracts in separate ownership. Also included is construction overheads, general overheads, and 5% in addition for omissions and contingencies, omitting, however, organization expenses. Consideration was given to the peculiar climatic conditions of Denver as affecting rot, rust, and decay; \$30,267 was added to cover interest on used and useful land during the construction period and \$139,300 added for working capital. The result arrived at is the sum of \$2,792,700 as a fair rate base upon which petitioner is entitled to earn a fair return.

In its opinion the court pointed out that the rate base as determined by the Secretary includes a complete recognition of going concern value and

that appellant failed to offer convincing proof of error (R. 1271). The substance of appellant's complaint is that the Denver Union Stock Yards Company has a going concern value of not less than \$325,000, and that the Secretary's failure to make a separate allowance for this item results in confiscation (appellant's brief, p. 28).

The Secretary was fully cognizant that appellant is a going concern with an established business, an operating organization, connected customers, and in a position to earn a fair return under reasonable rates (R. 309). The Secretary's detailed findings with respect to going concern value are set forth in his order (R. 309-312). It is clear from a reading of this portion of the order that the Secretary very carefully considered all the evidence adduced in this connection and treated the element of going concern value in exactly the same manner as it was treated in valuing the St. Joseph stockyards. See *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38. Although the Secretary expressly rejected the contention that a separate allowance of at least \$325,547 should be added to the rate base for going concern value (R. 310), he adopted a valuation of the property as a whole which was predicated on the fact that the business was established and in successful operation (R. 311). As this Court remarked in the *St. Joseph* case, "he thought that in the rate base he had fixed there was an adequate allowance for that element and that it

was 'inextricably interwoven with other values' " (298 U. S. 38, 64).

Appellant's evidence does not warrant a separate allowance for going concern value

Appellant asserts that no allowance for going concern value was included in the rate base as determined by the Secretary. This contention, appellant states, is based upon convincing proof of going concern value requiring a separate allowance of not less than \$325,000 (appellant's brief, p. 28). The evidence supporting this claim, it asserts, may be found summarized in paragraphs numbered 1 to 5, inclusive, at pages 24 to 28 of appellant's brief. Referring to those paragraphs, we find that in paragraph "1. *The nature of appellant's business* * * * the fact that appellant has been successful in creating and establishing a market with a strong buying demand" is advanced as proof of going concern value. In paragraph "2. *Cash outlays and other grants and expenditures in building the market,*" expenditures and grants of land and cash totaling \$325,547.10 as gifts to railroads and packing houses are advanced as proof of the amount of going concern value. In paragraph "3. *Sale-in-Transit and Sorting Privileges,*" appellant points to special railroad rate privileges it has obtained for certain of its customers and cites the expenses incurred as a result of having to defend and maintain these privileges. In paragraph "4.

Increased percentage of sales to receipts," the strength and value of the Denver market is reiterated as reflected in the percentage of sales to receipts. In paragraph "5. *Hyder's estimate,*" the conclusion of appellant's valuation engineer that the going concern value of appellant's plant may be determined by multiplying \$10.00 by the number representing the average annual carload receipts of livestock at the market, is set forth as justifying a separate allowance of \$350,000.

In so far as appellant contends that going concern value actually exists in its plant, we are in complete accord. The Secretary recognized the fact and reached a fair value on that basis. Obviously, the contentions of appellant as set out in the paragraphs relating to the nature of its business and the increased percentage of sales to receipts are no more than attempted proof that the Secretary *correctly* concluded that the plant does have going concern value.

The paragraph relating to sale-in-transit and sorting privileges has no relation whatever to this discussion. Such a contention gives no clue as to the existence or amount of going concern value. If this "privilege" is of special value to appellant, it is because the Interstate Commerce Commission has granted a *discriminatory* privilege to appellant. Appellant does not question the fact that the Secretary by including \$3,600 as annual expenses for Interstate Commerce Commission hearings in

his estimate of annual expenses has made adequate allowance for the cost of obtaining such privileges (R. 324).

The substance of appellant's claim that it is entitled to have included separately in the rate base not less than \$325,000 for going concern value is contained in the two paragraphs which indicate that \$325,547.10 has been contributed to railroads and packers and that appellant's valuation expert included in his appraisal \$350,000 as a separate allowance. An analysis of this evidence will show that it offers no basis for computing going concern value.

Appellant avoids going so far as to claim that its developmental costs, consisting of gifts to attract packers and railroads, are the absolute measure of going concern value but insists that such expenditures are "indicative" and "corroborative" proof (appellant's brief, p. 29). In connection with these inducements to packers and railroads to locate near the stockyard property Mr. Pexton, the assistant general manager of the appellant, testified that the cost of the land donated in this way had been \$254,589.38. To this he added carrying costs up to the date of the grants. The original cost plus carrying charges amounted at the date of the grants to \$325,547.10 (appellant's Ex. 15; R. 847-856).

The payment of subsidies bears neither a logical nor a legal relation to the existence of going concern value. It is even doubtful that such gifts have

benefited appellant to any appreciable extent. The court below stated in its opinion (R. 1271):

The benefits, if any, of such largesse are speculative and have not been identified. Nor are they part of that element of value that pertains to an assembled and established plant doing business and earning money, as defined in the Des Moines Gas Company case, 238 U. S. (supra). The well deserved success that plaintiff has enjoyed is not the result of such artificial stimuli, but rather to efficient management and financing and the advantages that Denver and the surrounding territory offer to an enterprise of this kind.

Appellant's argument assumes that the donations have augmented its success. Obviously, this is not a necessary consequence of such donations. The amount of the donations may not affect in any way the success of the company. On the other hand, an assumption that these donations did contribute to ultimate success furnishes no sound basis for computing a separate allowance for the going concern element. *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 394. Neither is it proper to use such a measure on the basis of *a priori* reasoning—the result is to include in the rate base theoretical values which have no foundation in fact.

Such a theory is just a slightly revised version of the "past deficit" method for computing going

concern value by attempting to capitalize past losses. The gifts to attract packers and railroads are closely analogous to past deficits. This Court in *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, declared that past losses and inadequate returns can not be taken as a basis for present valuation, saying (p. 395):

The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 14.

By the same token past donations to other industries cannot be used to erect a rate base. *Going concern value cannot be measured by what one gives away.*

Of even a more speculative character is the testimony of appellant's valuation expert. Mr. Hyder

testified at length upon the subject of going concern value (R. 1090-1103). He named as elements of going value to be considered over and above the value of the land, structural improvements, and working capital (R. 1127) the following: (1) an established business dating from 1886 and showing in a broad way a very favorable development, with substantial stability in volume (R. 1098); (2) an efficient organization, consisting of a permanent and qualified executive and personnel (R. 1098); and (3) substantial expenditures in developing the market (R. 1099, 1125). With respect to the value to be attributed to these elements of going concern, Mr. Hyder stated (R. 1127):

In my opinion, \$350,000 is a minimum figure that would have to be allowed and added to the value of the land structural improvements and working capital, in order to arrive at a reasonable and fair value of this property for rate making purposes. *That opinion was supported by the figure of \$10.00 per car for a 35,000 car business.* [Italics supplied.]

There is no testimony by this witness which justifies the selection of \$10 or of the average annual car-load volume. The figures are arbitrarily selected in order to make up a formula. Mr. Hyder emphasizes that this method of determining value is widely used commercially in valuing for sale filling stations, milk routes, newspaper circulation, laundry routes, and towel businesses (R. 1101).

This witness, in reaching the separate allowance that he did, was obviously influenced by Mr. Pexton's testimony (R. 856) that approximately \$325,547.10 had been expended in grants to railroads and packing houses. In fact, he so states (R. 1125):

Mr. Pexton's figures show, roughly, \$325,000 of expenditures. * * * In my approach to this question I necessarily took into account the development of the market and the cost so expended upon the part of the Stockyards Company * * * *The purpose of the investment, in my opinion, in a fundamental way, was to build up the market, which, in turn, of course, would react to the benefit of the Stock. Yard Company in increasing their business. By building up the market, I mean building up the buying power which in turn would bring more livestock into the market. [Italics supplied.]*

In so far as the witness attempted to justify his opinion on any other basis, it is apparent that he was considering *good will* as distinguished from *going concern value*. The mere fact that he admitted that he arrived at going concern value by applying an arbitrary value to the *volume* of business, as, he claimed, is done in valuing commercial enterprises for sale, is conclusive proof that "good will" was the basis of his testimony. Good will admittedly is a dominant factor in the commercial value of a private business, but it has no place in

a valuation for rate-making purposes. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 669; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 165; *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 396; *Los Angeles Gas & Electric Corp. v. R. R. Comm.*, 289 U. S. 287, 313.

An estimate of Mr. Hyder's testimony is afforded by the District Court. In the course of its discussion of going concern value, after a careful consideration of the decided cases, the court stated (21 F. Supp. 83, 89; R. 1270):

It is apparent from Mr. Hyder's interesting dissertation on going concern value that unconsciously perhaps as plaintiff's expert, he included certain intangible elements that we may not consider, such for instance as good will, etc. He allowed \$350,000 as a minimum going concern value, computing it at \$10.00 per car for an admitted yearly average of 35,000 cars of livestock. A formula of this nature has no support in the record. He says it is similar in principle to one used occasionally for measuring the going concern or good-will value of an established business for the purposes of sale. When applied to the situation here presented, we think it arbitrary and condemned by the Los Angeles case (*supra*).

That the appellant realizes the weakness of its position is apparent from its specious attempt to distinguish the character of its evidence from that rejected in the *St. Joseph Stock Yards* case (appel-

lant's brief, pp. 23-28). Patently, the theory upon which appellant's valuation engineer reached his "separate allowance" conclusion is characterized by the same speculative and conjectural indulgence as that adopted by Howson in the *St. Joseph Stock Yards* case. No probative value can attach to such inapposite conclusions, drawn as they are upon unwarranted assumptions.

The Secretary's total valuation amply allows for the element of going concern value

While no attempt was made to label any specific sum as the value of the going concern element, the Secretary endeavored to place on appellant's property a total value representative of its fair value as a going concern in successful operation. The increment of value attached to the separately ascertained values of the component parts by reason of this fact is inextricably interwoven in those values and can not be segregated. The Secretary adopted a valuation that proceeded on the basis that the plant was in successful operation—a "living entity"—and that valuation includes overheads sufficient to permit full restoration of the used and useful property in its present location surrounded by railroads, highways, and packing plants which furnish and absorb its present volume of business. The record squarely refutes appellant's contention that "the testimony establishes beyond the shadow of a doubt that the land was valued as bare land and the structures as the aggregate of so many units of

material and labor," and that "that method of valuation cannot include an allowance for going value" (appellant's brief, p. 28).

The Secretary adopted the reproduction new value as determined by Mr. Zelinski, the engineer for the government (Findings 125, 126, R. 305-306). Zelinski did not include a separate allowance for going concern value in his appraisal of appellant's property, *but he did value the property of the appellant as a going concern* (Finding 136, R. 311). He looked upon the appellant's material as being in place and made his appraisal with the fact in mind that the property was able and willing to function as a successful stockyard and as a business earning an income (R. 493).

On the basis of Mr. Zelinski's testimony, the Secretary determined that the total cost of reproduction new of appellant's used and useful property, including overheads, was \$2,530,201 (Finding 125, R. 305). To this figure the Secretary added \$2,283 as a net addition on account of an inventory correction in the water and sewer systems (R. 305), bringing the total to \$2,532,484. Applying the condition per cent of 80.545 (Finding 123, R. 304) to this figure of \$2,532,484, the Secretary found the total cost of reproduction new less depreciation to be \$2,039,789 (Finding 126, R. 306). Adding to this \$536,825 as the value of the land found to be used and useful (R. 311) \$30,267 (R. 306)*

* It is to be noted that this \$30,267 is an additional allowance made by the Secretary to preserve the values determined by the engineers during the construction of the plant.

to cover one year's interest on the used and useful land during the construction period, and \$139,300 (R. 312) as an allowance for working capital, the Secretary reached a figure of \$2,746,181 (R. 312). After further additions in the amount of \$22,500 for a bridge in the process of construction at the time of the oral argument and \$24,000 for a sewage disposal plant also in the process of construction at this same time (R. 312), the Secretary found the fair value of the appellant's property to amount to \$2,792,681 (R. 312). He concluded that the rate base, upon which appellant was entitled to earn a fair return, was \$2,792,700 (R. 312).

The District Court's summation of this method of valuation follows (21 F. Supp. 83, 88; R. 1269-1270):

The Government's case on valuation is made principally by the witness Zelinski, an employee of the department and charged with that work since 1934. His qualifications are recited at length in the record and include similar duties performed in other stockyard cases. His valuation is based upon material in place and upon a property able and willing to function as a stockyard and a business earning an income. As to particular details; he allowed interest during construction on the structural property, considered such items as proximity to highways, railroads, freedom from floods, access to water supply and other city services, its favorable location in regard to related industries, the effect of the city zoning ordinance,

and that the highest and best use of the particular area in question is for stockyards. He likewise testified that he valued it higher because of its availability for a stockyard and as an assembled tract as distinguished from the several tracts in separate ownership. He also included construction overhead, general overhead, and added 5 per cent in addition for omissions and contingencies, omitting, however, organization expense. He gave consideration to the peculiar climatic conditions of Denver as affecting rot, rust, and decay. The Secretary added to Mr. Zelinski's figures \$30,267 to cover one year's interest on the used and useful land during the construction period and added \$139,300 for working capital. In conclusion the Secretary arrived at \$2,792,700 as the rate base upon which the respondent is entitled to earn a fair return.

By this method the Secretary added to the bare cost of material and labor an amount equal to 40.17% of such bare cost. Of this 40.17% addition to bare cost of labor and material, 18.08% was applicable to construction overheads and 22.09% was applicable to general overheads (Appendix C, *infra*, p. 132).

At page 19 of appellant's brief the following statement appears:

Government exhibits 29 and 30, being volumes 1 and 2 of the report of the Government witness, show in detail the application of unit prices to the number of units found, under the above method. Typical pages are

reprinted in the appendix of this brief, pp. 108 to 110.

To the cost of reproduction new of the materials and labor thus determined, the witness added, and the Secretary adopted, certain general and *construction* overheads as follows [*italics supplied*]:

Omissions and contingencies, 5%.

Engineers and architects fees, 5%.

Legal expenses during construction, 1%.

General salaries and expenses during construction, 2%.

Fire insurance during construction, $\frac{1}{2}$ of 1%.

Interest during construction, $3\frac{1}{2}\%$ or $\frac{1}{2}$ year at 7%.

These percentage figures set forth by appellant represent the Secretary's allowance for general overheads—they do not include "*construction overheads*." Appellant cites as proof of the fact that construction overheads were included in the percentages set forth above "typical" sample pages 159 and 160 of Government Exhibit 29 and pages 251 and 255 of Government Exhibit 30 (appellant's brief, pp. 108–110). The conclusion is drawn that because construction overhead allowances do not appear on these sample pages they were not included at all except in the percentages set forth above. If all the pages from 159 to 182 of Government Exhibit 29 had been examined, instead of pages 159 and 160 only, which appellant cites as samples, it would have been discovered that the information on all the pages from 159 to 181 inclu-

sive is summarized on page 182. That page shows that the total cost of materials and labor for the cattle division *without overheads* is \$423,667 and at that point \$65,881 is added for construction overheads in connection with the cattle division.

In Appendix D to this brief, *infra* pages 133-134, a table is set forth which clearly shows the amount of construction overheads included by the Government's engineer in connection with all the appellant's structures and equipment. A list of the valuations placed by the Secretary on all the appellant's buildings, structures, and equipment, both used and useful and non-used and non-useful, may be found in Finding 118-a made by the Secretary (R. 299-301). The total cost of material and labor for *all* of appellant's property before construction overheads were added was found by the engineer to be \$2,137,969. He then added \$387,181 for construction overheads, making a total cost of material and labor, and construction overheads, of \$2,525,150 (See Appendix D to this brief, p. 134). The general overheads in addition on the *entire property* amounted to \$490,072 (See Gov. Ex. 28, p. S-2).¹⁰

¹⁰ The general overheads as shown in Government Exhibit No. 28, page S-2, are made up of the following items:

Omissions and contingencies (5%)	\$126,258
Engineers' and architects' fees (5%)	132,570
Legal expense (1%)	26,514
General salaries and expense (2%)	53,028
Fire insurance (0.5%)	13,257
Taxes during construction	36,481
Interest at 7% during $\frac{1}{2}$ the construction period	101,964
Total general overheads	\$490,072

Quite apart, however, from the fact that the structural property was valued as part of a "living organism," *the very method of ascertaining value for rate-making purposes that was employed in this proceeding* tended to establish a liberal valuation sufficient to recognize and cover the going concern element, even if it had not been covered in the valuation of the specific structures. Thus, the fact that the Secretary's method was *reproduction cost*, unmodified by considerations of actual or historical cost, is important.

The major portion of appellant's structures was built many years ago when labor and materials were considerably less expensive than at the present time (Gov. Ex. 5, Introduction). These structures for the most part will never have to be replaced *in toto*, because they can be maintained in serviceable condition by normal repairs and piecemeal replacements for which adequate allowance has been separately made. It appears, therefore, that the Secretary adopted a method of valuation which allows a substantial increment over and above actual cost. He has taken reproduction new cost less observed depreciation as a measure of value, without undertaking to weigh in the balance other factors legally recognizable which would undoubtedly have tended to diminish the value found.

When the foregoing valuations are considered in connection with the method followed in valuing the land, it is apparent that full consideration is given

to the going concern element. The government land appraiser stated that it was his endeavor "to base his valuation upon the values of similar adjacent and/or adjoining property" (Gov. Ex. 23, p. 1). Other elements of value which he considered were "*proximity of the land to highways, railroads, its freedom from floods * * * the availability of fire protection, easy access to the availability of water and other city advantages, such as electricity, car lines, labor supplies, schools, churches, proper housing for labor * * * the nearness of the property to general industrial centers of the city and the location of the land with regard to the particular related industries*" (R. 494). [Italics supplied.] These related industries which the appraiser considered as being in place consist of several packing plants and numerous railroad facilities. The setting is complete for the reproduction new of a stockyard comparable to that which now exists. The railroads and packing plants are themselves going concerns and an estimated value predicated on the proximity of the stockyard to these properties must include going concern value. Were it not for the fact that the stockyard is a going concern with a business intimately correlated with the railroad and packing industries, the land valuations determined by Mr. Zelinski obviously would be considerably reduced.

It is true that the rule in *The Minnesota Rate Cases* was designed to eliminate the possibility of valuing the land in such a way as to include an

increment of value attributable to the going concern element. When the rule is applied to gas works, water works, light plants, or railroads, that result will almost inevitably follow. However, the situation differs when an attempt is made to apply the rule to the valuation of stockyards. This is due to the fact that the industries which surround the stockyard, and whose land is taken as indicative of the value of the stockyard land, are closely related industries. The land which they own is valuable for the purposes for which it is used because it surrounds the stockyard. Consequently, the value of that land must reflect the going concern element in the stockyard land.

It is submitted that the Secretary's total valuation of appellant's entire plant which is used and useful in rendering stockyard services represents a fair rate base on which appellant should be permitted to earn a fair return. The manner of valuation was designed to give full consideration to the going concern element and the result includes an adequate allowance for that item. There is no evidence in the record which justifies the inclusion of an arbitrary amount as a separate allowance for going concern value.

The decided cases clearly establish that no separate additional allowance for going concern is required

The well settled rule, as expounded by this Court in numerous cases, is that no separate item need be

written into a rate base to cover going concern value unless there is convincing proof that such value exists and that it is not included in the total rate base. This rule was applied in sustaining an order of the Secretary fixing rates for the St. Joseph stockyards. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38. We believe that the facts in regard to going concern value in that case are so similar to those now presented as to make that decision controlling on this issue. However, there are numerous other cases which offer direct analogies in support of our position.

In *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, the appellant gas company claimed \$100,000 for going concern value but the Iowa court refused to allow this additional item (144 Iowa 426, 434). Upon appeal, this Court expressly rejected capitalization of earning power and upheld the state court, saying (at p. 669):

* * * the Court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff power to charge more than a reasonable rate.

By this case it is decided that no separate allowance is necessary as a matter of constitutional right. All that is required is the valuation as a whole of a plant in successful operation and that was accom-

plished in this case by assigning proper unit costs to the physical items.

In *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, the company sought to enjoin the enforcement of a municipal ordinance fixing gas rates. It was contended that the rates were confiscatory. The master appointed by the District Court, after finding the value of the property and allowing 15% for overheads, determined a value of \$300,000 for the item of going concern. After preparing this valuation the master, apparently on the basis of the decision of this Court in the *Cedar Rapids* case, *supra*, decided to disallow the item of \$300,000 for going concern. He therefore submitted merely his physical valuation of \$2,100,000, saying:

The physical value as hereinbefore determined is reckoned upon the fact that the plant was in "successful operation" when the ordinance was enacted, otherwise its value would be much less. The "going value" [which he excluded from his final valuation] is that enhancement which results from a well developed paying business.¹¹

Upon appeal, with going value the principal point in issue, this Court declared that an element of going value undoubtedly exists in an established utility plant, *but the master's report, which excluded any separate and additional allowance for going*

¹¹ The report of the master to the lower court is quoted at page 170-171, note 21, of the *Des Moines* case.

concern, was sustained. This Court said (at page 171):

While there is a difference between court and counsel as to what the master meant by this, we think it is apparent that he meant to say that, applying the rule of the *Cedar Rapids* case, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation, for he said that otherwise its value would be much less.

As pointed out in the *Cedar Rapids* case, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful operation, *and overhead charges have been allowed for the items and in the sums already stated*, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves and the appellant's contention in this behalf is not sustained. [Italics supplied.]

Among the overheads included in physical value by the master in the *Des Moines* case were labor ex-

penses, engineers' fees, compensation, insurance, contingencies, cost of administration, and interest and taxes during construction. Clearly, this means the Court considered a sufficient sum had been allowed by the master when he had appraised the items of physical property and had added thereto the overheads and organization contingencies but excluded an additional separate allowance of \$300,000. In referring to the cost of establishing the business, the Court said (at p. 166):

For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a Company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

In recent decisions this Court has applied the same principles. In *Los Angeles Gas & Electric Corp. v. R. R. Comm.*, 289 U. S. 287, the company attempted to have rates fixed by the Commission set aside. The company claimed a separate allowance of \$9,200,000 for going concern value. Witnesses for the company had calculated that from \$9,000,000 to \$16,000,000 was necessary for that item. One of these experts had formed his opinion on the basis of his stated experience (1) that a buyer will ordinarily pay for an established prop-

erty one year's gross revenue in excess of the "value" of the physical plant, (2) that he would pay approximately 15% above the cost of reproducing that plant, and (3) that going value equals not less than \$25.00 per customer meter.¹² The other witness estimated the cost of securing the present business of the company ("cost" being here used as meaning efficiency of earnings below an 8% return during the developmental period) and identified going value with this estimated reproduction cost. This witness arrived at a calculation of \$10,000,000 for going concern value. The Commission did not assign a separate amount for going concern value but took it into consideration generally in the appraisal of the property including allowances for overheads. It is noteworthy, however, that the overheads themselves were contested. In fact the additional overheads claimed came to \$9,100,000 and were as important an item in the discrepancy between the company and the Commission's valuation as the going value itself. The company demanded an amount approximating 24% of the structural value while the Commission allowed only 6%. This Court, in sustaining the finding of the Commission, disposed of these claims as follows (at p. 319):

It is unnecessary to analyze the testimony of these witnesses, as it is obviously too con-

¹² On these three different bases of calculation he reached values showing \$16,000,000, \$11,000,000, and \$9,000,000, respectively, for going concern.

jectural to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation.

In the opinion all previous Supreme Court cases involving going value were reviewed, and the Court, among other things, said (at pp. 313-314):

The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones.

The principle as thus recognized and limited is obviously difficult of application. *Cedar Rapids Gas Co. v. Cedar Rapids, supra.* It does not give license to mere speculation; it calls for consideration of the history and circumstances of the particular enterprise, and attempts at precise definition have been avoided. It is necessary again, in this relation, to distinguish between the legislative and judicial functions. It is the appropriate task of the Commission to determine the value of the property affected by the rates it fixes, as that of an integrated, operating enterprise, and *it is the function of the Court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use.* [Italics supplied.]

Another pertinent case is *Dayton P. & L. Co. v. Comm'n*, 292 U. S. 290. The controversy there concerned rates established by the Ohio Commission for natural gas distributed by the company. The company claimed a separate allowance for going concern of \$125,000 to \$140,000. The Commission rejected the separate allowance and held that whatever increment of going concern value might be found had already been recognized to a sufficient extent in the appraisal of the physical assets as part of an assembled whole, as well as by allowances in operating expense costs of developing new business. The action of the Commission was sustained by the Supreme Court of Ohio, and on appeal by this Court which said (p. 309):

We cannot in fairness say that after valuing the assets upon the basis of a plant in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. * * * Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.

A similar position was taken in *Columbus Gas Co. v. Comm'n*, 292 U. S. 398, where this Court also

upheld the Commission in its refusal to make a separate allowance for going value. All of the estimates made by the company's experts were rejected, either upon the ground that they were too speculative or that they were based on considerations which "did not even approximate precision * * *" (p. 413). This Court stated (at p. 411):

Objection is made also as to the disallowance of a going value for the affiliated companies. Going value was excluded both by court and by Commission as an item of property to be separately appraised and separately reported. The record justifies a holding that it was reflected in the other items and particularly in the appraisal of the physical assets as part of an assembled whole. Cf. *Hardin-Wyandot Lighting Co. v. Public Utilities Comm'n.*, 118 Ohio St. 592, 603; 162 N. E. 262. This, we think, was adequate.

Appellant makes the following statement in its brief (p. 28):

Hence, we submit that the question presented is whether or not in a rate case, as distinguished from a plant-acquisition case, any separate allowance for going concern value, is to be made in the rate base. *The Court has never held such an allowance unnecessary.* [Italics supplied.]

Appellant then cites cases wherein separate allowances were made and upheld by this Court. We submit that this is not the question that arises in this

case.¹³ It is not a question of what is not unnecessary but rather of what is *necessary*, i. e., whether or not rate regulatory bodies *are required* to make separate allowances in rate bases for going concern value over and above recognition and consideration for that factor in other valuations, particularly where the claim for separate allowance is

¹³ Appellant here is confusing the position of this Court in *Denver v. Denver Union Water Co.*, 246 U. S. 178, which it cites in support of its contention that the Court has never held a separate allowance unnecessary. In that case Mr. Justice Pitney, speaking for the Court, allowed \$800,000 with the following explanation (p. 192):

As was then observed [Mr. Justice Pitney is here referring to the *Des Moines* case], each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants.

This position of this Court can be readily reconciled with its stand in the *Cedar Rapids* and *Des Moines* cases. As a matter of fact the Court stated that it intended to "adhere to what was said in *Des Moines Gas Company v. Des Moines*, 238 U. S. 153." The law always required that a valuation for rate making purposes must be that of a going concern. In the *Denver* case the master had *specifically stated that the physical valuation did not include any consideration of the fact that the company was a going concern*. Hence the separate allowance might be deemed necessary. In other cases as in the instant case the physical valuation as brought to this Court was *expressly stated to have been based upon due consideration of going concern*. Therefore, no separate allowance was required.

based upon mere speculative and theoretical conjecture. The inclusion of a separate allowance is not required unless the evidence clearly demonstrates that by reason of an inadequate valuation the result is confiscatory. No such evidence exists in the instant case.

III

THE MAXIMUM RATES AND CHARGES PRESCRIBED BY THE SECRETARY ON LIVESTOCK RESOLD OR REWEIGHED FOR PURPOSE OF SALE ARE LAWFUL AND ARE SUSTAINED BY THE EVIDENCE

The Secretary found that appellant had not been assessing a "yardage charge against traders' livestock" resold or reweighed for purposes of sale, except that resold in the commission division (R. 240, 345). This practice was found to be unreasonable and unduly discriminatory (R. 345). On the basis of that finding the Secretary prescribed the following yardage charges for such livestock (R. 346):¹⁴

Cattle.....	\$0.15
Calves (under one year old).....	.10
Hogs.....	.06
Sheep or Goats.....	.03
Horses or Mules.....	.35
Pure bred bulls.....	1.00

Appellant does not question the Secretary's estimate (R. 350-351) that these rates, if applied,

¹⁴ These charges for cattle, calves, and hogs are fixed at one-half the full yardage charge on such livestock arriving by rail and at slightly less than one-half for sheep or goats. For horses or mules and pure bred bulls they are fixed at the full yardage charges on such livestock arriving by rail.

should produce \$10,960 of the total estimated revenue of \$530,117.

The court below found that it was unduly discriminatory for appellant not to charge yard traders for the services and facilities furnished them by the stockyard company, that the charges set out above were reasonable charges for such services; and that the evidence justified the fixing of these rates at less than the full rate on other livestock (R. 1253-1254). Appellant attacks the finding of the Secretary and the District Court as unauthorized; arbitrary, unreasonable, and unsupported by evidence. Obviously, no question of confiscation is raised, because the Secretary's order reduces no rates but simply authorizes the imposition of charges which had not hitherto been made.¹⁵

¹⁵ Appellant asserts (appellant's brief, pp. 78, 79-82) that the Secretary, in prescribing the above resale and reweigh charges, has reduced the yardage charges for livestock resold by traders through the commission division from the full charges which have heretofore been in effect for such resales to the above charges of substantially one-half the usual full charges and that the Secretary thereby has deprived appellant of the right to collect the full charges. The Secretary's schedule of rates (R. 346) always has been treated by the government as authorizing the full charge on livestock resold through commission men. The term "plants" is applied to this livestock, which is spoken of as "planted" when turned over to a commission man for sale (R. 240). In their supplemental brief filed in the court below the appellees stated that if subparagraph (1) of the Secretary's schedule (R. 346) did not make this fully apparent, counsel was authorized to state that the Department of Agriculture does so interpret the rate schedule.

Yardage charges, including those now prescribed, are made only upon selling operations of traders or speculators who buy livestock and resell it at the stockyards. They are not, as appellant has inferred (appellant's brief, p. 79), made against buyers or upon the buying operations of traders, dealers, or speculators.

There is a separate division within that part of the stockyard known as the cattle division which is called the trader division (R. 240). No separate trader division exists either in the hog division or the sheep division of the yards (R. 240). The persons using the trader division are known as traders, dealers, or speculators. They carry on their business within the stockyards, and that business consists of purchasing livestock from commission men and either reselling the livestock in the Denver market or shipping it to other outlets (R. 942). The trader's profit is the difference between his purchase price and the amount which he eventually obtains for the livestock (R. 421).

The pens used for accommodating livestock purchased and sold by traders occupy a substantial portion of appellant's yards. In September of each year traders are assigned a block of pens containing approximately 160 pens and the adjacent alleys (R. 336-337). During the light season of the year traders are allocated pens in the commission section of the yards in order to avoid the necessity of driving livestock to the trader division (R. 337).

It appears that the only income which appellant has received heretofore because of the operations of the traders has consisted of returns from selling feed and bedding for livestock (R. 336). Occasionally traders resell some livestock through commission firms and on this they have been and still are required to pay the usual charge (R. 346). The physical characteristics of the stockyard facilities allocated to the yard traders are substantially the same as those of the facilities allocated to the commission firms; at certain periods of the year the trader division is actually located in a part of the yards which at other periods of the year is considered as the commission division (R. 416, 890). There is no material difference as between the commission and trader divisions or as between commission men and traders with respect to the warehousing of livestock (R. 240, 887-889). There appears to be no valid reason for not imposing yardage charges on livestock resold by traders along with livestock sold by producers and others.

However, the traders do much of the driving and yarding work which usually is done by the stockyard company and ordinary shippers (R. 993). The traders generally purchase feed in substantial quantities and do their own feeding, although some of the feeding of the livestock of shippers is done by the stockyard company (R. 993). In recognition of these facts the Secretary fixed these rates at approximately one-half the regular yardage charges.

The traders operate on both sides of the market. As buyers, they afford part of the market outlet. In his buying operations, the trader is a competitor of other buyers. In his selling operations, he is a competitor of shippers who have livestock on the market for sale.

Appellant apparently contends not only that the schedule of rates prescribed by the Secretary is discriminatory but also that the Secretary lacks authority under the Packers and Stockyards Act to determine the reasonableness of existing rates and to fix ~~minimum~~ rates of the kind involved, for it is asserted that the action of the Secretary was an unauthorized "interference with the sphere of management, entrusted by law to the directors of the company" (appellant's brief, pp. 10, 84). Apart from the fact that this assertion is no more applicable to the regulation of yardage rates than to other rates, it is settled that under the Packers and Stockyards Act the Secretary is authorized to establish maximum yardage charges and to include the revenue from such charges in determining rates. To this effect are *Union Stockyards Co. of Omaha v. United States*, 9 F. Supp. 864, 881; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 69, as well as the decision of the court below in the instant case (R. 1272).

In *Union Stockyards Co. of Omaha v. United States*, *supra*, the court said (at p. 881):

In its substance the business of the plaintiff is to provide a market place where buy-

ers and sellers of live stock may come together and trade. The stockyard owner, following immemorial practice, exacts its toll from sellers, not from buyers. The function of preventing discrimination imposed upon the Secretary certainly required him to ascertain whether the traders enjoyed discriminatory favor when they sell on the plaintiff's market, and in performing this function he cannot be said to have gone beyond either the letter or the spirit of the statute.

It has been argued that the fact that in the business of the traders legal title to the livestock passes twice is not of controlling importance in the matter of fixing charges for stockyards services, but we think the argument ignores the very object of the existence of the stockyards, which is to provide the place and facilities by means of which buying and selling, that is, changing of title, in live stock may be carried on. Therein lies the justification for charges and, because it is a public service, the power to regulate.

And in *St. Joseph Stock Yards Co. v. United States*, *supra*, this Court stated at p. 69:

The Secretary found that the existing rates were "unreasonable and unjustly discriminatory." * * * The evidence disclosed the services rendered in the case of cattle and other livestock, and the question is simply as to a fair determination in the light of all the circumstances. If the rates

as prescribed were not confiscatory, the classification of rates was clearly within the Secretary's statutory authority.

Appellant argues that the special facts in this case do not justify the imposition of the charges prescribed by the Secretary for yardage. Appellant apparently contends that yard traders are afforded no free yard facilities or services (appellant's brief, pp. 72-73), yet the evidence is clear and uncontradicted that pens are allotted to yard traders and the facilities of the stockyards are made available to them without charge and that they are allowed to carry on their business at the stockyard without paying for this privilege (R. 890). It is immaterial that the "allocation of pens * * * confers no right or title to the allottees by way of lease or otherwise" (appellant's brief, p. 73).

In its findings and order, paragraph 198 (R. 338), the Secretary concluded:

The traders have set up their places of business within respondent's stockyard and conducted it without charge, except in so far as respondent makes a profit on feed which the traders purchase and from the yardage which respondent collects on livestock resold for traders in the commission division. It may be that respondent has the right to render free services to one class of its patrons if by so doing it does not have to maintain higher charges for services rendered to others. It is, however, unjustly

discriminatory as well as unreasonable for respondent to maintain a large section of valuable property and to incur numerous expenses in the rendition of free services to one class of its patrons and then remunerate itself through a charge on another class which is greater than necessary to cover the cost of rendering the service to the latter class.

The court below, in upholding the Secretary's findings and order, said (R. 1273):

It is undisputed that under present conditions trader livestock makes no contributions to the support of the yards, other than the profit it may pay on the hay and grain purchased. The Secretary in his five-year recapitulation of the volume of business 1930-34, inclusive, shows that 55,405 head of cattle out of a total of 367,822 were sold and reweighed for the purposes of sale. And that during this five-year period yardage was paid on 89 per cent. of cattle arrivals and 82 per cent. of calf arrivals. Manifestly livestock using the yards but not paying therefor casts a burden upon those that do pay, irrespective of the reason. Yard traders purchase livestock—mostly cattle—from commission men and either sell in this market or reship to other outlets. On stock shipped away from this market they pay no yardage, the charges under discussion being applicable only to stock sold here. So under the practice that now obtains a considerable part of the stockyards property is

used, maintained, and numerous expenses incurred in rendering free service to this class of patrons. Necessarily the charge to the other patrons must be that much greater if plaintiff is to earn a reasonable return. The present income of the stock yards company represents, almost entirely, commissions upon sales at the yards paid by shippers; that is to say by ranchers and farmers scattered throughout the West who use the yards only occasionally. They have an investment in a ranch or in a herd, while the yard trader has no capital investment, as he makes free use of the respondent's plant for and as his place of business.

Respondent's own witnesses testified that the producer; that is the shipper, has paid for this service in the marketing charge assessed against him by the stock yard company. It follows, therefore, that this is a discriminatory practice and results in the yard trader getting for nothing a service that all other patrons of the yard pay for. And to say that this discrimination is justified because the trader is a desirable part of the market machinery, helps maintain prices, and brings about a prompt absorption of offerings on the market is no reason why he should not pay his proportionate share of the cost of conducting the market.

Public utilities should occupy a disinterested position, charging all alike for the same service. A similar charge was upheld in the Omaha and St. Joseph Stock Yards Cases (Union Stock Yards Co. of Omaha v.

United States, *supra* [9 F. Supp. 864], at pages 879-881, and *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, at page 70). In the *Omaha Case* the court declined to follow the opinion in *Denver Union Stock Yard Co. v. U. S.* [57 F. (2d) 735, 750-752], *supra*, on this question.

The same considerations on the basis of which the Secretary found that appellant's practice of free service to yard traders is unjustly discriminatory as against other sellers of livestock sustain the fairness of the charge fixed by the Secretary's order for yard traders at approximately half the charge fixed for other sellers. Yet appellant argues that the Secretary's order in thus fixing the yardage charge for marketing service for traders is unjustly discriminatory (appellant's brief, pp. 78-82). Appellant's contention is to the effect that under the present rates all buyers are treated alike and all shippers are treated alike because no buyer pays a yardage charge and there is a yardage charge made on each sale by a shipper. This contention obviously omits "sellers," overlooking the consideration of equal treatment of all classes of sellers and the fact that the yard trader in addition to being a purchaser is also a seller. The existing rate structure does not treat both or all classes of sellers alike. There is no evidence in the record justifying complete exemption of the livestock sold by yard traders, although the evidence, referred to somewhat at length by appellant (appellant's brief, pp. 74-77), does show that the Secretary was war-

ranted in reducing the yardage for traders on "unplanted" sales substantially by half because the trader earns part of the charge by his own activities. Thus by charging both trader-sellers and other sellers on the same basis and by making the above-mentioned allowances which equalize the charges as between them the Secretary has remedied an unfairly discriminatory schedule of yardage rates and substituted a fair and reasonable one.

Appellant has put much stress upon the existence of the so-called "transit privilege" and the extent of its use at the Denver stockyards, together with the practice of "sorting" by yard traders (appellant's brief, pp. 69-70), in an effort to establish the fact that the conditions at the Denver stockyards are so different from those at Omaha and St. Joseph as to warrant or require a different treatment of rate regulation at Denver than at other places, but it is apparent that, whatever the relative extent of the participation of a yard trader in the stockyard business at Denver and elsewhere may be, the same considerations respecting the equitableness of the yardage rate as between trader-sellers and other sellers and distribution of the cost of those rates clearly are applicable. In other words, these considerations are applicable in any situation in which the relationship between traders and other buyers and sellers and between traders and shippers is the same as, or similar to, that which exists at the Den-

ver stockyard. However, from the standpoint of these considerations, this relationship at Denver does not appear to differ materially from the corresponding relationship which exists at other stockyards at which yardage charges are imposed on traders. The functions of yard traders are substantially the same wherever they operate. Besides, whatever peculiar advantages they may have had in the past because of the existence at the Denver yards of the transit privilege granted by the Interstate Commerce Commission, these advantages have been equalized largely, it is believed, by the granting to the Missouri River markets of substantially equivalent privileges.

In *Union Stock Yards Co. of Omaha v. United States*, 9 F. Supp. 864, the same situation with respect to yardage charges upon traders' livestock existed at Omaha as now exists at Denver. This is shown in the extract quoted from the Secretary's order by the court in that case (pp. 879-880). A yardage charge upon traders, fixed by the Secretary at half the regular yardage charge, was sustained. The court said (p. 881):

The charges exacted from the traders and speculators are not shown to be unjust or unreasonable, and the reasons why the rates are not the same as those applicable to shippers but are substantially less were properly addressed to the discretion of the Secretary.

Following the *Omaha* case, a hearing was held regarding charges at the St. Joseph stockyards

and the Secretary, after finding that the existing rates there imposed were unreasonable, prescribed a new schedule. In the proceeding before the Secretary involving the St. Joseph stockyards it was found that the tariff of the stockyards company did not impose any charges on "resales" or "reweighs" other than "plants" and that the company was not collecting any yardage charge on the greater portion of such livestock (*St. Joseph Stock Yards Co. v. United States*, no. 497, October Term, 1935, R. 35-36). The Secretary ordered that a yardage charge be imposed on all livestock "resold or reweighed for purposes of sale" on a basis similar to that adopted by the Secretary in the present case, *i. e.*, approximately one-half of other regular yardage charges (see record in *St. Joseph Stock Yards* case, pp. 128-129). The validity of this charge was contested by the stockyards company but the District Court, without discussion, rejected the objections of the company and adopted the Secretary's findings. *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322. Finally, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 70, on appeal from the District Court decision sustaining the order of the Secretary, this Court sustained the validity of the yardage charges required of traders by the Secretary's order against contentions that these charges were unreasonable and unjustly discriminatory. These decisions, culminating finally in the adjudication of this Court in *St. Joseph Stock Yards Co. v. United States*, *supra*,

are conclusive in reference to appellant's exceptions with respect to the findings and the order of the Secretary requiring traders to pay substantially one-half the regular yardage charges on sales made by them. There appears to be no material difference between the respective situations of traders at the St. Joseph stockyards and those at the Denver stockyards.

Apart from the question of whether or not it is just and proper that the yard trader should be exempted from paying for service rendered to him which is also rendered to others who pay for that service, appellant contends (appellant's brief, p. 81) that the burden of the yardage charge made against the trader will be passed by the trader to the producer of the livestock marketed and that the result will be to effect discrimination as between producers who succeed in disposing of their stock by sale in the first instance to non-trader buyers and producers who are compelled to depend upon initial purchase by a trader and subsequent resale by the latter. Here again appellant argues for equal treatment of unequals and overlooks the fact that such treatment is as discriminatory as is the unequal treatment of equals. If it is true that all charges against yard traders are passed on to producers, it is nothing less than fair that a shipper who, because of the exigencies of the market, has had to avail himself of additional marketing service, should bear the expense of that additional marketing service in the sale of his livestock.

Moreover, whether or not these charges are thus passed on by the yard trader, the best and fairest thing which can be done is to require the trader-seller who receives yardage or marketing service from a stockyard company to bear the cost of that service on as nearly the same basis with other sellers as is possible. This, it is apparent, the Secretary's order does to the extent that an equitable distribution can be worked out in substitution for the existing schedule which manifestly is unjustly discriminatory not only as against non-trader-sellers but also in reference to producers and the distribution of any portion of the yardage or marketing charges which may be passed ultimately to them.

If, as appellant contends (appellant's brief, p. 81), the yardage or marketing charge imposed on trader-sellers will be passed on by them to shippers, either partially or wholly, then it cannot be true at the same time that the yard trader will be driven out of the stockyard if the Secretary's schedule is put into effect, as appellant has inferred will happen (appellant's brief, pp. 71, 74, 76). There is, however, no justification for any supposition that imposing a yardage charge on traders would drive them from the Denver market. If, as appellant contends (appellant's brief, p. 74), they are an economic necessity at the Denver yards, they will continue to operate there. Appellant cannot consistently say that the existence at the Denver stockyard of the "sorting" and "transit" privi-

leges gives the traders at Denver special advantages and at the same time predict that they will be forced from the Denver market by imposition of what is substantially only half the regular yardage charge, especially in the face of the fact that at other markets the traders remain. In this connection it should be noted that appellant says (appellant's brief, p. 71) that because of the existence of the so-called "transit privilege" at the Denver stockyard "the purchaser at Denver can afford to pay up to the difference between the combination of the local and the through rate, because his delivered cost is no greater than if he were buying from some one who was not in a position to preserve the through rate or were buying livestock which cannot sell in transit, such as truck receipts." If this is true, it is clear that the purchaser can well afford to pay the one-half yardage charge imposed on yard traders by the Secretary's order, and that there is no ground for appellant's inference that yard traders will be driven off the market if the yardage rates prescribed by the Secretary are enforced.

But, the final and conclusive answer to appellant's intimation that the effect of the application of these rates will be to drive the yard trader from the stockyard and deprive shippers of the benefit of his services is that there is no concrete evidence whatever in the record to this effect and any testimony on the point must necessarily be entirely conjectural. In *Tagg Bros. & Moorhead v. United*

States, 29 F. (2d) 750, 756 (affirmed 280' U. S. 420), such a prediction was made and was disposed of by the Court in these words:

It appears that the practice has become established for the plaintiffs to charge a certain class of persons, called speculators or yard traders, half the regular commission which shippers generally have to pay for the same service. *The Secretary evidently thinks this discrimination improper*, and in his schedule he eliminates it, and authorizes the plaintiffs to charge such traders and speculators the same rate that apply to all others. Both the commission men and the speculators are certain that the whole business of buying for resale on the market will quit, to the detriment of the livestock industry, unless the discriminatory rates are continued; but that is prophecy.

The court has no function where such forecasts of the future clash. Abstractly, speculation appears to be a feature of all open markets everywhere, and might continue at South Omaha, even without discriminatory commission rates in favor of speculators. But the future, and not the courts, must determine. It follows that the showing of probable loss to Tagg Bros. & Moorhead on the hypothesis of half rates to speculators, instead of full rates, as prescribed by the Secretary, is immaterial. [Italics supplied.]

It is submitted that the evidence sustains the finding of the Secretary that the complete exemp-

tion of yard traders at appellant's stockyard from yardage charges on sales of livestock to others than commission men is unreasonable and unjustly discriminatory (R. 337, 338, 345). The rates prescribed by the Secretary's order for such sales by yard traders are fair and reasonable (R. 346), and therefore the Secretary's order and the decision of the court below should be sustained with respect to trader yardage.

IV

THE SECRETARY'S DETERMINATION OF THE FAIR VALUE OF APPELLANT'S LAND WHICH IS USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES IS AMPLY SUPPORTED BY THE EVIDENCE

The Secretary found that the total value of appellant's land which is used and useful in the rendition of stockyard services is \$536,825 (Finding 115, R. 297). The District Court found (R. 1252): "The fair and reasonable value of all of petitioner's land is \$724,974 and the value of petitioner's used and useful land is \$536,825."

In making these findings the Secretary and the court had before them two separate land appraisals. The government appraisal was made by John A. Zelinski, an expert land appraiser for the Department of Agriculture (R. 272-273, 1271). The other appraisal was made by a board of three local realtors whom the appellant employed (R. 271-272, 1271). The Secretary adopted substantially the land valuations of Mr. Zelinski (R. 1271) which support the findings noted above.

The question presented to this Court in regard to this issue is very narrow. Appellant states in its brief (pp. 93-94):

If the government land appraiser was a qualified expert, then the findings of the Secretary and of the trial court are based upon substantial evidence and we admit that the court, under the authorities cannot set those findings of the administrative agency aside.

Apparently the gist of appellant's argument is that the government appraiser was not qualified because he had never before valued any land in the immediate vicinity of Denver, Colorado. As the District Court stated in its opinion (R. 1271-1272):

The argument is grounded on the alleged lack of experience of the government witness. Zelinski's previous lack of familiarity with land valuations in and about Denver is as immaterial to this discussion as is the fact that the three experts on the other side never valued any other stockyards before, either in Denver or elsewhere.

As to the general qualifications of the government appraiser there can be no question.¹⁶ In

¹⁶ Mr. Zelinski's education, training, and experience are detailed in his testimony (R. 458-459). The Secretary summarized Mr. Zelinski's qualifications in Finding 78 of the order (R. 272-273). For present purposes it is sufficient to note that Mr. Zelinski is a graduate in civil engineering from Ohio State University. Since graduation he has spent nearly 20 years in land appraisal work for the Interstate Commerce Commission. Subsequently he was in private practice as a consulting engineer. In 1934 he became principal valuation

Union Stock Yards Co. of Omaha v. United States, 9 F. Supp. 864, the District Court specifically approved Mr. Zelinski's qualifications to testify as to real estate valuations. Likewise in the litigation arising out of the rate order for the St. Joseph stockyards, the District Court accepted this witness as a qualified expert whose testimony was sufficient evidence to support the Secretary's findings, and this Court in affirming the decision observed that all the land value witnesses "were highly qualified experts." *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, 333; 298 U. S. 38, 58.

Obviously the length of time that an appraiser has spent in a particular vicinity or the number of appraisals which he has made in that vicinity is not determinative of his qualifications to appraise a tract of land such as is involved in the instant case. If the method which is followed is designed to properly familiarize a recognized expert appraiser with general real estate values in the vicinity and is designed to uncover the factors which determine the value of the particular tract of land, the judgment of that expert cannot be discarded as worthless.

As already noted, Mr. Zelinski was the government's witness on land valuation in the proceedings

engineer of the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture, and in that capacity has given expert testimony in a number of rate proceedings.

involving stockyard rates at the Omaha stockyards and at the St. Joseph stockyards. In the suits which were brought to challenge the orders which were entered as a result of the rate proceedings at these stockyards, Mr. Zelinski's qualifications were attacked, among other things, upon the ground that he was unfamiliar with local conditions. In the *Omaha* case it appeared that he had never been in the Missouri Valley country before—indeed, up to that time practically all of his activities had been in the East. In the *St. Joseph* case his qualifications were contrasted by the petitioner with those of the local appraisers for petitioner, who, presumably, it was argued, knew local real estate conditions much better. There is really nothing new in the attack on Mr. Zelinski's qualifications in the instant case that has not been aired before in the previous stockyard rate cases. Mr. Zelinski's qualifications as a stockyard land appraiser have been upheld in every instance where they have been attacked in judicial proceedings.

Mr. Zelinski has described at some length the general method which he followed in preparing to appraise this particular tract of land (R. 459-463). His testimony shows that he obtained in advance a transcript of the record of the 1930 hearing before the Secretary involving this same stockyard and copies of exhibits introduced at that hearing (R. 460). From the Interstate Commerce Commission he secured such information as it had on railroad valuations in Denver. Subsequently he

visited Denver personally and inspected appellant's property (R. 460). He gave consideration to the topography, size, shape, and location of appellant's land with respect to highways, railroad trackage, and to development in that portion of the city in which the stockyard property is located. He also took into consideration the general nature of the surrounding development and the use to which the surrounding property is devoted. He gave weight to local transportation service and the available city facilities (R. 460-462). He compiled an elaborate report of sales which had taken place over a period of many years indicating the location of these sales with respect to petitioner's land and describing each of these sales in his report (Gov. Ex. 23).¹⁷

If any doubt remains as to Mr. Zelinski's competency to express an informed opinion as to the value of this tract of land, reference need only be made to the detailed statement which he made in the course of the hearing (R. 465-481). He followed the general method which he used in appraising the property of the St. Joseph Stock Yards Com-

¹⁷ Appellant seems to take some comfort from the fact that in one instance Mr. Zelinski's report was erroneous as to one isolated sale (appellant's brief, p. 95). The report shows the sale price of a tract of land as being \$6,000 and the sale price of the improvements on the land as being \$16,000 (Gov. Ex. 23, p. 78). However, the evidence is clear that this is a reversal of figures and that the sale price of the land was in reality \$16,000. In his order the Secretary recognized this error and considered the value as being \$16,000 (Finding 112, R. 295-296).

pany, and that method received the approval of this Court. *St. Joseph Stock Yard Co. v. United States*, 298 U. S. 38, 58.

It is quite apparent from the testimony of the three witnesses who collaborated in making appellant's appraisal that they gave the property an increment of value due to its present successful use as an operating stockyard. One of the appraisers stated "I would think that if the expansion lands which I have mentioned were built up with pens or covered with railroad tracks it would add to their value" (R. 722). Again, he stated that he "considered the land in Zone 1 to be of equal value if not greater value than the land in Zone 9 because the land in Zone 1 is in the very heart of the stockyards district" (R. 718). Another of appellant's appraisers stated that in valuing the land "*you have in mind all the time that there is an industry there* and the whole thing is to keep in mind the use of the property for the highest and best purpose that it can be used" (italics supplied) (R. 764). He added "I gave thought to the intensive use of the land" (R. 765).

It is apparent that appellant's appraisers committed substantially the same error as was condemned in *St. Joseph Stock-Yards Co. v. United States*, 298 U. S. 38, 59-60. The court below took this view of the testimony, stating in its opinion (R. 1272):

It is apparent that the company's three experts took into consideration the so-called

“stockyards value” of the property, instead of the fair average market value of similar land without considering the anticipated use. This is contrary to the rule in the Minnesota Rate Cases, 230 U. S. 352.

V

THE MAXIMUM RATES AND CHARGES PRESCRIBED BY THE SECRETARY INCLUDE AN ADEQUATE ALLOWANCE FOR ALL REASONABLE EXPENSES INCURRED BY APPELLANT

The Secretary found that the reasonable expenses, exclusive of return on investment, which should be covered by the rates amount to \$346,545 (Finding 182, R. 333).¹⁸ Appellant, in challenging the sufficiency of this allowance, complains of only two items (appellant's brief, pp. 85-93). These items consist of (1) the annual allowance for dues, donations, and subscriptions which amounts to \$325 and (2) the annual allowance of \$1,200 for the cost of hearings under the Packers and Stockyards Act. Appellant in the brief filed with the Secretary in support of its exceptions to the tentative findings and order requested the Secretary to allow \$3,250 for contributions (R. 217) and \$5,000 for costs of hearings (R. 187). Appellant therefore requested for these two items an allowance of \$8,250, whereas

¹⁸ The total reasonable expense, including return on investment found in Finding 182, is \$528,071. Subtract from this amount the reasonable return on investment of \$181,526 and the remaining expenses amount to \$346,545.

the Secretary allowed \$1,525. Thus appellant claimed \$6,725 more than was allowed.

Although appellant only asked the Secretary to allow \$5,000 annually for the costs of hearings, it is now contended by appellant that \$8,000 per year should have been allowed for this purpose (appellant's brief, pp. 89-93). No mention is made in appellant's brief of the fact that appellant requested only an allowance of \$5,000 for costs of hearings in presenting its case to the Secretary.

The District Court found that slightly over \$300 is contributed annually by appellant to charities and community activities which benefit appellant's employes or patrons, and that \$325 annually is a proper sum to cover into rates for this expense. The court also found that \$1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act (R. 1254).

It is apparent that the two items which appellant complains of are too insignificant to raise any question of confiscation. Regardless of whether the Secretary and the District Court were correct in determining that the allowance made was sufficient to cover appellant's necessary and reasonable expenses, the exclusion of this amount cannot affect the result of this case.

The District Court noted that allegations as to the confiscatory character of an administrative order must state facts which disclose a serious ques-

tion of unconstitutionality; to raise constitutional objections, it is not sufficient simply to plead legal conclusions (R. 1274-1275).¹⁹ The court then said (R. 1275):

We cannot take seriously the plaintiff's allegation that its property has been confiscated simply because the Secretary eliminated from the expense account "dues, donations and subscriptions" that during the past five years averaged from three to four thousand dollars a year and limited this item to \$300 a year, the amount of the contributions thought to be actually beneficial to the Stock Yard Company employees and patrons.

While we consider it sufficient to point out that both the Secretary and the District Court found as a matter of fact that sufficient allowance is made for the items in question, that the items are too insignificant to involve any question of confiscation, and that appellant in this connection has failed to raise any substantial issue as to confiscation, nevertheless we shall discuss very briefly the actual method adopted in determining these particular expense allowances.

¹⁹ In discussing this general question the court cited *Ex parte Poresky*, 290 U. S. 30; *Spielman Motor Co. v. Dodge*, 295 U. S. 89; *Hall v. Geiger-Jones Co.*, 242 U. S. 539; *United Gas Co. v. R. R. Comm'n.*, 278 U. S. 300; *Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585; *Los Angeles Gas & Electric Corp. v. R. R. Comm'n.*, 289 U. S. 287.

A. The allowance for dues, donations, and subscriptions is adequately supported by the evidence

Appellant contends that it is entitled to an allowance of \$3,000 to \$4,000 for dues, donations, and subscriptions. The Secretary included in his allowance for reasonable expenses \$325 for this item. It is interesting in this connection to note that in the order promulgated by the Secretary in 1930 and subsequently set aside by the District Court, appellant claimed that its actual expenditure under this heading was \$223.11 and that the Secretary had erroneously excised \$81.75 from this part of appellant's expenses. *Denver Union Stock Yard Co. v. United States*, 57 F. (2d) 735, 753.

The general method followed by the Secretary is set out in Finding 164 (R. 324-325). The Secretary states, "In determining what dues, donations, and subscriptions should be passed on to the public through the rates charged, the guide has been that those contributions which are of peculiar benefit to respondent's employees and patrons should be covered into the rates and that the remainder of them should not be" (R. 325). This standard was applied to a complete audit of all dues, donations, and other contributions which appellant had incurred during the years 1930 to 1934 (Gov. Ex. 41, pp. 4-7). The audit was made by an accountant of the Bureau of Animal Industry of the Department of Agriculture and is set

up with two columns for each year. In one column are listed the actual expenses and in the other column are listed the amounts which the accountant considered as proper dues, donations, and contributions to be considered in determining the rates which the stockyard patrons must bear. The general principle upon which the accountant made his determination was stated by him in the administrative hearing (R. 557-558) and is the same as the principle applied by the Secretary. On cross-examination the accountant discussed his consideration of particular items included in this part of his audit (R. 577-587). On the basis of the accountant's audit and his testimony the Secretary made his finding that \$325 annually should be covered into rates for this expense (R. 325), and the District Court made a similar finding (R. 1254).

The method followed by the Secretary and adopted by the District Court for determining the proper expense allowance for this item is the same as that used in framing the rate orders for the Omaha stockyard and for the St. Joseph stockyard. In each instance the Secretary's method and his finding were sustained by the courts over objections similar to those now raised by appellant. *Union Stock Yards Co. of Omaha v. United States*, 9 F. Supp. 864, 883; *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, 337, affirmed 298 U. S. 38. See also *Denver Union Stock Yard Co. v. United States*, 57 F. (2d) 735, 753.

In *Reno Power, Light and Water Company v. Public Service Com'n*, 298 Fed. 790, the court said (p. 801):

I note charges in the first eight months of 1921 for picnics, photographs of employees, rodeo stock, charitable organizations, magazines and newspapers, floral pieces, and music. Such expenditures, especially charitable contributions, are certainly to be commended, but in a suit of this character they should not be imposed on the rate payers, unless in some way it be shown that they were incurred in the service of and for the benefit of the patrons of the company.

While the cases cited by appellant appear to hold that contributions to local charities *may* properly be charged to operating expenses, in a reasonable amount, they do not hold that it is error to exclude them. The Secretary in making these exclusions is not interfering with the management which is still free to make any contributions deemed worthy. But the Secretary is simply limiting the amount of these expenditures which can be taxed to the ratepayers who, as the government accountant pointed out, also have the burden of supporting local charities in their own communities (R. 557-558). Worthy as are such charities as the Denver Community Chest, it is submitted that donations from appellant to this and other similar good causes ought to be borne by the stockholders and not the ratepayers who have their local community chests and kindred charities to support at home.

B. The allowance for expense of hearings under the Packers and Stockyards Act is adequately supported by the evidence

At the hearing before the Secretary appellant introduced evidence to show that it had actually expended \$8,786.88 per year for hearings resulting from the enforcement of the Packers and Stockyards Act during the period 1930 to 1934 (R. 324). This was the result of amortising the expense of a hearing in 1930 over a five-year period during which no rate order was in effect. The 1930 rate hearing therefore was in fact paid for out of rates that were not regulated. In this connection it should be noted that spreading the costs of the hearing held in 1930 over a five-year period for the purpose of determining an annual allowance for this purpose is hardly justifiable. Up until the present hearing appellant had been engaged in only one hearing since the Packers and Stockyards Act was passed in 1921—a period of fourteen years. These rate hearings are infrequent.

The expenses of the 1930 hearing, together with the subsequent litigation arising out of it, are analyzed in Government Exhibit 38, pages 155-156.²⁰

²⁰ At the trial of this case in the District Court appellant introduced the stipulation referred to in its brief in which the total cost of the present hearing and subsequent litigation is estimated as being \$40,439.27 (appellant's brief, p. 91). This stipulation was not before the Secretary and the items included in the total are not sufficiently detailed to be analyzed.

That exhibit shows that approximately \$24,000 was paid out in attorneys' fees, and approximately \$14,000 represents the cost of evaluations, and appraisals which appellant had made. The Secretary in analyzing these past expenses recognizes that the rates which he is prescribing are rates for the future (R. 324). Consequently, his determination is based upon the probable future expenses which the stockyard company would necessarily incur as a result of enforcement of the Packers and Stockyards Act.

The amount which is to be covered into rates as expenses for rate hearings is a question which must be determined by the rate-maker. There is no justification for compelling the patrons of a utility to bear the total amount of such expenses limited only by the whim of the utility. The Packers and Stockyards Act has been in effect since 1921—a period of seventeen years. There has been sufficient time for those who are connected with the administration of the Act to gain the experience required to determine the amount reasonably necessary for this type of expenditure. It is apparent that once rates are fixed, expenses will cease for some time to come and future reopenings of the proceeding will be relatively inexpensive. It cannot be said that the Secretary has exceeded the limits of his discretion in allowing \$1,200 annually to cover the expense of such hearings.

The District Court, in reviewing the Secretary's order, found (R. 1254) :

\$1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act.

Appellant relies on this Court's decision in *West Ohio Gas Co. v. Comm'n*, 294 U. S. 63, as proving that the Secretary must be governed by actual past expenditures in determining a proper allowance for costs of rate hearings. That case is clearly distinguishable from the situation confronting the Secretary in the instant proceeding. This Court merely held that retroactive rates for a definite period must cover the expenses incurred by the utility in the hearing fixing such rates. *The decision expressly refuses to pass upon the question raised by a proceeding in which rates are being fixed for an indefinite future period.* Here it is apparent that the Secretary has made rates for the future and his allowance has been found adequate by the court below.²¹

Appellant cannot seriously contend that the cost of subsequent litigation arising out of the Secre-

²¹ Many courts have held that since the expense of a valuation hearing is a non-recurring cost, it should not be considered in determining whether or not rates are confiscatory. See *New York and Queens Gas Co. v. Newton*, 269 Fed. 277, 290; *City of Winona v. Wisconsin-Minnesota Light and P. Co.*, 276 Fed. 996, 1005; *Reno Power, Light and Water Co. v. Public Service Comm'n*, 298 Fed. 790; *Columbus Gas and Fuel Co. v. City of Columbus*, 17 F. (2d) 630, 640. Compare *West Ohio Gas Co. v. Comm'n*, 294 U. S. 63, 72.

tary's order is any evidence as to the validity of the order. If the rates fixed by the Secretary are inadequate to the point of confiscation, appellant has no need to count upon the expenses of this lawsuit to establish the fact. But if the rates as fixed are not already inadequate, appellant cannot make them so by the amount of expense which it incurs in attempting to have the rates set aside. *Columbus Gas and Fuel Co. v. City of Columbus*, 17 F. (2d) 630, 640.

VI

THE RATES FIXED BY THE SECRETARY ARE SUFFICIENT TO YIELD A FAIR RETURN ON THE FAIR VALUE OF THE USED AND USEFUL PROPERTY IN ADDITION TO ALL REASONABLE STOCKYARD OPERATING EXPENSES

The Secretary having found the rate base, determined as nearly as he could from the evidence the number of revenue producing livestock of each species which appellant might reasonably expect to receive at its yards under normal conditions and the amount of feeds of various sorts which it would probably sell. He then designed a schedule of yardage rates and feed profits to produce a 6½% return upon the \$2,792,700 rate base in addition to all reasonable operating expenses. The schedule so designed when applied to the amount of revenue-producing business reasonably to be expected would produce ~~\$320,117~~^{530,117} (R. ~~351~~³⁵¹, 1254). The reasonable operating expenses were found to be \$346,-

545 (R. 333),²² and the necessary net operating income to produce a fair rate of return on the fair value of the property was found to be \$181,526 (R. 333). This leaves a margin of \$2,046 that the rates would produce as applied to the estimated volume of revenue-producing business over and above the reasonable return and reasonable net operating income. This schedule of rates if applied to the actual volume received in 1935, a subnormal year, would have produced a return of 6.10%, and if applied to the actual volume received in 1936 would have produced a return of 6.74% on the rate base found by the Secretary (R. 362), an average return of 6.42% for the two years.

A. The rate of return of 6½% which the Secretary used in determining reasonable rates is reasonable and is amply supported by the evidence

The Secretary found that appellant was "entitled to charge rates which would yield an average rate of return of 6½ per cent" (R. 319). The court below found that 6½% is a fair return (R. 1253). Appellant in attacking the Secretary's order alleged "that the evidence * * * sustains a rate of return of not less than 6¾% upon the fair value of petitioner's property" (R. 13).²³

²² The total reasonable expense, including return on investment, is \$528,071 (Finding 182, R. 333). Subtracting from this amount the reasonable return on investment of \$181,526, the remaining expenses amount to \$346,545.

²³ At the trial of this case in the District Court appellant contended in brief and argument that a rate of return of 6¾% should be allowed because Dr. Dqzier's testimony sup-

The evidence relating to the fair rate of return upon appellant's property consists of the testimony of two expert witnesses. The witness called by the government was Dr. Howard D. Dozier, an economist in the employ of the Department of Agriculture, who has testified in every stockyard rate case before the Department of Agriculture for the past ten years (R. 611-612).²⁴ The witness offered by appellant was Mr. Arthur Bosworth, a local investment banker, who is a stockholder and a member of the board of directors of appellant Denver Union Stock Yard Company (R. 1135-1136).

Dr. Dozier testified that the rate of return should be high enough to assure the investors in the common stock of the Denver Union Stock Yard Company an annual return of 6% on their investment (R. 644). It was his opinion "that a schedule of rates which would produce over the next few years a rate of return varying from 6½ to 7 per cent

ported that figure. Appellant's contention now is that Dr. Dozier's testimony is incompetent evidence.

²⁴ Dr. Dozier is a graduate of Vanderbilt University and has received his master's and doctor's degrees at Yale University. He was head of the School of Commerce at the University of Georgia and later a professor of economics at Dartmouth College. Subsequently he was employed in the Treasury Department of the United States Government and left that position to take up his present duties. His work with the Department of Agriculture has required him to make a thorough study of investments, finance, and general economic conditions. He is the author of numerous articles related to his field of study. (R. 611-612.)

would be reasonable" (R. 613-614). As the witness subsequently explained, the somewhat higher figure of $6\frac{1}{2}\%$ to 7% was to permit the stockyard company to accumulate a reserve "to make good that 6 per cent if in any year it doesn't earn it currently" (R. 646).

Appellant's witness, Mr. Bosworth, testified that he was of the opinion that a somewhat higher rate of return was reasonable in this case. It was his opinion that the Denver stockyard could be capitalized on a basis of bonds earning $4\frac{1}{2}\%$ and preferred stock earning $6\frac{1}{2}\%$, providing that there was a sufficient amount of common stock earning 10% (R. 1145). On this basis he concluded that 8% would be a reasonable return on appellant's property, used and useful in rendering stockyard services (R. 1146).

There can be no question but that the witness called by the government was a well qualified expert who had made a thorough study of the matter under investigation. The District Court in accepting his opinion stated (R. 1276):

Mr. Dozier has testified in a great many rate cases before the Department as an expert on the rate of return and his exhaustive studies on this question are to be found in Gov. Ex. 45. The plaintiff's only witness was Mr. Arthur Bosworth, a local investment banker of high standing, and a stockholder and member of petitioner's board of directors. We take judicial notice that the plaintiff enjoys a monopoly with no prospect

of competition. Also we may note the fall in the rate of return on conservative investments over the past five or six years. *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 284 U. S. 248, at p. 260.

The substance of appellant's contentions (appellant's brief, pp. 96-101) in regard to this issue is that the government witness did not base his opinion upon the proper information and that he reached the wrong conclusion upon the information which he had before him. This amounts to an attack upon the witness' qualifications and his method. As pointed out by the District Court, there can be no question as to Dr. Dozier's qualifications. He has testified upon this subject and related economic subjects in several cases which have been before this Court.²⁵ A brief description of his investigation and the information upon which he based his opinion will suffice to show that his opinion is substantiated by the facts.

Dr. Dozier in the course of his regular work "began, a number of years ago, the compilation of the price of public utility and industrial bonds, preferred stocks and common stocks and the earnings of the issuing corporation" (R. 616). The results of this study up to the date of the administrative hearing in this case are set out in Government Exhibit No. 45. After forming a tentative opinion

²⁵ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38; *Morgan v. United States*, 298 U. S. 468, No. 581, October Term 1937; *Acker v. United States*, 298 U. S. 426.

on the basis of this personal study, Dr. Dozier checked his opinion against material obtained from other sources, including statistics taken from various business digests (R. 619-621). The witness then made a statistical comparison of the net return earned by the Denver Union Stock Yard Company, stockyards generally, public utilities, and industrials for the purpose of determining the relative stability of the various types of enterprises (R. 621-623). This study revealed that stockyard companies have been subject to less variation in their earnings from year to year than "either public utilities generally or industrial corporations generally" (R. 623). On the basis of all this information and his intimate knowledge based on years of study, Dr. Dozier formed the opinion which is the basis for the findings of the Secretary and the court below.

It is submitted that a return of $6\frac{1}{2}\%$ is not only an adequate but a liberal return on a business such as appellant's which, as the court below pointed out, enjoys a virtual "monopoly with no prospect of competition" (R. 1276). The record shows that stockyards in general and the Denver Union Stock Yard in particular have proved to be remarkably stable enterprises during the past ten years (R. 622). Throughout the whole period of the depression appellant has never defaulted on its bonds or its preferred stock and has always paid a substantial dividend on its common stock (Gov. Ex. 38, p. 290). Certainly, a rate of return which is suf-

ficiently high to yield an average for a period of years of over 6% on the investment of all types of security holders can not be described as confiscatory.

There is abundant evidence in the record which discloses that general business conditions at the time of the hearing were such as to make a return of 6½% a comparatively high rate of return for a business like appellant's. Appellant argues that there is no evidence which justifies the Secretary in using a lower rate of return than that found reasonable in various other stockyard hearings held between 1930 and 1932. This is not the fact. The record shows that long-term government bonds which sold to yield 3.77% in 1926 reached a high point of 4.28% in January 1932, and since that time have steadily declined so that the average yield was only 2.59% on June 14, 1935 (R. 615). The table on page 620 of the record compiled from Moody shows that the average bond yield in 1921 for industrials was 7.04% and for public utilities was 7.17%. In 1932 the average yield was 6.71% for industrials and 6.30% for public utilities, and since that time the yield has steadily declined so that in May 1935 it was 4.29% for industrial bonds and 4.52% for public utility bonds. Furthermore, appellant's own witness testified that the general trend on good long term bonds had been steadily downward from 1928 to the time of the present hearing (R. 1161-1162). The history of preferred stocks is very similar to the history of bonds in respect to the yield obtainable from such securities. Dr. Dozier

testified that it was his opinion that good preferred stocks would yield approximately 1% less in 1935 than in 1930 (R. 617). As to the yield of common stocks, business conditions in recent years have been such that it would be practically impossible to chart intelligently the return of such investments. However, we believe that this Court may properly take judicial notice of the fact that in view of general business conditions a stable annual return of over 6% on common stocks would be more than adequate.

This Court in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 692, stated:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

See also *Los Angeles Gas & Electric Corp. v. R. R. Comm'n*, 289 U. S. 287; *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488.

It is submitted that reviewing the evidence in the light of the above decisions there can be no question as to the adequacy of the rate of return which the Secretary found reasonable. This Court has in other instances sustained rate orders which were designed to or actually did yield a return of $6\frac{1}{2}\%$ or less. In *Lindheimer v. Illinois Tel. Co.*, 292 U. S. 151, the rate order was sustained although the rates would have yielded only $6\frac{1}{2}\%$ in 1931 and $5\frac{1}{2}\%$ in 1932. In *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72, it was pointed out that although the Secretary had found that 7% would be a reasonable rate of return, the rates would have yielded only 5.67% in the test year. In *Dayton P. & L. Co. v. Comm'n*, 292 U. S. 290, this Court, in sustaining a rate order for a small utility with physical assets of less than \$1,000,000, said (p. 311):

The appellant contends that to avoid confiscation the rate of return should be 8 per cent, instead of $6\frac{1}{2}\%$, which was allowed.

In view of business conditions, of which we take judicial notice (*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 284 U. S. 248, 260), the rate allowed was adequate. *Los Angeles Gas & Electric Corp. v. Railroad Commission of California*, *supra*, p. 319.

It is submitted that the evidence in this case sustains the conclusion reached by the Secretary and the District Court that a rate of return of $6\frac{1}{2}\%$ upon the fair value of appellant's property,

used and useful in the public service, is just and reasonable.

B. The rates prescribed by the Secretary, if applied to the volume actually received subsequent to the test period would have yielded an amount sufficient to cover all reasonable operating expenses and a fair return upon the fair value of appellant's used and useful property

Appellant calls the attention of this Court (appellant's brief, pp. 100-101) to the fact that the rates prescribed by the Secretary actually produced a net operating income of 6.10% on the rate base in 1935 and 6.74% on the same rate base in 1936.²⁶ It was the stated purpose of the Secretary to prescribe a schedule of reasonable rates which would produce a normal rate of return that was not so low as to touch the line which separates the zone of reasonableness from that of confiscation.

All witnesses were in agreement that appellant's 1935 receipts would be unusually low and would not be indicative of the probable annual receipts for subsequent years. Dr. Dozier testified that in considering the reasonable rate of return he expected the 1935 volume would be subnormal and that it was unlikely the rates would produce 6½% in that year (R. 614). The testimony of Mr. C. L. Harlan, Principal Agricultural Statistician in

²⁶ These returns for the respective years would have been 5.68% and 6.33% had the Secretary, as the appellant claims he should have, considered \$11,592 as stock-show, rather than stockyard, income.

charge of the Division of Crop and Livestock Estimates of the Department of Agriculture, clearly demonstrates that 1935 was a subnormal year and that a general upward trend in receipts might be expected at Denver for the following five years (R. 1186-1196). Appellant's own witness, the manager of the Denver stockyard, testified that neither 1934 nor 1935 could be taken as indicative of future business and that he did not feel the business would be back to normal before January 1, 1937 (R. 962).

The test of the character of a schedule of rates from the standpoint of confiscation is what the schedule yields when applied to actual business. Conceivably the Secretary, with the facts of this record before him, could have arrived at a schedule which he thought reasonable without recourse to a computation involving any specific rate of return. Had he done so, it might be that appellant could have been heard to complain that the Secretary had acted arbitrarily, or that he had failed to consider pertinent evidence. Appellant might even have shown that its property was confiscated by undervaluation or by failure to determine proper reasonable costs. However, if in the course of litigation it had been stipulated that the rates made without resort to a computation involving any specific rate of return did as a matter of fact produce 6.10% of the fair value in a subnormal year and 6.74% the next year, appellant could hardly claim

such rates to be confiscatory at a time when most investors in conservative securities were compelled to be satisfied with returns considerably smaller.

It is submitted that the Secretary acted reasonably and fairly in using $6\frac{1}{2}\%$ as a rate of return factor in arriving at the rates which he prescribed, and that the 6.10% and the 6.74% returns which the rates would actually have earned for the years 1935 and 1936, respectively, are not only reasonable rates of return but are well above the line of confiscation.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

✓ ROBERT H. JACKSON,
Solicitor General.

✓ THURMAN ARNOLD,
Assistant Attorney General.

✓ WENDELL BERGE,

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✓ MASTIN G. WHITE,
Solicitor, Department of Agriculture.

APRIL 1938.

APPENDIX A

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, Secs. 301-408 (U. S. C., Title 7) provides in part as follows:

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

* * * * *

SEC. 302. "Stockyard" defined: determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 301 to 317 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

* * * * *

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

* * * * *

SEC. 309.—

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

* * * * *

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will

be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

* * * * *

SEC. 316. For the purposes of this title, the provisions of all laws relating to the

suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

SAMPLE SUMMARY PAGE FROM GOVERNMENT EXHIBIT 29

A summary of the information contained in the sample pages cited by appellant appears on page 182 of Government Exhibit 29. These sample pages, but not the summary, are reprinted in appellant's brief at page 108. It will be noted that the overheads are added on the summary page.

Cattle Division, open pens—page 182, Gov. Ex. 29

	Material		Labor	
	Unit Price	Total	Unit Price	Total
Total Material and Labor.....		299,744		123,923
Total Without Overheads.....			423,667	
Contract Work.....		175,443		59,936
Add Material 16%.....		28,071		
Add Labor 20.5%.....				12,287
Company Work.....		124,301		63,967
Add Material 4.5%.....		5,594		
Add Labor 9%.....				5,759
Plant Cost, 18893 c. y. Concrete @ \$0.75.....		14,170		
Total Material and Labor.....		347,579		141,969
Total With Overheads.....			489,548	

NOTE.—The \$28,071, the \$12,287, the \$5,594, the \$5,759, and the \$14,170 shown in the table make up the \$65,881 of construction overheads for the cattle division to which reference is made in the text.

APPENDIX C

SUMMARY OF VALUATION OF STRUCTURES

The following summary shows the cost of reproduction new, the condition per cent, the reproduction new less depreciation, and the construction overheads and general overheads of appellant's used and useful property as found by the Secretary:

	Reproduction New	Condition Per cent	Reproduction New Less Depreciation	Percentage of Overhead Inclusion
Cost of Material and Labor before Overheads (See Appendix D, pp. 137-138)	\$1,794,480	80.545	\$1,445,364	Percent
Construction Overheads (See Appendix D, pp. 137-138)	324,481	80.545	261,353	18.08
Total Cost of Labor, Materials and Construction Overheads	2,118,961		1,706,717	
General Overheads ¹ (See Order, para. 125, R. 305)	411,240	80.545	331,233	22.09
Adjustment (See para. 125, R. 305)	2,283	80.545	1,839	
Total cost of Labor and Materials and all Overheads of used and useful structures and equipment	\$2,532,484	80.545	\$2,039,789	
Ratio of all Overheads to Cost of Labor and Material, i. e., 18.08% of \$1,445,364, plus 22.09% of \$1,445,364				40.17

¹ The \$411,240 general overheads is arrived at as follows (R. 305):

Omission and contingencies 5%	\$105,948
Engineer's expenses and architect's fees	111,245
Legal expenses 1%	22,249
General salaries 2%	44,498
Fire insurance $\frac{1}{2}$ of 1%	11,125
Taxes during construction	30,613
Interest during construction	85,562
Total	\$411,240

Note.—These percentages are applied against \$2,118,961, which figure represents the total cost of reproduction new of labor and material.

APPENDIX D

The following table gives by appraisal units the total cost of material and labor before construction overheads, the construction overheads, and the total cost of materials and labor after construction overheads, together with references to the exhibits where the figures are shown:

	Total material and labor before construction overhead	Exhibit	Page	Construction overheads	Total material and labor after construction overheads
New Exchange Building.....	194,902	29	62	33,357	228,259
Old Exchange Building.....	83,590	29	88	13,310	96,900
Chute House.....	27,813	29	105-6	4,548	32,361
Garage & Shop.....	18,823	29	114	3,129	21,952
Club House ¹	26,721	29	123	4,792	31,513
Stadium ¹	149,371	29	137	27,000	176,371
Stadium Run over Shed.....	789	29	139	128	917
Stadium Hook-up Shed.....	2,903	29	142	442	3,345
Stadium Heating Plant ¹	5,189	29	145	926	6,115
Restaurant V 13.....	1,509	29	148	220	1,819
Stadium Restaurant V 14 ¹	5,112	29	152	954	6,066
Carpenter Shop.....	726	29	154	111	837
Material Shed.....	371	29	155	65	436
Hide Storage Building ¹	12,394	29	158	2,451	14,845
Cattle Division Open Pens.....	423,667	29	182	65,881	489,548
Cattle Division Feed Lots.....	2,538	29	184	185	2,723
Cattle Division Cattle Dip.....	4,337	29	187	829	5,166
Branding & Dehorning Chute #1.....	3,340	29	190-1	374	3,714
Branding & Dehorning Chute #2.....	3,156	29	194	481	3,637
Branding & Dehorning Chute #3.....	4,022	29	196	734	4,756
Foot viaducts.....	11,227	29	199	2,002	3,229
Stock viaduct.....	16,611	29	201	3,073	19,684
Subway.....	5,758	29	204	1,308	7,066
Hog Shed #1.....	9,011	29	210	1,490	10,501
Hog Shed #2.....	10,791	29	215-16	1,766	12,557
Hog Shed #3.....	10,763	29	221-2	1,765	12,528
Hog Shed #4.....	15,042	29	229	2,720	17,762
Hog Shed #5.....	5,620	29	234	1,086	6,706
Hog Immunization Plant.....	5,615	29	240	1,073	6,688
Sheep Dip and Drain Pens.....	4,227	29	246-7	806	5,033
Sheep Pens at Sheep Dip.....	1,819	29	250	374	2,193
Sheep Barn #1.....	231,897	30	290	50,357	282,254
Sheep Barn #2.....	234,889	30	328	50,576	285,465
Horse and Mule Div. H&M 1.....	32,095	30	333	5,721	37,816
Horse and Mule Div. H&M 1A.....	434	30	334	75	509
Horse and Mule Div. H&M 2.....	13,362	30	338	2,447	15,809
Horse and Mule Div. H&M 3.....	3,640	30	340	530	4,170
Horse and Mule Div. H&M 4.....	10,303	30	344	1,633	11,936
Horse and Mule Div. H&M 5.....	18,418	30	350	3,339	21,757
Horse and Mule Div. H&M 6.....	8,584	30	355	1,505	10,089
Horse and Mule Div. H&M 7.....	12,787	30	359	2,376	15,163
Horse and Mule Div. H&M 8 ¹	5,020	30	362	922	5,942

¹ Represents property found by the Secretary to be not used and useful in the rendition of stockyard services.

	Total material and labor before construction overhead	Exhibit	Page	Construction overheads	Total material and labor after construction overhead
Horse and Mule Div. H&M 9 ¹	10,913	30	385	1,972	12,885
Horse and Mule Barn Y 8.....	76,005	30	379	13,512	89,517
Blacksmith Shop.....	4,456	30	382	668	5,124
Retaining Wall RW #1.....	4,240	30	383	1,045	5,285
Corrals.....	4,701	30	390	633	5,334
Hay Barn Y 1.....	5,031	30	392	991	6,022
Hay Barn Y 2.....	3,677	30	394	651	4,328
Hay Barn Y 3.....	11,226	30	396	2,146	13,372
Hay Barn Y 4.....	15,501	30	398	3,063	18,564
Hay Barn Y 5.....	5,095	30	400	974	5,969
Corn Tank.....	2,703	30	402	486	3,189
Burlington Chutes ¹	24,819	30	405	4,835	29,654
Union Pacific Chutes ¹	29,140	30	408	5,612	34,751
C. & S. Chutes ¹	9,960	30	411	1,891	11,851
River Chutes ¹	14,704	30	416	2,818	17,522
Truck out Pens.....	865	30	418	51	916
Hog & Sheep Truck-in Dock.....	2,899	30	423	527	3,426
Drive-in Office.....	768	30	426	134	902
Cattle Scale #1.....	3,977	30	429	715	4,692
Cattle Scale #2.....	3,542	30	431	650	4,192
Cattle Scale #4.....	5,055	30	435	906	5,963
Cattle Scale #5.....	4,583	30	438	811	5,394
Cattle Scale #6.....	4,566	30	441	813	5,379
Cattle Scale #10.....	5,274	30	445	948	6,222
Cattle Scale #11.....	5,324	30	450	955	6,279
Sheep Scale #7.....	4,791	30	452	872	5,663
Sheep Scale #8.....	4,608	30	455	819	5,427
Sheep Scale #12.....	4,467	30	458	739	5,206
Hog Scale #3-9.....	5,147	30	463	972	6,119
Hog Scale #13-14.....	5,492	30	468	1,000	6,492
Hay Scale Y 2A.....	994	30	470	186	1,180
Hay Scale Y 3A-Y3B.....	1,351	30	472	249	1,600
Hay Scale Y 5A.....	996	30	474	184	1,180
Manure Dump.....	6,718	30	476	1,340	8,058
Manure Dump Office.....	787	30	478	136	923
Manure Dump Shed.....	1,207	30	480	228	1,435
Railroad Tracks T-1 ¹	49,606	30	485	8,433	58,039
Trackmen's Tool House ¹	222	30	486	39	261
Yardmasters' Office ¹	309	30	488	55	364
General Roadways.....	11,263	30	489	2,545	13,810
Sewer System.....	82,323	30	495	15,483	97,806
Water System.....	48,359	30	500	8,705	57,064
Fire Protection.....	1,337	30	502	67	1,404
Flooding Equipment.....	6,910	30	503	311	7,221
Horses, Mules & Harness.....	2,851	30	505	128	2,979
Total used and useful and not used and useful.....	\$2,137,969			\$387,181	\$2,525,150
Not used and useful ¹	343,489			62,700	406,189
Used and useful.....	\$1,794,480			\$324,481	\$2,118,961

¹ Represents property found by the Secretary to be not used and useful in the rendition of stockyard services.

APPENDIX E

REVENUES PROCURABLE FROM AN APPLICATION OF THE
RATES PRESCRIBED BY THE SECRETARY AS REASON-
ABLE TO THE VOLUME USED AS A RATE FACTOR COM-
PARED WITH THE REVENUES PROCURABLE FROM THE
RATES UNDER INVESTIGATION APPLIED TO THE SAME
VOLUME

The revenues produced from an application of the rates prescribed by the Secretary to the volume of business used by him as a rate factor are \$530,117. The revenues produced by an application of the rates under investigation to the volume used by the Secretary as a rate factor are \$579,342. The \$530,117 produced by the prescribed rates is 91.5% of the \$579,342 produced by the rates under investigation.

The following table shows the method and computations by which these results were obtained:

	Volume used as a rate factor (record 342)	Rates under investi- gation (record 238)	Reve- nues from rates under investi- gation	Rates pre- scribed (record 330)	Reve- nues from rates pre- scribed
Yardage:					
Cattle:					
Rail.....	325,000	\$0.35	\$113,750	\$0.30	\$97,500
Truck-ins.....	75,000	.40	30,000	.35	26,250
Resales.....	56,000			.15	8,400
Bulls.....	850	1.00	850	1.00	850
Calves:					
Rail.....	20,000	.25	5,000	.20	4,000
Truck-ins.....	30,000	.27	8,100	.25	7,500
Resales.....	3,000			.10	300
Hogs:					
Rail.....	25,000	.12	3,000	.12	3,000
Directs.....	146,000	.12	17,400	.06	8,700
Truck-ins.....	225,000	.14	31,500	.14	31,500
Resales.....	250			.06	15

	Volume used as a rate factor (record 342)	Rates under investi- gation (record 238)	Reve- nues from rates under investi- gation	Rates pre- scribed (record 350)	Reve- nues from rates pre- scribed
Yardage—Continued.					
Sheep:					
Rail.....	2,000,000	\$0.08	\$160,000	\$0.075	\$150,000
Truck-ins.....	80,000	.10	8,000	.10	8,000
Resales.....	75,000			.03	2,250
Horses & mules.....	6,000	.35	2,100	.35	2,100
Total yardage.....			\$379,700		\$350,345
Feed, Bedding, Etc.:					
Hay, cwt. on fence.....	136,000	11.609	82,824	.50	68,000
Hay, cwt. fed.....	34,000	11.609	20,706	.60	20,400
Corn, bu.....	20,000	1.651	13,020	.45	9,000
Straw, bales.....	18,500	1.44	8,140	.40	7,400
Miscel. feed, lbs.....	150,000	(1)	1,000		1,000
Total revenue procurable.....			\$125,690		\$105,800
Miscellaneous Revenue.....			73,952		73,952
Total revenue procurable.....			\$579,342		\$530,117
			100.0%		91.5%

¹ These gross profits made by respondent on the amount of the various feeds and bedding sold during the 5 years 1930 to 1934 inclusive are determined by the feed sale figures shown in Government Exhibit 38, pp. 77 to 83.

² Average.

³ Estimated.

APPENDIX F

**REVENUE PRODUCING VOLUME RECEIVED BY APPELLANT
COMPARED WITH VOLUME REASONABLY TO BE ANTICIPATED OR THE VOLUME RATE FACTOR USED BY THE
SECRETARY IN DETERMINING REASONABLE RATES**

Number head of Cattle			
	Receipts	Revenue producing Volume	
Secretary's Rate Factor ¹			400,000
1935 ²	482,421 × 89% ² =	429,335	
1936 ²	489,768 × 89% ² =	435,804	
Number head of Calves			
Secretary's Rate Factor ¹			50,000
1935 ²	78,279 × 82% ² =	64,189	
1936 ²	73,767 × 82% ² =	60,489	
Number head of Hogs			
Secretary's Rate Factor ¹			395,000
1935 ²	362,919 × 76% ² =	275,818	
1936 ²	400,635 × 76% ² =	377,443	
Number head of Sheep			
Secretary's Rate Factor ¹			2,080,000
1935 ²	2,903,355 × 75% ² =	2,177,516	
1936 ²	3,023,893 × 75% ² =	2,267,920	

¹ See Record 342, paragraph 206.

² See Record 336, paragraphs 188, 189, 190 for an explanation of the use of these percentages.

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SUPREME COURT OF THE UNITED STATES.

No. 798.—OCTOBER TERM, 1937.

The Denver Union Stock Yard Company, Appellant, vs. The United States of America and Secretary of Agriculture.	}	Appeal from the District Court of the United States for the District of Colorado.
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[May 31, 1938.]

Mr. Justice BUTLER delivered the opinion of the Court.

November 8, 1934, the Secretary of Agriculture initiated proceedings in which, February 17, 1937, after extended investigation, taking of much evidence and full hearing, he made findings of fact and an order, prescribing maximum rates to be charged by appellant for services rendered by it.¹ March 9, 1937, it commenced this suit² to set aside the order on the ground that the prescribed rates are confiscatory and that enforcement of the order would deprive the company of its property without due process of law in violation of the Fifth Amendment. The case was submitted on stipulations and the evidence before the Secretary. The court made findings of fact, stated conclusions of law, announced opinion, 21 F. Supp. 83, and entered decree dismissing the bill.

The challenged rates include marketing charges per head; they are applicable only when sales are made, and are the same without

¹ 7 U. S. C. § 211. "Whenever after full hearing . . . the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

² 7 U. S. C. § 217; 28 U. S. C. §§ 44, 47(a).

regard to the time the stock remains in the pens. These are called "yardage charges." Appellant makes no charge for use, as such, of pens or other facilities; its charges for feed, bedding and other services are regulated by the order. About three-fourths of the total number of animals received at the yard are sold there. Some are sold to traders, also called dealers and speculators, and held in the yard until sold again. Appellant has never made any charge against traders for resales or reweighing for sale except when the resale was through commission men. For that service, the order prescribes rates which for convenience may be referred to as "yardage charges to traders." Appellant's activities are not confined to services covered by the order. It unloads and loads livestock from and into cars of railroads serving the yard, and receives from the carriers compensation not regulated by the Secretary. If enforced, the order will reduce revenue from charges for yardage services by about eight and one-half per cent, and from charges for other services by about nineteen per cent; miscellaneous revenues in a substantial amount are not affected; total revenue will be reduced by about eight and one-half per cent.³

To ascertain the amount on which appellant is entitled to earn a return, the Secretary determined what land and structures were used and useful for performance of the services, and to present value of land added cost of reproduction new less depreciation of structures, and allowances on account of a bridge and sewage disposal plant being built, and working capital. The total is slightly less than \$2,792,700, which the Secretary adopted as rate base. He found six and one-half per cent to be a reasonable rate of return, \$530,117 the revenue procurable if prescribed charges be put in effect, and \$346,545 the operating expenses, leaving a net return of \$183,572, slightly more than six and one-half per cent on the value of the property.

Appellant accepts as correct the Secretary's estimate of cost of reproduction less depreciation of property found to be used and useful, and also the allowances above mentioned. But it objects to its exclusion of land and improvements used for a stock show

³ The Secretary in his brief furnishes the Court the following statement. "The revenues produced from an application of the rates prescribed by the Secretary to the volume of business used by him as a rate factor are \$530,117. The revenues produced by an application of the rates under investigation to the volume used by the Secretary as a rate factor are \$579,342. The \$530,117

and for trackage and facilities for unloading and loading livestock, to his valuation of the land, to his treatment of going concern value, to his refusal to allow certain items that it claims to be operating expenses, and to the rate of return found by him to be reasonable.

The rate base. As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of

produced by the prescribed rates is 91.5% of the \$579,342 produced by the rates under investigation.

"The following table shows the method and computations by which these results were obtained:

	Volume used as a rate factor	Rates under investi- gation	Reve- nues from rates under investi- gation	Rates pre- scribed	Reve- nues from rates pre- scribed
Yardage:					
Cattle:					
Rail	325,000	\$0.35	\$113,750	\$0.30	\$97,500
Truck-ins	75,000	.40	30,000	.35	26,250
Resales	56,000	....	.....	.15	8,400
Bulls	850	1.00	850	1.00	850
Calves:					
Rail	20,000	.25	5,000	.20	4,000
Truck-ins	30,000	.27	8,100	.25	7,500
Resales	3,000	....	.....	.10	300
Hogs:					
Rail	25,000	.12	3,000	.12	3,000
Directs	145,000	.12	17,400	.06	8,700
Truck-ins	225,000	.14	31,500	.14	31,500
Resales	250	....	.....	.06	15
Sheep:					
Rail	2,000,000	.08	160,000	.075	150,000
Truck-ins	80,000	.10	8,000	.10	8,000
Resales	75,000	....	.....	.03	2,250
Horses & mules ...	6,000	.35	2,100	.35	2,100
Total yardage..		....	\$379,700	....	\$350,365
Feed, Bedding, Etc.:					
Hay, cwt. on fence	136,000	.609	82,824	.50	68,000
Hay, cwt. fed ..	34,000	.609	20,706	.60	20,400
Corn, bu.	20,000	.651	13,020	.45	9,000
Straw, bales....	18,500	.44	8,140	.40	7,400
Misc. feed, lbs..	150,000	....	1,000	....	1,000
Total revenue procurable ..	.....	....	\$125,690	....	\$105,800
Misc. Revenue.....	.....	....	73,952	....	73,952
Total revenue procurable ..	.....	....	\$579,342	....	\$530,117
	.....	....	100.0%	....	91.5%

return upon the value of property used, at the time it is being used, to render the services. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41. *Minnesota Rate Cases*, 230 U. S. 352, 434. *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 690. *Board of Commrs. v. N. Y. Tel. Co.*, 271 U. S. 23, 31. *McCardle v. Indianapolis Co.*, 272 U. S. 400, 414. *Los Angeles Gas Co. v. R. R. Comm'n*, 289 U. S. 287, 305. But it is not entitled to have included any property not used and useful for that purpose. Cf. *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 56.

The stock show property excluded. The stock show is held on property owned by appellant and is conducted by an incorporated association not organized for pecuniary profit. It continues for about one week in January of each year. The Secretary found a part of that property, which is operated by the Colorado Horse and Mule Company, to be used and useful for performance of services covered by the rates regulated by him, and included it in the rate base. He appraised the rest of the show property, which consists of 2.633 acres and improvements thereon, at \$219,033, but excluded it as not used for the performance of services covered by the rates he regulates.

For payment of expenses of the show there is used the money received for admission to it and to other events on the property, and also some that is donated for that purpose. Appellant assumes the carrying charges, including interest and taxes; when the show is unable to pay rental sufficient to cover all charges, appellant absorbs the deficit. It requested findings in substance as follows: Large quantities of livestock are entered in the show and much is sold on the show property. Some is sold in the yards operated by appellant. The show attracts buyers and throughout the year widens the outlet for producers' stock, operates to increase receipts, makes for improvement of stock raised and for higher prices, has educational value, and advertises the market. It is supported by appellant in good faith and in the belief that it stimulates its business and that of livestock producers. These facts are not in substantial conflict with the Secretary's findings, and may be taken as established by the evidence. But they are not sufficient to prove that the property excluded is used and useful for the performance of services covered by rates being regulated by the Secretary. None of those services is performed on

or by the use of any of that property. The Secretary rightly says "If it is appellant's contention that the stock show increases the stockyard business, then it should request that a reasonable allowance be made for advertising expense as a charge against its income." In support of that view he adds "Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason. *West Ohio Gas Co. v. Comm'n*, 294 U. S. 63, 72." Appellant's contention that the court erred in upholding the Secretary's exclusion of that item is not sustained.

Trackage and unloading and loading facilities. The Secretary appraised that property at \$177,108. He excluded it as not used for performance of any stockyard service. Appellant leases the trackage to railroad carriers for substantial rentals. It does not claim that exclusion of that part of the item is confiscatory and fails to show it prejudicial. It follows that the court did not err in upholding the Secretary's determination. The unloading and loading facilities include ways between docks and the pens where the stockyard services are rendered. Appellant uses these facilities to unload and load livestock. That is a service for which the carriers pay appellant. Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison Ry. v. United States*, 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities.

Land value. The Secretary's finding depends on the appraisal and testimony of his valuation engineer. Appellant maintains that it is not supported by evidence because the engineer was not a qualified expert witness. It concedes that, if he was competent, the valuation must be sustained. To support its point, appellant relies on the fact that the appraiser had never lived in Denver or previously appraised any land there or in that vicinity or assembled or appraised any large industrial tracts. The significance adverse to competency that might be attributed to these facts if they stood alone is negated by others disclosed by the record. The appraiser is an experienced civil engineer; he was long engaged in land appraisal work under the Interstate Commerce Commission. He later had private practice as consulting engineer and in 1934 became principal valuation engineer of the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture; in that capacity he has given testimony in a number of

rate proceedings. His report submitted to the Secretary discloses elaborate investigation and consideration of prices paid for land, of the Interstate Commerce Commission's appraisals of lands in the vicinity and of other facts material to the ascertainment of value of the land in question. It cannot reasonably be said that, because of his lack of earlier knowledge of local conditions, the finding was made without evidence.

Going concern value. Appellant maintains that, while admitting it exists in the property, the Secretary failed to include in rate base any allowance on account of it, and that the evidence requires addition of at least \$325,000 to cover that element.

In substance, the Secretary's findings state: The stockyard is a going concern; it has a long history of efficient management and has won a reputation for good service; it has been financially successful. His valuation engineer (whose figures and valuation are the basis of the Secretary's appraisal) considered going concern value but did not include a separate amount for it. In adopting the value of the land and the cost of reproduction new less depreciation of structures, consideration was given to the element of going concern value. Adequate allowance has been included, although no separate item on its account has been set forth. The findings contain a "summary of the value of used and useful land, the cost of reproduction new of structures and equipment, including direct construction overheads, indirect overheads, interest on used and useful land during construction, and working capital, and the cost of these, less depreciation where depreciation exists, of respondent [appellant] as a going concern."⁴ . . . It is found

	Cost of Reproduction New	Condition Per Cent	Cost of Reproduction New less Depre- ciation
Land—Used and Useful.....	\$536,825	100	\$536,825
Total Material, Labor, Direct Con- struction Overhead and Indirect Construction Overhead	2,532,484	80.545	2,039,789
Interest on Used and Useful Land during Construction	37,578	80.545	30,267
Working Capital	139,300	100	139,300
Total on Basis of Original Testimony			\$2,746,181
Bridge in Process of Construction at Date of Oral Argument.....			22,500
Sewage Disposal Plant in Process of Construction at Date of Oral Argument			24,000
Total			\$2,792,681

that the fair value of the property of respondent as a going concern is \$2,792,681. . . ."

The substance of appellant's claim is that these figures are exclusively attributable to physical elements. Assuming that to be true, it does not follow that the Secretary failed to include proper allowance for going concern. *Dayton P. & L. Co. v. Comm'n*, 292 U. S. 290, 309. The value of appellant's property used in stockyard services is single in substance. *West v. C. & P. Tel. Co.*, 295 U. S. 662, 672. While it may be considered as made up of tangible and intangible elements, it is not necessarily to be appraised by adding to cost figures attributable to mere physical plant something to cover the value of the business. *Kennebec Water District v. Waterville*, 97 Me. 185, 220. Value depends upon use and is measured, or at least significantly indicated, by the profitability of present and prospective service rendered at rates that are just and reasonable as between the owner of and those served by the property. *Cleveland & C. Railway Co. v. Backus*, 154 U. S. 439, 445. *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 864-866. *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 165. *Denver v. Denver Union Water Co.*, 246 U. S. 178, 192. Cf. *Pub. Serv. Comm'n v. Utilities Co.*, 289 U. S. 130. It is elementary that value of a going concern may be less than, equal to, or more than, present cost of plant less depreciation plus necessary supplies and working capital. See *Galveston Elec Co. v. Galveston*, 258 U. S. 388, 396. *Los Angeles Gas Co. v. R. R. Comm'n*, *supra*, 313, 314. *Dayton P. & L. Co. v. Comm'n*, *ubi supra*. Appellant's plant without business, present or prospective, would be worth much less than the cost figures found by the Secretary to represent value. Appellant's claim, that the rate base includes nothing on account of going concern value, is without foundation in fact.

The considerations upon which appellant claimed to have established an amount to be added to rate base to cover going value may be summarily stated: (1) The sales charge is for the privilege of the market. The value of the market is not reflected in reproduction cost of structures. It is over and above value of or investment in plant. (2) Appellant has spent large sums and made gifts of money and land as a result of which large packers have their plants at Denver and buy on appellant's market. (3) Cattle of

various owners arriving at the Denver market by rail for the same market session from different shipping points may be sorted into uniform carloads to move to another destination on the through rate from point of shipment to point of destination. The privilege is not open at Chicago or any Missouri River market. (4) A high percentage of the stock received at appellant's yard is sold there; this percentage has progressively increased. (5) Volume, appraised at \$10 per car, applied to the 35,000 cars annually received at the yard.

None of these considerations has much, if any, bearing on the ascertainment of going value or the application of the rule that it is to be taken into account in confiscation cases. That element is not separate from or necessarily in excess of reasonable cost figures attributable to the plant. The Secretary considered its location, the volume and flow of shipments, percentages of sales to receipts, privileges in transit, cost of service, past history, future prospects, and other pertinent facts. Appellant does not claim that its past operations clearly reflect excellence of service and low cost per unit in comparison with results attained by other stockyards, or that conditions affecting performance give dependable assurance of future growth and capacity to earn net returns at relatively low rates. See e. g. *McCardle v. Indianapolis Co.*, *supra*, 413-415. Its evidence falls far short of condemning as arbitrary and confiscatory the Secretary's refusal to add a separate amount to his rate base to cover going concern value.

Yardage charges to traders. These are prescribed as reasonable maximum rates to cover sales for which, as above stated, appellant has made no charge. Its failure so to do is found by the Secretary and the lower court to be unreasonably and unjustly discriminatory, in that it does make charges for similar privileges it furnishes producers and others selling in its market. The prescribed charges apply to animals sold by producers or others to traders and by the latter resold or reweighed for sale at the yard. On cattle, calves and hogs they are 50 per cent of those charged producers, on sheep and goats 40 per cent, and on horses, mules and pure-bred bulls, 100 per cent. The Secretary estimates that if appellant exacts the prescribed charges to traders it will obtain revenue from that source of \$10,960 per year, and he includes that amount in his calculation of reasonable return.

There is controversy between the parties as to space assigned to traders and details of service attributable to sales by them. But the evidence clearly shows that, as found by the Secretary and lower courts, appellant does provide them facilities and privileges similar to, though not precisely the same as, those furnished to others making sales in the market. These charges are not discriminatory as between producers; they directly bear but one charge. Assuming that the charge for selling by traders would operate to lessen prices obtainable by producers from them, no unjust discrimination results, for obviously charges for the two sales of the same animals reasonably may be more than that exacted for the first one. These rates are prescribed, and revenues obtainable from them are included by the Secretary in his estimate of appellant's income, to the end that it may not exact from producers and others selling at the yard charges sufficient to cover the part of its operating expenses that is fairly attributable to the sales made by traders. The statute denounces unjust discrimination and requires appellant as a public market to charge, and empowers the Secretary to prescribe, rates that are non-discriminatory. There is no ground for the appellant's suggestion to the effect that the order unlawfully invades its right as owner to manage the yard and control its business policy. Cf. *Interstate Comm. Comm. v. Chicago G. W. Ry.*, 209 U. S. 108, 118. *Nor. & West. Ry. v. West Virginia*, 236 U. S. 605, 609. *Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585, 595, 596. *Banton v. Belt Line Ry.*, 268 U. S. 413, 421.

Dues, donations and subscriptions. Appellant claims an allowance in operating expenses of \$3000 to \$4000 a year. The Secretary found that it has regularly made disbursements ranging between those figures to local charities, philanthropies, civic organizations, etc.⁵ He held that only those of peculiar benefit to respon-

⁵ There were over one hundred recipients of dues, donations and subscriptions during the five years ending with 1934. The contributions made in 1934 are fairly illustrative. They are listed below. Those in italics were made (in varying amounts) in each of the five years; those underscored were allowed by the Secretary.

Denver Community Chest, \$1000; *Denver Chamber of Commerce*, \$240; *U. S. Chamber of Commerce*, \$50; *Junior Chamber of Commerce*, \$15; *Tickets and Boxes—Stock Show*, \$395.50; *American Stockyards Association*, \$832.56; *Church Donations*, \$115; *Flowers*, \$4; *United Appeal*, \$75; *Volunteers of America*, \$10; *Veteran Volunteer Firemen*, \$5; *Firemen's Protective Association*, \$15; *Denver Traffic Club*, \$18; *Denver Commercial Traffic Club*, \$18;

dent's employees and patrons should be included; and on that basis allowed in estimated future operating expenses \$325 a year. Appellant says that the exclusion leaves return about \$1000 short of six and one-half per cent, that no contributions were made to charities which did not carry on in the stockyards area, and that nearly all other items were business expenses.

But decision here cannot be made to turn on an estimated margin relatively so small. Appellant's annual receipts and sales at the yard vary considerably. Operating expenses may be less or more per head than the estimates therefor. Property value may decline or advance. None of the expenditures in question is compulsory. Appellant may withhold dues, donations or subscriptions as it sees fit. It was not, and probably could not have been, proved that failure to respond would adversely affect its revenue. The Secretary is not required to prescribe rates so low as to be barely sufficient to withstand attack on the ground of confiscation, but is at liberty within limits that he may find to be just and reasonable to establish higher rates. *Banton v. Belt Line Ry.*, *supra*, 422. *Dayton P. & L. Co. v. Comm'n.*, *supra*, 308. *Columbus Gas Co. v. Comm'n.*, 292 U. S. 398, 414. *Atlantic Coast Line v. Florida*, 295 U. S. 301, 317. Cf. *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 484. In view of the variable elements to which appellant's prospective income is subject, its control over the items in controversy, and their triviality, we find it unnecessary to decide whether appellant as of constitutional right is entitled to have any of them included in its future operating expenses.

Expenses of hearings under the Act. The Secretary found it reasonable to include in estimated operating costs some of the

I. C. C. Traffic Reports, \$25.25; *Traffic Service Corp.*, \$10; *Brand Inspectors—Christmas*, \$70; *Denver Live Stock Exchange*, \$95.53; *Denver Post*, \$12; *Tax Payers Review*, \$5; *Policemen's Protective Association*, \$50; *Lunches at Auction*, \$55; *4-H Club Luncheon*, \$34; *Traffic Red Book*, \$8; *Old Folks Home*, \$10; *Christmas Seals*, \$1; *Rescue Mission*, \$2.50; *Chicago Drivers Journal Yearbook*, \$1; *Church Messenger*, \$11; *Joint Labor Day Committee*, \$10; *Denver Tourists Bureau*, \$100; *Wedding Gift*, \$250; *Gents Driving & Riding Club*, \$10; *Colorado Womens College*, \$100; *International Vet. Congress*, \$25; *Police & Sheriffs Association*, \$25; *Federal Income Tax Service*, \$66; *Western Legionnaire*, \$5; *National Federation of Federal Employees*, \$11; *American Legion*, \$5; *Program—Holy Name Basket Ball*, \$5; *Office Employees Hay Ride, etc.*, \$3; *Gulldman Community Center*, \$2.50; *President's Ball—Tickets*, \$18.

expenses incident to future hearings under the Act, suggested that they will be less than heretofore, and allowed \$100 a month. The court below reached the same conclusion. Appellant does not attack this allowance as insufficient to cover expense on account of future hearings. Here, it complains that nothing is included "to amortize over a reasonable future period or at all the costs and expenses of the present litigation".

But we are not called on to decide that question. Appellant's bill challenges the Secretary's allowance, refers to expenses theretofore incurred in rate investigations and alleges that the allowance "is wholly inadequate to permit petitioner [appellant] either to reimburse itself for expenditures forced upon it by the Secretary or to meet probable reasonable expenditures for said purposes in the future, and that the . . . finding . . . is arbitrary . . .". At the trial the Secretary, without conceding materiality of the facts, stipulated that expense of the present proceeding from its commencement, about January 1, 1935, to the date of the order was \$24,654.27 and that a reasonable estimate of the expense of litigation in the lower court was \$15,785. Appellant requested the court to find that its average annual expense on account of hearings under the Act for the five-year period ending with 1934 was \$8,786.88, and to find the facts stipulated by the Secretary and that its average annual expense on account of enforcement of the Act for the eleven-year period ending with 1934 was \$6,216.

The burden was on appellant by direct allegations plainly to set forth the facts on which it intended at the trial to maintain that the rates are confiscatory. *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447, and cases there cited. *N. O. Public Service v. New Orleans*, 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 88-89. *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249, 255. Its complaint failed to disclose the claim it now makes. It is that for each of the five years following the effective date of the order, there should be added to estimated cost of operation about \$8,000 to cover expenses of hearings before the Secretary and of litigation in the district court. Its request for finding was not sufficient to present the question. Probable expense of future hearings being in issue, the Secretary's stipulation as to actual cost of past hearings and probable expense of future liti-

gation cannot be regarded as consent to litigate the question of amortization not raised by the bill. As the issue was not appropriately presented below, appellant is not entitled to have it decided here.

Rate of return. Upon consideration of the testimony of the Secretary's economist and a local investment banker of high standing, who is also a stockholder and director of appellant, the Secretary and lower court found that six and one-half per cent per annum of the value of the property is a reasonable return. We need not restate the considerations to be taken into account in determining a reasonable rate of return.⁶ Plainly the evidence is not sufficient to require or warrant a finding that in the immediate future a return of six and one-half per cent on the value of the property will be confiscatory.

The judgment of the District Court must be affirmed.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁶ *Willeox v. Consolidated Gas Co.*, 212 U. S. 19. *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 692. *Lindheimer v. Illinois Tel. Co.*, 292 U. S. 151. *Dayton P. & L. Co. v. Comm'n.*, 292 U. S. 290, 311. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72.